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

CRIMINAL APPEAL NO.817 OF 2014

Bharat Polaji Ghanchi @ Ghelot
Age-24 years, Occu-Nil,
R/o-Padiv, Dist- Sirohi
State-Rajasthan.
(At present detained in Yerwada
Central Prison, Pune 411 006)

... APPELLANT
(Orig. Accused no.2)

VERSUS

The State of Maharashtra
(Through Officer-in-charge,
Samarth Police Station,
Dist. Pune)

... RESPONDENT

W I T H

CRIMINAL APPEAL NO.977 OF 2014

Bharat Kaluram Ghanchi @ Ghelot
Age-22 years, Occu-Service,
R/o-Padiv, Dist. Sirohi,
State-Rajasthan
(Now in Yerwada Central Jail, Pune)

... APPELLANT
(Orig. Accused No.1)

VERSUS

The State of Maharashtra
Through Samarth Police Station, Pune.

... RESPONDENT

W I T H
CRIMINAL APPLICATION NO. 953 OF 2018
(For Intervention)
IN
CRIMINAL APPEAL NO.817 OF 2014

Nagraj Chandmal Chajed
Age-63 years, Occu-Business,
R/o- 1104 C building, Gagan Galaxi
Gangadham Bibwewadi, Market Yard,
Pune.

... APPLICANT
(Orig. Informant)

In the matter between

1. Bharat Polaji Ghanchi @ Ghelot
Age about 28 years, Occu : Nil
Residing at Padiv, Dist-Shirohi,
State : Rajasthan

... APPLICANT
(Org. Accused No.2)

VERSUS

The State of Maharashtra
(At the instance of Samarth
Police Station)

... RESPONDENT

...

Miss. Nagma Tandon Advocate for Appellant in Criminal
Appeal No. 817 of 2014.
Mr. Daulat G. Khamkar, Advocate for Appellant in
Criminal Appeal No. 977/2014
Mr. Rajesh A. More, Advocate for the applicant –
intervenor in Criminal Application No. 953 of 2018
Mrs. M.M. Deshmukh, A.P.P. for Respondent – State in
Criminal Appeal No.817 of 2014, Criminal Appeal No.977
of 2014 and Criminal Application No.953 of 2018.

...

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

DATE OF RESERVING JUDGMENT : 26th OCTOBER, 2018.

DATE OF PRONOUNCING JUDGMENT: 19th NOVEMBER, 2018.

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

1. Criminal Appeal No.817 of 2014 filed by accused No.2 Bharat Polaji Ghanchi @ Ghelot, is directed against the Judgment and Order dated 2nd September, 2014 passed by the Additional Sessions Judge, Pune thereby convicting accused No.2 Bharat Polaji Ghanchi @ Ghelot for the offence punishable under Section 302 of the Indian Penal Code (for short, "IPC") and sentencing him to suffer life imprisonment and to pay fine of Rs.2,000/- and in default to suffer further rigorous imprisonment for three months. The Trial Court also convicted accused No.2 Bharat Polaji Ghanchi @ Ghelot for the offence punishable under Section 380 of IPC and sentenced him to suffer rigorous imprisonment

for five years and to pay fine of Rs.2,000/, in default to suffer further rigorous imprisonment for three months. All the sentences were directed to be run concurrently.

2. Criminal Appeal No.977 of 2014 filed by accused No.1 Bharat Kaluram Ghanchi @ Ghelot is directed against the Judgment and Order dated 2nd September, 2014 passed by the Additional Sessions Judge, Pune thereby convicting him for the offence punishable under Section 302 read with 34 of IPC and sentencing him to suffer life imprisonment and to pay fine of Rs.2,000/- and in default to suffer further rigorous imprisonment for three months. The Trial Court also convicted accused No.1 Bharat Kaluram Ghanchi @ Ghelot for the offence punishable under Section 380 read with 34 of IPC and sentenced him to suffer rigorous imprisonment for five years and to pay fine of Rs.2,000/, and in default to suffer further rigorous imprisonment

for three months. All the sentences were directed to be run concurrently.

3. Criminal Application No.953 of 2018 is filed by original informant Nagraj Chandmal Chajed, seeking permission to intervene in Criminal Appeal No.817/2014. The Applicant has further prayed to return him the 10 ornaments as mentioned in Annexure C to the Application.

4. Both these Criminal Appeals are arising out of one and the same Judgment and Order passed by the trial Court, hence the same are being decided by this common Judgment.

5. Before the Trial Court there were in all three accused i.e. Accused No.1 – Bharat Kaluram Ghanchi @ Ghelot, Accused No.2 – Bharat Polaji Ghanchi @ Ghelot and Accused No.3 – – Machharam Polaji Ghanchi @ Ghelot. The Trial Court convicted

and sentenced Accused Nos.1 and 2 as afore-stated. However, the Trial Court acquitted Accused No.3 from all the offences with which he was charged. Therefore, these two appeals are preferred by Accused No.1 – Bharat Kaluram Ghanchi and Accused No.2 – Bharat Polaji Ghanchi, challenging their conviction and sentence. (for the sake of brevity, hereinafter we would refer Bharat Kaluram Ghanchi @ Ghelot as “accused No.1” and Bharat Polaji Ghanchi @ Ghelot as “accused No.2”).

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

A] Nagraj Chandmal Chajed, a Goldsmith resides in Shubham Apartment, Block No.13, Rasta Peth, Pune, along with his wife Jayanti. He has two sons viz : Sachin and Ankush. They are doing separate business and residing separately. Nagraj is having jewelry shop named and style as Najraj

Jewelers at 501, Ganesh Peth, Kasturi Chowk, Pune. He is dealing in sell and purchase of gold and silver. So also he is doing money-lending business against gold, but he is not keeping record of money-lending business transaction. Time of shop of Nagraj Jewelers is 9.00 a.m. to 1.30 p.m. and from 3.00 p.m. to 8.00 p.m. Accused no.1 Bharat Kaluram Ghelot, resident of village Padiv, Rajasthan was serving in the shop of Nagraj. Bharat Kaluram (Accused No.1) used to go to the house of Nagraj at 8.45 a.m. for household work and thereafter used to go to shop at 9.45 a.m. One Mahendra Parmar was also employed by Nagraj in his shop since last seven years preceding of the incident. However, one and half months prior to the incident, Mahendra Parmar proceeded on leave. One Mahendra Rajput was also working in the shop of the informant during the period between 2008 to 2010. As per the prosecution case, Mahendra Rajput was employed on the recommendation of Bharat

Kaluram.

