

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

**CRIMINAL APPEAL NO. 42 OF 2013**

Rakesh Janardhan Jana.  
Adult, aged 22 yrs., Indian  
Inhabitant, Occ: Service,  
Residing at Sadguru Krupta  
Chawl No. 1, Behind Relax Hotel,  
Nandivali, Kalyan, Thane. Having  
his permanent address at Room No. 1316,  
Lambha Indira Nagar, Aslani,  
Ahmadabad, Gujarat. ... Appellant.

Versus

The State of Maharashtra.  
(at the instance of DCB CID Unit 3,  
Mumbai, vide C.R. No. 55/2011.) ... Respondent.

WITH

**CRIMINAL APPEAL NO. 72 OF 2013**

Raghunath Vasudev Muhuri @ Raju  
Adult, aged 31 yrs., Indian  
Inhabitant, Occ: Service,  
Residing at Sunder Nagar Mahakali Gufa Rd.,  
Jewelex Compound, Room No. 8,  
MIDC, Andheri(E), Mumbai.  
Having his permanent address at

Kamalpur, Purvanpada, Dhantala,  
Dist. Nandia, West Benga.

... Appellant.

Versus

The State of Maharashtra.  
(at the instance of DCB CID Unit 3,  
Mumbai, vide C.R. No. 55/2011.)

... Respondent.

WITH  
**CRIMINAL APPEAL NO. 79 OF 2015**

Shubendu Jagannath Sardar,  
Aged 29 yrs., Occ: Service,  
R/o. Sudarshan Colony,  
Chawl No. 6, Room No. 4,  
Khade Golvali, Vithalwadi(E),  
Kalyan, Dist. Thane.  
(at present detained at Kolhapur  
Central Prison)

... Appellant.

Versus

The State of Maharashtra.  
(at the instance of DCB CID Unit 3,  
Mumbai, vide C.R. No. 55/2011.)

... Respondent.

WITH  
**CRIMINAL APPEAL NO. 100 OF 2015**

1 Ashish Ashok Kha.  
Age: 21 years, r/o. Kusberiy Gaon,

P.S. Ulberiya, Dist. Hawda,  
West Bengal.

2 Shubendu Jagannath Sardar  
Age : 31 years, R/o. Sudarshan Colony,  
Chawl No. 6, Khade Golwali,  
Vitthalwadi, Kalyan, Dist. Thane.

3 Deepankar Govind Gosh  
Age : 23 years, R/o. Jari Karkhana,  
Bandra Plot, Western Express High way,  
Jogeshwari, Mumbai.

4 Palash Laxmikant Mandal  
Age : 32 years, R/o. Dakshin Ramchandrapur,  
Post-Panpur, Dist. Amata,  
Hawda, West Bengal.

(at present detained at Kolhapur  
Central Prison)

... Appellants.

Versus

The State of Maharashtra.  
(at the instance of DCB CID Unit 3,  
Mumbai, vide C.R. No. 55/2011.)

... Respondent.

WITH  
**CRIMINAL APPEAL NO. 233 OF 2013**

Uttam Shivaji Pawar.  
Aged 26 years, Indian Inhabitant  
residing at Barrack No. 34,  
Near Saibaba Temple,

Behind Mamta Hospital,  
Ulhasnagar No. 1, Kalyan, Thane.

... Appellant.

Versus

The State of Maharashtra.  
(at the instance of DCB CID Unit 3,  
Mumbai, vide C.R. No. 55/2011.)

... Respondent.

WITH  
**CRIMINAL APPEAL NO. 305 OF 2013**

Jamshedali Safiuddin Shaikh,  
Aged : 24 years at present undergoing  
a sentence of seven years at Kolhapur  
Central Prison

... Appellant.

Versus

The State of Maharashtra.  
(at the instance of DCB CID Unit 3,  
Mumbai, vide C.R. No. 55/2011.)

... Respondent.