B) On 6th October, 2010 as usual Nagraj left house for shop at 9.00 a.m. Bharat Kaluram (Accused No.1) arrived in shop at about at 09.30 a.m. At about 10.30 a.m. Nagraj contacted his wife on phone, and in reply she informed him that one person came at house and was making inquiry about Mahendra. The informant Nagraj told her not to open the door of the house to an unknown person. At about 11.00 a.m. on the date of the incident Nagraj sent Bharat Kaluram (Accused No.1) to spectacles shop for repairing his spectacles. Bharat Kaluram returned within half an hour after repairing spectacles. As the wife of Nagraj has to go to hospital, therefore, he tried to contact her so as to ascertain whether she has gone to hospital, at 12.00 noon, 12.30 noon and 1.30 p.m., but she did not give response, so presuming that she might have gone to hospital, Nagraj after

closing shop went to the hospital of Dr. Sachin Oswal at about 1.30 p.m. Doctor told him that his wife has not come to the hospital, so Nagraj returned to his house. He noticed that door of the house was closed from the inside. He opened the door with key which was with him. He entered in the house and saw that his wife was lying in the pool of blood in bed-room. He sent two boys to Police Station. Police came there within five minutes. Police called Ambulance and sent wife of Nagraj to the hospital, where she was declared dead. Nagraj noticed that ornaments of money-lending business of the customers worth Rs.32,00,000/-(Thirty two lakhs only), kept in 100-125 small pouches along with name of the customers, weight and amount of the ornaments written on the chit, kept in the cupboard, are stolen. Nagraj contacted Bharat Kaluram (Accused No.1) on mobile and asked him to come to his house. Bharat Kaluram (Accused No.1) assured him

that he will come to house, but did not come, so after 20 minutes Nagraj again contacted him on phone. At that time it was realized by the informant that Bharat Kaluram (Accused No.1) had switched off his phone. So Nagraj along with police went to the place where Bharat Kaluram was residing. They came to know that Bharat Kaluram (Accused No.1) left the room with his bag and all his belongings. Nagraj lodged complaint in Samarth Police Station. On the basis of the said complaint, Crime No.154 of 2010 came to be registered under Section 302, 381 read with Section 34 of the IPC.

C) Sunil Gaikwad, API attached to Samartha Police Station, after receiving information from Nagraj, went to the house of Nagraj along with police staff. Shri Gaikwad prepared spot panchanama and took blood samples lying on the spot. He seized articles found on the spot.

Investigation was handed over to Sunil Gaikwad. On 6th October, 2010, he along with police staff went to Rajasthan in search of accused. They traced out the Accused No.1 on 12th October, 2010. The custody of accused Bharat Kaluram was taken at the house of his sister at village Noon, Dist- Siroli. The Investigating Officer then traced out the Accused No.2. Then accused Bharat Polaji was taken in custody from Siroli bus stand, and thereafter, the Investigating Officer gave information about arrest of the accused No.2 to Kalindri Police Station. Thereafter, he brought both the accused to Pune. On 13th October, 2010, he formerly arrested both the accused. Thereafter, accused Nos. 1 and 2 during an interrogation disclosed some relevant facts in relation to the incident. Pursuant to their disclosure statements, the Investigating Officer seized stolen gold ornaments from the possession of accused Nos.1 and 2 under seizure panchanama. He has also seized weapon used

by accused No.2 while committing the offence. The seized muddemal was sent for analysis. He recorded statements of various witnesses. He has also arrested accused No.3 – Machharam Polaji Ghanchi @ Ghelot. After completion of the investigation, the investigating officer filed charge sheet against the accused persons in the Court of Judicial Magistrate, First Class on 10th January, 2011.

D) As the offence punishable under Section 302 of the IPC is exclusively triable by the Court of Sessions, Judicial Magistrate First Class, Court No. 1 committed the matter to the Sessions Court vide order dated 8th February, 2011 for trial.

E) A charge under Section 302 and 381 read with Section 34 of the IPC, under Section 37(1) read with Section 135 of the Bombay Police Act and under Section 4 read with Section 25 of the Arms

Act against accused persons was framed vide Exhibit-31 and the same was read over and explained to the accused in vernacular. The accused pleaded not guilty and claimed to be tried.

7. After recording the evidence and conducting full-fledged trial, the trial Court convicted and sentenced the appellants – Accused Nos.1 and 2 for the aforesaid offences. Hence Criminal Appeal No. 817 of 2014 is preferred by appellant Bharat Polaji Ghanchi @ Ghelot and Criminal Appeal No.977 of 2014 is preferred by appellant – Bharat Kaluram Ghanchi @ Ghelot challenging the conviction and sentence. Criminal Application No.953 of 2018 is preferred by the informant for intervention in the Criminal Appeal No.817 of 2014 and for return of the 10 ornaments as mentioned in Annexure C to the Application.

8. Learned counsel appearing for the Appellant in Criminal Appeal No.817 of 2014 submitted that there is no eye witness to the incident and the case of the prosecution is based upon circumstantial evidence. There is no direct evidence against the accused. She further submitted that chain of circumstances on which reliance was placed by the prosecution has not been established beyond reasonable doubt by the prosecution. Learned counsel further submits that the prosecution has not proved the possession of ornaments with the informant on the day of incident. The prosecution has not proved that the informant is money-lender having valid license at the time of incident. The prosecution has not brought on record that, on which phone number the informant contacted Accused No.1. The prosecution has not examined any customer of the informant to whom money was lend on depositing the ornaments with him. The informant has not mentioned the

description of ornaments in the FIR. The prosecution has not produced any Register or receipt book showing money lending transactions in respect of the alleged stolen ornaments. There was no test identification parade of the Accused during the course of investigation. The recovery is not duly proved by the prosecution. The presence of the Appellants – Accused in the house of the informant is not duly proved by the prosecution. There was not test identification parade in respect of the recovered ornaments. During the course of trial, all the ornaments were not produced by the informant, and therefore all the ornaments were not shown to any witness and thus the prosecution failed to prove all the ornaments allegedly seized in the evidence. The photographs and video shooting of seizure of ornaments were recorded but the same were not produced on record.

9. Learned counsel further submits that, the informant stated that the ornaments on person of deceased Jayanti were also stolen, but the record shows that in fact the ornaments on person of the deceased were handed over to one Parmar at the time of inquest panchanama. The name of one Mahindra Rajput was mentioned in the FIR, but neither he was interrogated nor any inquiry was made about him during the course of an investigation. The prosecution has not examined any witness from the shop of the informant to prove the knowledge of Accused No.1 regarding family members of the informant, money lending transaction and also fact of keeping said ornaments in the house of the informant. Learned counsel further submits that the prosecution has not brought on record any evidence to show that Accused No.2 has knowledge about the house of deceased or about the family members of deceased. No evidence is brought on record showing that

there was any communication between Accused No.1 and Accused No.2 prior to the incident or after the incident.

10. Learned counsel further submits that there are several contradictions, omissions, discrepancies and improvements in the evidence of the prosecution witnesses in respect of various circumstances and therefore reliance could not be placed on the oral testimony of said witnesses. Learned counsel further submits that the Trial Court has not properly appreciated the evidence brought on record and came to the wrong conclusion. In support of her aforesaid submissions, learned counsel for the Appellant placed reliance upon the observations made/ratio laid down in the case of (i) Madhu @ Madhav Nivruti Pawar V/s the State of Maharashtra¹, (ii) Arjun Puna Soni V/s the State of Maharashtra²,

1 2016 ALL MR (Cri) 655

2 2017 ALL MR (Cri) 157

(iii) Ratanlal V/s State of Rajasthan³, (iv) Ganesh S/o Somaji Pithale V/s State of Maharashtra⁴, (v) Balasaheb S/o Namdeo Bhale V/s the State of Maharashtra⁵, (vi) Tanaji Baburao Raut and another V/s the State of Maharashtra⁶, (vii) Ravi & another V/s the State of Karnataka⁷, (viii) Laxmi Narayan V/s State of Rajasthan⁸ and (ix) Datta S/o Daulatrao Mundhe and another V/s the State of Maharashtra and another⁹.

Learned counsel therefore submits that the Appeal may be allowed.

11. Learned counsel appearing for the Appellant in Criminal Appeal No.977 of 2014 has adopted the arguments advanced by the learned counsel appearing for the Appellant in Criminal Appeal No. 817 of 2014. In addition to that,

3 2018 ALL SCR (Cri) 472

4 2018 ALL MR (Cri) 7

5 2018 ALL MR (Cri) 62

6 2016 ALL MR (Cri) 820

7 2018 ALL SCR (Cri) 1108

8 1984 RLW (Raj) 225

9 2018 ALL MR (Cri) 3130

learned counsel submitted that there is absolutely no iota of evidence against the Appellant. The present case is based upon the circumstantial evidence and the evidence adduced by the prosecution is absolutely not sufficient to bring home the charge of conviction against the Appellant. The prosecution has failed to prove the alleged motive against the Appellant. Learned counsel therefore submits that the appeal deserves to be allowed.

12. The learned A.P.P. appearing for the State submitted that though the case of the prosecution is based upon the circumstantial evidence, the chain of circumstances on which reliance has been placed by the prosecution, have been established beyond reasonable doubt by the prosecution. She further submits that, since prior to the incident, Accused No.1 was serving in the house as well as in the shop of the informant and

was having knowledge regarding the ornaments kept in the house of the informant and the prosecution has proved that in furtherance of their common intention, Accused Nos.1 and 2 have killed wife of the informant and stolen the ornaments kept in the house. Learned A.P.P. further submits that after considering the entire evidence on record, the Trial Court has convicted both the accused and findings recorded by the Trial Court are in consonance with the evidence brought on record. Learned A.P.P., therefore submits that both the Appeals may be dismissed.

13. Heard learned counsel appearing for the respective Appellants and learned APP appearing for the Respondent – State, at length. With their able assistance, we have carefully perused the entire notes of evidence so as to find out whether the findings recorded by the trial Court are in consonance with the evidence brought on record or

otherwise.

14. Now we would discuss the evidence brought on record by the prosecution. To prove its case, the prosecution has examined as many as thirteen witnesses.

15. PW-1 Ashok Baban Deshmukh is a panch witness to the seizure panchnama of clothes of deceased Jayanti. He deposed that on 7th October, 2010, lady police constable produced clothes of deceased Jayanti which were consisting of pink coloured sari in four pieces, pink coloured petticoat stained with blood and pink coloured blouse stained with blood. Police seized those clothes and wrapped in a paper and obtained their signatures on seal. He proved seizure panchanama (Exhibit-45).

16. PW-2 Ritesh Sohanlal Parmar is a panch

witness to the spot panchanama. He deposed that on 6th October, 2010 he was called by Police for panchanama at Shubham Apartments, Rasta Peth, Pune. They went in the flat of Nagraj Chhajed situated on 4th floor. Police were present there. He knows Darshan Parekh, who was present on the spot and resides in the same Apartment on 5th floor. His evidence shows that the flat of Chhajed was facing towards west side. The door of flat was wooden. Name plat of Shri Nagraj Chhajed was on the door. After entering in the flat, firstly there is a hall. Blood was stained on the floor of the hall. After hall there is passage. To the side of passage there is kitchen and thereafter there is toilet. In the kitchen at some places blood was spilled on the floor. The napkin was there to which the hand of blood stains were cleaned. On the basin also there were blood stains. After the kitchen there was bedroom. They went in the bedroom. Chhajed told them that his wife was lying

in injured condition and thereafter she was referred to hospital before they went on the spot. In the bedroom there were stains of blood. Still cupboard was having door opened. Key was on the door of the cupboard itself. The observation of bedroom was indicating that the blood spilled on the floor was tried to wipe off. The bed and bed cover of the bed in the bedroom were stained with blood. That bed-sheet and napkin were seized by Police. Photographer came there and he took photographs. He further deposed that with the help of cotton swab, the blood lying on the floor was collected from 10 to 12 places. Those cotton swabs were sealed. Finger print expert was also called. Seized articles were sealed and they signed on that seals. Police prepared detailed panchanama (Exhibit - 47).

17. PW-3 Rakesh Chandrakant Gaikwad is the panch to memorandum panchanama (Exhibit-60) of

accused No.1. He deposed that on 15th October, 2010 Police called him for panchanama. Inspector Gaikwad and other staff members were present in the Police Station. Accused No.1 was also present in the Police Station. PW-3 Rakesh further deposed that accused No.1 gave statement that he will show the stolen articles concealed by him at his village. Accused No.1 gave statement which was reduced in writing by the police. The statement of Accused No.1 was read over to him. He further deposed that he also read the statement, it bears his signature, signature of another panch and P.I. Gaikwad. Thus he proved Memorandum Panchanama (Exhibit – 60).

18. PW-3 Rakesh further deposed that thereafter, he along with another panch, two accused and Police staff started by private vehicle to Rajasthan, at village Padiv, Dist. Siroi and on next day in the evening they reached

village Padiv. After they reached at village Padiv, accused told to stop their vehicle. Accused took them to a partly constructed house. On inquiry, Accused No.1 told that the said house was of his brother-in-law namely Chhaganji Ghanchi. There was a window to southern side of that room. Accused jumped from that window and they followed Accused No.1. After going 4-5 feet, accused started digging the ground and digged upto one and half feet by hand. Accused No.1 removed a plastic bag from that place. There was big plastic bag in which there were about 113 small plastic bags containing gold ornaments having chits of weight and name of the owner of ornaments. Police wrapped those ornaments in brown paper. Their signatures were obtained on that brown paper. PW-3 – Rakesh further deposed that Accused No.1 again entered in that room. There was a drum. By the side of the drum, Accused No.1 produced one Military colour bag having sticker "One Polo". That bag was also

seized by the Police and shooting and photos of seizure of the ornaments were taken. He proved the seizure panchanama (Exhibit – 61).

19. PW-3 Rakesh further deposed that there were variety of articles and he does not remember description of all the ornaments, but some of the ornaments were pieces of gold belt of wrist watch, Kanthimal, necklace, chains etc. When gold articles being Article Nos. 16 to 27 were shown to him, he identified the same. PW-3 – Rakesh further deposed that on 19th October, 2010, Accused No.2 made statement in Kalinde Police Station at Kalindi, Tq. Siroha in presence of the panchas and P.I. Gaikwad. Accused No.2 stated that he melted the stolen ornaments and prepared a gold bar and some of the ornaments sold to goldsmith and received a cash of Rs.1,85,000/-. Accused No.2 further told that he forgot Rs.1,50,000/- in a taxi and concealed a bar of gold in his village

and he was ready to show that taxi and the place where gold bar was concealed. He proved the Memorandum statement (Exhibit-62).