WITH  
**CRIMINAL APPEAL NO. 1353 OF 2012**

Deepankar Govind Gosh  
Age : 23 years, Indian inhabitant,  
Occ. Service, R/o. Zari Kharkana,  
Bandra Plot, Western Express High way,  
Jogeshwari(E), Mumbai.  
(at present detained at Kolhapur

Central Prison)

... Appellant.

Versus

The State of Maharashtra.

(at the instance of DCB CID Unit 3,  
Mumbai, vide C.R. No. 55/2011.)

... Respondent.

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Ms. Payoshi i/b. Dr. Yug Mohit Chaudhary, advocate for  
appellant.

Ms. Pallavi N. Dabholkar, APP for State.

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**CORAM : SMT.SADHANA S. JADHAV,J**

**DATE : JUNE 21, 2019**

**JUDGMENT.:**

1           The appellants herein are original accused in Sessions  
Case No. 716 of 2011. They have been convicted by the Sessions  
Judge, Sewaree, Mumbai vide Judgment and Order dated  
9/11/2012 and sentenced to suffer imprisonment for 7 years and  
to pay fine of Rs. 10,000/- each I.d. to suffer S.I. for one year

each for offence punishable under section 397 of the Indian Penal Code. Appellants are also convicted for offence punishable under section 395 of the Indian Penal Code and sentenced to suffer R.I. for 7 years and to pay fine of Rs. 10,000/- each I.d. to suffer S.I. for one year each. Appellants are convicted for offence punishable under section 120-B of the Indian Penal Code and sentenced to suffer imprisonment for six months and to pay fine of Rs. 1,000/- each I.d. to suffer S.I. for one month each. The appellants are also convicted for offence punishable under section 452 of the Indian Penal Code and sentenced to suffer imprisonment for 3 years and to pay fine of Rs. 5,000/- each I.d. to suffer S.I. for six months each. The appellants are also convicted for the offence punishable under section 341 of the Indian Penal Code and sentenced to suffer imprisonment for one month and to pay fine of Rs. 200/- each I.d. to suffer S.I. for one month each. The appellants are convicted for the offence

punishable under section 427 of the Indian Penal Code and sentenced to suffer imprisonment for one year and to pay fine of Rs. 2,000/-each I.d. to suffer S.I. for one month each. The appellants are convicted for the offence punishable under section 323 of the Indian Penal Code and sentenced to suffer imprisonment for 6 months and to pay fine of Rs. 1,000/- each I.d. to suffer S.I. for one month each. The appellants are convicted for offence punishable under section 506-II of the Indian Penal Code and sentenced to suffer imprisonment for one year and to pay fine of Rs. 1,000/- each I.d. to suffer S.I. for one month each. Being aggrieved by the said Judgment, the appellants have preferred the present appeals.

2 Such of the facts necessary for decision of these cases are as follows :

(i) It is the case of the prosecution that on 9/5/2011 at about 8.30 to 9 p.m. the offenders had entered into cabin of one Dilip Jain i.e. Sayyam Casting. His workers were present. The workers were craftsmen, who were making ornaments from raw gold weighing about 2400 gms. There was raw gold and cash amount of Rs. 60,000/- in the cash box and 1100 gms. of gold with the workers.

(ii) According to Dilip Jain, upon hearing door bell, he opened the door by using electronic button. A young boy entered into the office and placed revolver on the head of Dilip Jain and restricted his movement. The cell phone of Dilip Jain was snatched and thereafter, thrown on the ground. The said boy has also damaged the T.V. and had disconnected telephone wires. Mr. Dilip Jain was assaulted by kick blows.

(iii) The young boy was followed by four other persons armed with revolver. Their faces were covered. Mr. Dilip Jain alongwith workers were tied by nylon rope. Miscreants had taken away cash amount of Rs. 60,000/- and 1100 gms. from the workers.

(iv) Dilip Jain had realised that one of the miscreants was Raju who was working with him 15 days ago. The articles were kept in a bag handed over to Amit who happened to be one of the worker and then they had all fled.