20. PW-3 Rakesh further deposed that thereafter Accused No.2 took them to his village Padiv, Tq. Sirohi and from the bed of a river, he dug sand and took a plastic bag. In that bag, there was a golden biscuit on which, "100 g" was written and on another side 074784 was written in English having weight 100 gms. That gold bar was seized by the Police and wrapped in brown paper and label was also affixed and seizure panchanama was prepared. He proved seizure panchanama (Exhibit -63). PW-3 Rakesh further deposed that on the very day, they went to Mount Abu. Accused No.2 shown the said Taxi. The Taxi driver told them that the bag found in the Taxi was handed over to Mount Abu Police Station. Then they went to Mount Abu Police Station and saw the bag. There were

currency notes of Rs.1,50,000/- in the said bag. That amount was seized by the Police and seizure panchanama (Exhibit-64) was prepared. When Muddemal Article No.28 – bag produced by Accused No.1 from the house nearby drum and Article No.29 – bag seized from Taxi were shown to him, he identified the same.

21. PW-3 Rakesh further deposed that on 17th October, 2010, again Police called him for panchanama at village Sirohi near Mayur hotel. He deposed that Accused No.2 halted in Mayur hotel by name Vinod and when Accused No.2 was residing in that hotel, he gave his clothes for washing to Laundry and thereafter Accused No.2 left hotel without taking his clothes. He further deposed that Police collected the said clothes of Accused No.2 from the owner of said hotel and prepared seizure panchanama (Exhibit-65). Said clothes consist two shirts and one pant. He further

deposed that the said clothes were shown to Accused No.2, who identified the same. When Article 30 – Pant and Article 31 and 32 – shirts were shown to him, he identified the same.

22. PW-3 Rakesh further deposed that on 21st October, 2010, Police again called him for panchanama in Police Station. Police called him and another panch for the purpose to show 113 gold ornaments which were seized from Accused No.1 and also for the purpose to take weight of the said ornaments from goldsmith. He deposed that the ornaments were shown to the informant who identified the same. He further deposed that thereafter they all went to Sonya Maruti chowk, Budhwar Peth, Pune in the Government recognized Goldsmith shop of Vasudeo Narayan Parkhi. In the said shop, they took weight of every ornament on weighing machine. He further deposed that police prepared panchanama (Exhibit-66). When 10

ornaments shown to him in the Court, he deposed that the same were out of 113 ornaments which were seized. He further deposed that the weight of gold bar (Biscuit) was also taken in the same shop and panchanama (Exhibit-67) was prepared.

23. PW-3 Rakesh further deposed that on 27th October, 2010, Police called him at Police Station. At that time Accused No.1 made memorandum that he is ready to show the shop from where he had purchased the bag having "One Polo" mark on the said bag and which he produced at village Padiw before the Police. He showed the said shop namely "Siddheshwar Bags", situated at Doke Talim and one Kamble was the owner of the said shop. Police showed the seized bag to the shop owner, who identified the said bag as also the accused. The shop owner told that Accused No.1 had purchased the said bag from his shop. He further deposed that seizure panchanama (Exhibit-68) was

prepared in his presence. Article 28 – bag when shown to him, he identified the same.

24. The defence has extensively cross-examined PW-3 Rakesh, but nothing contrary was brought on record and his evidence remained intact and un-shattered.

25. The prosecution has examined PW-4 Sadashiv Baba Dhanawade. His evidence shows that on 23rd October, 2010, he was called by Samarth Police for panchanama at Samarth Police Station. Accused No.2 – Bharat Polaji Ghanchi was in the police station, who told that he is ready to show the place of offence and how he has committed the offence. Police reduced the statement of accused No.2 into writing. He proved the statement (Exhibit-70). His evidence further shows that he along-with other panchas and accused, went by police jeep to the house at Shubham Apartment near

MSEB office. His evidence further shows that accused No.2 shown them where he had initially concealed himself in gallery and then shown how the accused came from gallery to the hall. Accused No.2 shown the cupboard in which the ornaments were kept. The police conducted panchnama and obtained his signature. He proved the said panchnama. He identified accused No.2 Bharat Polaji Ghanchi, who was sitting in the Court Hall. But, according to us no much importance can be given to his evidence.

26. PW-5 Sachin Nagraj Chhajed is the son of the informant. His evidence shows that he knows accused No.1 — Bharat Kaluram Ghanchi who was working in their shop. His evidence further shows that accused No.1 used to come at their house at 8.30 a.m. and was doing the household work till 9.30 a.m., and thereafter accused No.1 used to go to the shop. His evidence further shows that

after the incident he went to the spot and thereafter his father contacted their servant Bharat Kaluram i.e. accused No.1 in his presence. Accused No.1 answered that he would come within 15 minutes, but did not come, and thereafter the phone of accused No.1 was switched off. His evidence further shows that then he went to the room of accused No.1 and noticed that accused No.1 has left the room with his bag and all belongings.

27. During the course of cross examination, PW-5 Sachin has stated that, when he came to the house, his father told him that he made telephone call to accused No.1 and narrated him about the incident and called him in the house. PW-5 has further stated that his father has not contacted with Bharat in his presence.

28. The prosecution has examined Ritesh Sohanlal Parmar as PW-6, who was already examined

as PW-2. His evidence shows that he was called in the police station to act as Panch. His evidence further shows that accused No.2 told that the weapon used by him was concealed by him and he was ready to show that place. Police reduced the statement of accused No.2 into writing. PW-6 proved the memorandum statement (Exhibit-77) of accused No.2. His evidence further shows that thereafter he along with another panch, police, photographer and accused No.2, went by police Jeep. Accused No.2 showed the way via power house, 7 Levels Chowk, Swargate, took "U" turn at Mahalaxmi Mandir, near Sarasbaug and accused No.2 took them down from iron stair case. There was compound wall of iron wire. Accused No.2 dig at said place by hand and took out one polythene bag from that place. Thereafter, he took out sword-stick (Gupti) from the said bag. There was piece of cloth stained with blood. Police seized that weapon and earth from the said place in polythene

bag. The photographer conducted shooting of the entire event. Police prepared the panchnama of the spot. PW-6 proved the panchnama of the said spot (Exhibit-78). During the course of his evidence, when the sword stick was shown to him, he identified the said sword stick.

29. PW-7 Anil Mahadeo Sabale is another panch witness. His evidence shows that on 23rd October, 2010, he was called by Samarth police in the police station for panchnama. His evidence shows that accused No.1 took them to Kasturi Chowk, near Nagraj Jewelers shop and further took them from the staircase on third floor and produced one empty cement bag in which, in newspaper sword was wrapped. Police seized the sword and seizure panchnama (Exhibit-83) was prepared. Police also took video shooting of the entire episode.

30. However, according to us no importance can

be given to the evidence of PW-7. Since during the course of cross-examination, PW-7 admitted that the sword was in the corner of the stair case. PW-7 further admitted that said sword was visible to persons passing by stair-case. PW-7 further admitted that police did not make enquiry who was residing in the said building.

31. PW-8 - Nagraj Chandmal Chhajed is the informant. His evidence shows that the incident occurred on 6th October, 2010. At that time he was residing at Shubham Apartment, Rasta Peth, Pune, along with his wife. He had two sons but they are residing separate. His shop namely, "Nagraj Jewelers" is situate in 521, Ganesh Peth, Kasturi Chowk, Pune. He is also doing business of money lending and possessing valid license for doing business of money lending. Working hours of his shop were from 9.00 a.m. to 1.30 p.m., and from 3.00 p.m. to 8.00 p.m. The distance between his

house and shop is 1.5 to 2.00 k.ms. His evidence further shows that in the month of October, 2010, there were two workers in his shop viz. Mahendra Rajput and Bharat Kaluram Ghelot (accused No.1). Both the said workers were native of Rajasthan State. His evidence further shows that Accused No.1 was residing in his room. Accused No.1 used to come to his house for doing household work. Accused No.1 used to come to his house at 8.00 a.m., and used to leave the house at 9.00 to 9.15 a.m., and thereafter used to attend at the shop.

32. The evidence of the informant further shows that on the day of incident at about 9.00 a.m., he left the house for shop. On that day Accused No.1 had come to his house for routine work before he went to the shop. His evidence further shows that he left the house when accused No.1 came to his house. The evidence of informant further shows that when he left the house, his

wife Jayantiben and accused No.1 were only in the house. At about 9.30 a.m. accused No.1 also came in the shop from the house. At about 10.30 a.m. the informant received phone of his wife informing that one person was making enquiry of Mahendra Parmar from outside of the house as the door was closed, and informant told her not to open the door. Thereafter informant made phone call to his wife at about 11.30 a.m. to 12.00 noon for 2-3 times, but there was no response from his house. His evidence further shows that he sent accused No.1 to repair his spectacles and after 11.30 a.m. to 12.00 noon accused No.1 had come to the shop after repairing spectacles. The evidence of the informant further shows that as his wife was not giving response to the phone calls, he felt that she might have went to the hospital. At 1.30 p.m., he closed the shop and went to hospital, but doctor told him that his wife had not come to the hospital. Thereafter the informant went to the

house. The door of the house was bolted from the inside, and though he knocked the door, no one opened the door. The informant was having spare key of the house and so he opened the door by the said key. When the informant entered in the hall, he saw blood stains in the hall. Then informant went in the inner room from the hall and saw that his wife was lying in unconscious condition in the pool of blood on the floor. Steel cupboard in the said room was open. His wife had injuries on her neck. The informant made phone call to police station, police came on the spot and shifted his wife to hospital. Doctor of Sasoon Hospital declared his wife as dead.

33. The evidence of informant (PW-8) further shows that, he saw steel cupboard and noticed that two cotton bags containing ornaments of money lending transactions were missing. In the said cotton bags, ornaments were kept in 100 to 125

small plastic pouches having name, amount of money lending and weight of ornaments. Police asked the informant to who he has doubt and the informant shown his doubt on his servants Mahendra Parmar and accused No.1. The evidence of the informant further shows that he called accused No.1 on his mobile phone and asked to come at house. Accused No.1 assured to come but did not come. Thereafter, the informant made phone call to accused No.1 in presence of police, but accused No.1 did not give any response, and thereafter the mobile phone of accused No.1 was switched off. Thereafter informant and police went to the place where accused No.1 took food and they came to know that, accused No.1 left that place with his bag and all belongings. Thereafter informant lodged the complaint (Exhibit-85).

34. The evidence of the informant further shows that, thereafter police arrested accused

No.1. Police had shown seized ornaments to him, he identified the said ornaments. On 26th October, 2010, the informant told the police in respect of theft of gold ornaments on the person of his wife, with description. Total ornaments of Rs.84 Lakhs were stolen. Ornaments of money lending transactions were seized by the police. His evidence further shows that, he had received those ornaments from the Court on Supratnama. Some of the ornaments which were demanded by the customers were given to them and some of the ornaments were with the informant. When the ornaments, i.e. Article Nos.16 to 27 were shown to him in the Court, he identified the same as the ornaments which were stolen from his house. He received those articles from the Court on bond. Those articles are pertaining to money lending transactions. The ornaments were having names of the concerned owners, weight and amount. His evidence further shows that the ornaments, article

Nos.16 to 17 were brought by him in the Court, on the day of recording his evidence. The evidence of the informant shows the details of the said ornaments, like name of the owner, description, weight and price of said golden ornaments. The evidence of the informant further shows that Article Nos.16 to 27 were received by him. The informant identified the accused persons who were present in the Court. The informant also identified the clothes which were on the person of his wife at the time of incident, shown to him in the Court, those were Article Nos.1 to 3 – saree, petticoat and blouse.

35. The prosecution examined PW-9 Afsar Mohamad Mulani. His evidence shows that since 7 to 8 years he was serving with Samruddhi Tours and Travels and his duty was to book seats of the bus. His evidence further shows that, on 6th October, 2010, he was on his duty. At about 2.30 p.m., two

boys came to the office and asked him, whether there was any bus for Ahmedabad, and he told them that departure of bus would be at 5.00 p.m. The said boys told him that as their father expired, they required urgent bus. The evidence of PW-9 further shows that he provided one taxi on rent of Rs.9,000/- for dropping the said boys at Ahmedabad. One of the boy was having sack with him. His evidence further shows that they paid Rs.5,000/- as advance. His evidence further shows that those boys were in hurry to leave for Ahmedabad. The evidence of PW-9 further shows that on 24th October, 2010, he was called by Samarth Police station. Police arrested some accused and showed him those accused. His evidence further shows that those accused were the same persons who came to his office on 6th October, 2010, for booking car. His evidence further shows that, he identified the accused persons when they were shown to him in the Court. During the course of

recording his evidence, when PW-9 was shown the sack, he identified the said sack, which was with the accused when they visited his office for booking car.

36. PW-10 Kumar Shantaram Kamble deposed that he runs a shop of sell and service of bags by name, "Sateshwar Bags" at 303, Nana Peth, Pune. His evidence shows that working hours of his shop are from 9.00 a.m. to 8.00 p.m. On 27th October, 2010, police of Samarth police station came to his shop, and he went to police station to identify the sack. There was one bag having monogram, "one polo", having military colour. His evidence shows that, the said bag was purchased by accused No.2, from his shop for Rs.180/- but he has not issued bill of said bag. During the course of recording his evidence, PW-10 identified accused No.2 as the person who had purchased the said bag from his shop.

37. PW-11 Kirtiraj Popat Kamble was the person who was doing business of video-shooting and photography. He deposed that on 23rd October, 2010 he was called by police and at the instance of accused No.1 one sword was seized, which was concealed by accused No.1 on the stair case of Shankar Parvati Apartment, Ganesh Peth, Pune. His evidence shows that he made video shooting of the entire event of seizure of sword at the instance of accused No.1. The evidence of PW-11 further shows that on the same day i.e. 23rd October, 2010, police took him to Shubham Apartment along with accused persons where the incident of theft and murder took place. His evidence further shows that the accused showed demonstration how they committed murder and video recording of demonstration was made by him. His evidence further shows that as per the instructions he made video shooting of the seizure of sword which was

seized at the instance of accused No.2, concealed under fly over constructed in Sarasbaug, Pune.

38. PW-12 Dr. Ajay Aniruddha Taware is the medical officer who conducted postmortem examination on the dead body of Jayanti Nagraj Chhajed on 7th October, 2010, between 9.30 a.m. to 10.45 a.m., along with another medical officer, namely Dr. Nitin Patil. The evidence of Dr. Ajay Taware (PW-12) shows that on external examination, he noticed following injuries on the person of deceased Jayanti:-

1) Linear abrasion over lower tip, outer aspect, oblique 0.8 X 0.5 cm.,

2) Abrasion over chin in the midline horizontal 1 X 0.3 cm.,

3) Incised wound 4 cm. Below left angle of

mandible, 2 X 0.3 muscle deep,

4) Incised wound starting from 5 cm. below chin, in midline, running horizontally on left side, 8 X 1 cm. trachea deep.

5) Incised wound over right supraclavicular region, extending upto suprasternal region, vertically oblique 9 X 2 cm. cavity deep.

6) Stab injury, 5 cm., below right clavicle, 3 cm., away from midline, vertically oblique 3 X 1 cm., cavity deep.

7) Linear abrasion 8 cm., below left nipple, 11 cm., away from midline, horizontal 5 X 0.3 cm.,

8) Stab injury 16 cm., below left clavicle, 2 cm., away from midline, 3 X 1.2 cm., cavity deep,

9) Stab injury over epigastrium, 22 cm., below suprasternal notch, 13 cm., above umbilicus, in midline, vertical, 3 X 2 cm., cavity deep.

10) Incised wound over dorsum of right thumb, proximal phalynx, 3 X 1 cm., bone deep,

11) Incised wound over base of right thumb lateral aspect, 1.5 X 1 cm., muscle deep.

39. The evidence of PW-12 shows that all the above injuries were fresh. Margins and angles of above mentioned injuries were acute and clean. His evidence further shows that on internal examination of thorax, they noticed stab injuries underneath injury Nos.6 and 8. Both cavities contain 250 cc., blood. Stab injury underneath injury Nos. 6 and 7 over upper lobe. Stab injury underneath injury No.8 over upper lobe. His evidence further shows that on internal

examination of abdomen, they noticed stab injury underneath injury No.9. Cavity contains 1200 cc., blood. Stab injury underneath injury No.9, vertical, left lobe. His evidence further shows that as per his opinion, cause of death was "due to traumatic and haemorrhagic shock due to stab injuries". He proved postmortem notes (Exhibit-95). His evidence further shows that stab injuries mentioned in Column No.17 of postmortem notes, corresponding to internal injuries were sufficient to cause death in ordinary course, and said injuries were possible due to sword.

40. PW-13 Sunil Pandurang Gaikwad, the then A.P.I. attached to Samarth Police Station, Pune, was the investigating officer, who deposed about the manner in which he has carried out the investigation of the crime.

41. PW-14 Dr. Sunil Pralhad Jogdand is the

medical officer who examined accused No.2. The evidence of Dr. Sunil shows that on 13th October, 2010, he examined accused No.2 – Bharat Polaji and noticed as many as 11 injuries on the person of accused No.2. All the injuries were abrasions and incision and were of simple nature. The age of injuries was within one week, caused by sharp edged tip, rough and irregular objects.

42. The prosecution has also brought on record C.A. Reports regarding the seized articles, which are at Exhibit 48 to 50.

43. We have discussed the entire evidence brought on record by the prosecution. The evidence of the medical officer (PW-12) shows that deceased Jayanti received multiple internal and external injuries, including stab injuries and thus her death was homicidal.

44. Admittedly, in the present case there is no eye witness to the incident and the entire prosecution case is based upon circumstantial evidence. For connecting the said offences with accused No.2, the prosecution has brought on record overwhelming circumstantial evidence. The prosecution has brought on record medical evidence showing that, accused No.2 had as many as 11 injuries on his person and most of the injuries were to his palm. The medical officer who has examined accused No.2, has opined that the age of injuries was within one week. Learned A.P.P. argued that while accused No.2 assaulted deceased Jayanti, she might have resisted and during the said course accused No.2 has received those injuries. The evidence on record further shows that, at the instance of accused No.2 sword stick was seized which was concealed by him beneath the ground, and by digging the ground accused No.2 had took out the polythene bag in which sword stick

was kept. The place from where the sword stick was seized, was not the open place accessible to all, but the same was within the exclusive knowledge of accused No.2. The evidence on record shows that along with the sword stick, there was piece of cloth stained with blood. The C.A. Report shows that DNA profile obtained in cotton swab matched with the sword stick and the said piece of cloth which was seized at the instance of accused No.2.

45. The prosecution has brought on record the evidence showing that after the incident accused No.2 stayed in the hotel at Sirohi (Rajasthan State), by falsely stating his name as Vinod, and gave his clothes for washing to laundry. Accused No.2 left the said hotel without collecting those clothes, which were seized by the police, which were having blood stains. The C.A. report shows that DNA profile matched all the obligate alleles present in the DNA profile obtained from the pant

of accused No.2. Learned counsel appearing for the Appellants argued that said clothes of accused No.2 were given for washing and it was not possible to detect blood stains on the clothes when the clothes were washed. We are not in agreement with the aforesaid submission of the learned counsel, for the simple reason that the expert has given opinion that there were blood stains on the clothes and the DNA profile was matched.

46. Though the prosecution has relied upon the circumstance that one bag having monogram "One Polo" was purchased by accused No.2, but the prosecution has not brought on record any evidence showing that the said bag was having any special marks. The said Polo bag is easily available in the market. Further, it is pertinent to note that it has come in the evidence of another prosecution witness (PW-3) that said Polo bag was seized at

the instance of accused No.1. Therefore the seizure of said Polo bag cannot be said to be incriminating circumstance against accused No.2.

47. The prosecution has also relied upon another circumstance that at the instance of accused No.2, cash amount of Rs.1,50,000/- was recovered from Mount Abu police. It is the case of the prosecution that accused forgot a bag of Rs.1,50,000/- in the taxi at Mount Abu and the said taxi driver had deposited the said amount with Mount Abu Police Station and the said amount was recovered by the Investigating Officer in the present case, from Mount Abu police station. In this respect, it is significant to note that neither the said taxi driver nor the police personnel from Mount Abu police station was examined by the prosecution to prove the said circumstance.

48. The evidence on record shows that an accused No.2 had melted some of the stolen ornaments and prepared a gold bar. The evidence on record shows that at the instance of accused No.2, from his village Padiv, Tq-Sirohi, the said golden bar was recovered. The said golden bar was seized from the bed of a river which was concealed by accused No.2, $1\frac{1}{2}$ to 2 feet beneath the sand. Thus, the said golden bar was seized from the place which was exclusively within the knowledge of accused No.2. Further, accused No.2 had not given any plausible explanation how such golden bar came into his possession though he was obliged under Section 114 of the Evidence Act to offer plausible explanation. In his statement recorded u/s. 313 of Criminal Procedure Code, except simple denial or he does not know, is the reply given by him when all the adverse circumstances were put to him.

49. Thus, the prosecution has brought on

record overwhelming circumstantial evidence against accused No.2, and proved that he has committed theft of the golden ornaments from the house of the informant belonging to the informant, and during the process of said theft when wife of informant resisted, accused No.2 committed her murder.

50. Now, we will discuss the circumstances brought on record by the prosecution for connecting the said offences with accused No.1. The evidence on record shows that accused No.1 was serving in the shop of the informant. Accused No.1 used to work in the house of the informant from 8.45 a.m. till 9.45 a.m., and thereafter he used to go in the shop of the informant for work. Thus, the prosecution has proved that, accused No.1 was well conversant to the situation of the house of the informant and also about the family members residing in the house. The evidence on record

shows that, on the day of incident, at 9.00 a.m., when the informant left for his shop, at that time only accused No.1 and deceased Jayanti were present in the house. So, also the evidence on record shows that after the incident the conduct of accused No.1 was not natural. The evidence of the informant shows that, soon after the incident he made phone call to accused No.1 and asked him to come to the house. Accused No.1 assured to come, but did not come to house of the informant and thereafter accused No.1 switched off his mobile phone. The evidence on record further shows that soon after the incident, the accused has left his rented residential place and went to his native place. The evidence on record shows that, accused No.1 did not wait for bus which according to PW-9 was supposed to depart at Ahmedabad at 5.00 p.m., and hired taxi for an exorbitant amount of Rs.9000/- and left Pune. In fact, accused No.1 alongwith another co-accused went at Samruddhi

Tours and Travels at about 2.30 p.m. and at 5.00 p.m. there was bus to go to Ahmedabad. But they did not wait even for 2½ hours more. Thus, the prosecution has proved that soon after the incident, accused No.1 hurriedly left Pune. Thus, the prosecution has brought on record sufficient evidence showing that soon after the incident, the conduct and behaviour of accused No.1 was suspicious.

51. The evidence of PW-3 Rakesh Gaikwad, supported with the evidence of investigating officer (PW-13) shows that, at the instance of accused No.1 ornaments were seized at village Noon, Tq-Sirohi, Rajasthan State. The said ornaments were concealed by accused No.1 in the house of his sister, beneath the floor of the house. The prosecution has brought on record the evidence showing that at the house of his sister, accused No.1 digged upto 1 and ½ feet on the floor

and thereafter took out plastic bag in which there were about 113 plastic bags containing golden ornaments. Accused No.1 has not given any explanation how such huge golden ornaments came into his possession. Further, the said ornaments when seized, were identified by the informant as belonging to him. In the case of Praveen vs. State of M.P.¹⁰, the Supreme Court has held that in absence of any explanation from the accused as to the possession of the articles belongs to the victim, the recovery of articles is reliable. It is significant to note that, the accused No.1 in his statement under Section 313 of Code of Criminal Procedure did not offer plausible explanation, how he came in to possession of such huge quantity of gold.

52. Thus, the prosecution has proved that accused No.1 while sharing common intention with

¹⁰ (2008) 16 SCC 166

Accused No.2 had committed theft in the house of the informant and took away golden ornaments which were belonging to the informant. Thus, the prosecution has proved that accused No.1 had committed an offence under Section 380 of the IPC.

53. Thus, the prosecution has brought on record overwhelming circumstantial evidence showing the involvement of both the accused in the crime of theft of an ornaments. Thus, the prosecution has proved that accused No.1 and accused No.2 in furtherance of their common intention committed theft of golden ornaments from the house of the informant, and in the said process Accused No.2 has committed murder of Jayanti Nagraj Mehta.

54. After considering the entire evidence brought on record by the prosecution, we are of the view that circumstances brought on record by

the prosecution are not sufficient to connect accused No.1 for the offence under Section 302 of IPC. The evidence of the informant shows that, though on the day of incident accused No.1 visited the house of the informant, but as usual at routine time at 9.30 a.m. accused No.1 attended the shop of the informant. The evidence of informant further shows that at 10.30 a.m. he received phone call of his wife. Thus, it is clear that when accused No.1 left the house of the informant and thereafter also till 10.30 a.m. wife of the informant was alive. Though the evidence of the informant further shows that, thereafter he sent accused No.1 to repair his spectacles, but he stated that at about 11.30 a.m. to 12.00 noon accused No.1 had came back to the shop after repairing spectacles. The prosecution has also not brought on record cogent evidence showing that during said period, accused No.1 visited the house of the informant and

committed murder of wife of the informant. Thus, the informant himself has weaken the prosecution case regarding commission of an offence under Section 302 of IPC by accused No.1. Though the evidence on record shows that, every day in the morning hours accused No.1 used to attend the house of the informant for doing household work and was having knowledge of the house, the prosecution has not brought on record an evidence showing that, accused No.1 was having spare key with him of the house of the informant. On the contrary, evidence of the informant shows that when he went to the house after returning from the Doctor, the door of the house was not opened even after door was knocked by him. Therefore, the informant opened the house by the spare key which was with him.

55. So far as the alleged recovery of the sword at the instance of accused No.1 is

concerned, the evidence on record shows that the said sword was recovered from the stair case, and the said place was visible and accessible to the persons using said stair case. In the case of *Sujit Gulab Sohatre & others vs. the State of Maharashtra*¹¹, the Division Bench of the Bombay High Court held that, recoveries from the places which are accessible to all and sundry is not incriminating evidence. As observed earlier, in the present case also, the recovery of weapon at the instance of the accused No.1 was from the place accessible to all, and therefore the said circumstance cannot be said to be incriminating circumstance against accused No.1. The prosecution has not brought on record any clinching evidence to connect accused No.1 with the offence punishable under Section 302 of the IPC.

56. In the case of *Sanwat Khan vs. State of*

¹¹ 1996 [3] All M.R. 439

Rajasthan¹², the Supreme Court in Para -7 of the Judgment observed as under:

"7..... In our Judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murder. Suspicion cannot take the place of proof."

57. In the present case also, the prosecution has proved that accused No.1 and accused No.2 had committed theft of the golden ornaments which were owned and possessed by the informant. It is true that said stolen golden ornaments were recovered at the instance of accused No.1. But the circumstances on record does not at all indicate

¹² AIR 1956 S.C. 54

that at the time of commission of offence of murder, accused No.1 could have been present at the spot of incident.

58. In Limbaji and others vs. State of Maharashtra¹³, the Supreme Court in Para 28 and 29 of the Judgment, while discussing the presumption under Section 114 of the Evidence Act, held as under:

“28. Whether the presumption could be further stretched to find the appellants guilty of the gravest offence of murder is what remains to be considered. It is in this arena, we find divergent views of this Court, as already noticed. In Sanwat Khan case¹⁴, the three-Judge Bench of this Court did not consider it proper to extend the presumption beyond theft (of which the accused were charged) in the absence of any other incriminating circumstances excepting possession of the articles belonging to the deceased soon after the crime. However, we need not dilate further on this aspect as

13 (2001) 10 SCC 340

14 AIR 1956 SC 54

we are of the view that in the peculiar circumstances of the case, it would be unsafe to hold the accused guilty of murder, assuming that murder and robbery had taken place as a part of the same transaction. The reason is this. Going by the prosecution case, the deceased Baburao was hit by a heavy stone lying on the spot. The medical evidence also confirmed that the fatal injuries would have been inflicted by a heavy stone like Article 1. It is not the case of the prosecution that the appellants carried any weapon with them or that the injuries were inflicted with that weapon. There is every possibility that one of the accused picked up the stone at that moment and decided to hit the deceased in order to silence or immobilise the victim. If the idea was to murder him and take away the ornaments from his person, there was really no need of forcibly snatching the earrings before putting an end to the victim. It seems to us that there was no premeditated plan to kill the deceased. True, common intention could spring up any moment and all the three accused might have decided to kill him instantaneously, for whatever reason it be. While that possibility cannot be ruled out, the possibility of one of the accused suddenly getting the idea of killing the

deceased and in furtherance thereof picking up the stone lying at the spot and hitting the deceased cannot also be ruled out. Thus two possibilities confront us. When there is reasonable scope for two possibilities and the court is not in a position to know the actual details of the occurrence it is not safe to extend the presumption under Section 114 so as to find the appellants guilty of the offence of murder with the aid of Section 34 IPC. While drawing the presumption under Section 114 on the basis of recent possession of belongings of the victim with the accused, the court must adopt a cautious approach and have an assurance from all angles that the accused not merely committed theft or robbery but also killed the victim.

(29) In the result, we set aside the conviction of the accused under Section 302 IPC. We find the accused guilty of the offence punishable under Section 394 read with Section 34 IPC and accordingly convict the accused under Section 394 and sentence them to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.500 each and in default to undergo further imprisonment for a period of three months. The appeals are thus partly allowed."

59. Applying the said ratio to the present case in hand, in the facts of the present case though it is proved that accused No.1 had committed theft of the ornaments of the informant, the prosecution has not brought on record any evidence even remotely showing the involvement of accused No.1 in the commission of offence of murder. Thus, we are of the considered view that the offence under Section 302 of the IPC is not at all proved as against accused No.1.

60. The record of Criminal Appeal No.977 of 2014 shows that by order dated 28th June, 2018 passed by the Division Bench of this Court (Coram : B.R. GAVAI & SARANG V. KOTWAL, JJ.), the Appellant – Accused No.1 has already been released on bail. It is also observed in the said order that Appellant – Bharat Kaluram Ghanchi @ Ghelot was in custody for more than seven years. Thus, it

is clear that Appellant has already suffered sentence for the offence under Section 380 of the IPC.

61. For the reasons afore stated, we are of the view that the prosecution has proved that, accused No.2 had committed theft of the golden ornaments of the informant and during the process of said theft, he has committed murder of Jayanti, wife of the informant. Thus, the prosecution has proved that accused No.2 had committed an offence under Section 380 and 302 of the IPC. So far as accused No.1 is concerned, the prosecution has proved that accused No.1 has along with accused No.2 committed an offence under Section 380 of the IPC. But the prosecution has failed to prove that accused No.1 had committed an offence under Section 302 of IPC.

62. So far as Criminal Application No.953 of

2018 filed by the informant – Nagraj Chandmal Chajed, praying therein to return the ornaments to him as mentioned in Annexure-C of the Application is concerned, the same deserves to be allowed, by giving certain directions.

63. In the result, we pass the following order:

O R D E R

(I) Criminal Appeal No. 817 of 2014 filed by Appellant – Original Accused No.2 – Bharat Polaji Ghanchi @ Ghelot is hereby dismissed. The impugned Judgment and order dated 2nd September, 2014, passed by the Additional Sessions Judge, Pune in Sessions Case No.146 of 2011 convicting the Appellant – accused No.2 for the offence punishable under Section 380 r/w. 34 of the Indian Penal Code and

sentencing him under said Section is confirmed. So far conviction and sentence as ordered by the Trial Court of accused No.2 under Section 302 r/w. 34 of the Indian Penal Code is concerned, same stands modified and instead of conviction and sentence under Section 302 r/w. 34 of the Indian Penal Code, accused No.2 is/stands convicted for the offence punishable under Section 302 of the Indian Penal Code simplicitor. As ordered by the Trial Court, both the sentences shall run concurrently. The Appellant – accused No.2 be given set off under Section 428 of the Code of Criminal Procedure.

(II) Criminal Appeal No.977 of 2014 filed by Appellant – Original Accused No.1 – Bharat Kaluram Ghanchi @ Ghelot is

partly allowed as follows :

(a) The impugned Judgment and order dated 2nd September, 2014, passed by the Additional Sessions Judge, Pune in Sessions Case No.146 of 2011 convicting and sentencing the Appellant – Accused No.1 – Bharat Kaluram Ghanchi @ Ghelot for the offence punishable under Section 302 of the Indian Penal Code is set aside and the Appellant – Accused No.1 is acquitted of the offence punishable under Section 302 of the Indian Penal Code. Fine amount, if any paid by the Appellant be refunded to him.

(b) The impugned Judgment and order dated 2nd September, 2014, passed by the Additional Sessions Judge, Pune in Sessions Case No.146 of 2011 convicting

and sentencing the Appellant – Accused No.1 – Bharat Kaluram Ghanchi @ Ghelot for the offence punishable under Section 380 read with 34 of the Indian Penal Code and sentence to suffer rigorous imprisonment for five years and to pay fine of Rs.2,000/- (Rs. Two Thousand) in default of payment of fine to suffer further rigorous imprisonment for three months stands confirmed. The accused No.1 has already undergone the sentence imposed upon him for the offence punishable under Section 380 r/w. 34 of the Indian Penal Code. The bail bonds of Appellant – accused No.1 shall stand cancelled.

(III) Criminal Application No.953 of 2018 is allowed. On executing indemnity bond to the satisfaction of the trial

Court i.e., the Court of Sessions, Pune by the Applicant – Nagraj Chandmal Chajed, Muddemal property (i.e. the ornaments as mentioned in Annexure C to the Application) be returned to the Applicant, after the period of filing the Special Leave Petition, as provided under the Supreme Court Rules, 1966 is over. The Record and Proceedings along with Muddemal property be sent to the trial Court. The trial Court, after verifying indemnity bond and completing all other formalities, shall return Muddemal property to the Applicant – Nagraj Chandmal Chajed.

[A.S. GADKARI, J.]

[S.S. SHINDE, J.]