(v) After miscreants had fled, the victims had succeeded in getting themselves released from the nylon rope. On inspection they had noticed a live revolver cartridge on a mat in front of the iron cupboard. It appears that the offender had

then gone to C.H. Engineering Works, which was on the third floor.

(vi) The police were summoned and law was set into motion. On the statement of Dilip Jain C.R. No. 55 OF 2011 was registered with DCB CID Unit III. Rakesh Jana, Ashish Kha were arrested on 24/5/2011. Shubhendu Sardar was arrested on 29/5/2011 whereas Raghunath @ Raju Muhuri was arrested on 2/6/2011. Uttam Pawar was arrested on 3/6/2011, Dipankar Ghosh was arrested on 9/7/2011, Jamshed Ali Shaikh was arrested on 9/7/2011, Palash Mandal was arrested on 19/7/2011. Accused were subjected to test identification parade.

3 Prosecution examined as many as 31 witnesses to bring home the guilt of the accused. P.W.1 Dilip Jain happens to be first informant and eye witness to the whole incident.

P.W.2, 3 and 7 happened to be workers of P.W.1. P.W.5,6, 8, 10, 11, 12, 15 and 19 happened to be panch witnesses whereas P.W.9 Madhukar Patil happened to be the owner of Mayaka Devi Refinery, to whom accused allegedly handed over gold articles for moulding and disposal. Some of the witnesses are examined by the prosecution to show that these accused were temporarily residing with them. They would not be relevant witnesses. P.W. 20 Dr. Pawar had proved medical certificate of witnesses Kasim and Manohar by placing on record medical certificate which are at Exh. 106 and 107. P.W.27, 29 and 30 are the investigating officer.

4 P.W.1 Dilip Jain happens to be the complainant, owner of Sayyam Casting. There were 7 workers/craftsmen in his unit. He was confronted with the first information report and has admitted the contents of FIR and the same is marked as

Exh. 47. According to him, on 13/7/2011 he had been summoned by Crime Branch to Arthur Road Jail for identification of the accused. He had identified accused No. 3 Subhendu. On 10/8/2011 he was again called to Arthur Road Jail. He had identified the accused who had put the revolver to his forehead. The witness had also identified the said accused in court whose name was Dipankar.

5 In the cross-examination, it is admitted that prior to being summoned in Arthur Road Jail, he had been to the Court on 10 to 12 occasion and had seen accused in the court for about 5 to 6 times. He had also met the police officer on more than four occasions. He had not known the names of the identified accused even after test identification parade in Arthur Road Jail and therefore, he had not disclosed the same to the Tahasildar. He was in the identification room for about 10

minutes, had identified accused within 2 minutes, but had not informed the Tahasildar that the identified accused had put revolver on his forehead. It is also admitted that he had not identified the accused on the basis of their physical constitution.

6           It is also admitted that he had filed an application on 29/6/2011 seeking return of property before Metropolitan Magistrate. Notices were issued to the accused. It is also admitted that the gold property involved in the present offence did not belong to him but to his brother Sanjay and the application for return of property was filed by Sanjay. However, the complainant had failed to execute supartnama. The said property was handed over to his brother. The police had not recorded supplementary statement of the witnesses after test identification parade. It is further admitted that he had been to Arthur Road Jail for the purpose of identification only once i.e.

10/8/2011. That he had met the Tahasildar and panchas for the first and last time only in identification room at the time of parade.

7 It is also admitted that there is no document to substantiate his claim as the owner of Sayyam Casting. However, his office address is of Byculla. He and his brother are having independent business. None of the labourers who were working on the said gold, at the time of the incident had been summoned by the police for identification of the recovered gold property. It is also admitted that before recording of FIR the police had visited shop of his brother in the name and style of Sayyam Casting. It is also admitted that on the day of incident at about 9.30 p.m. he had been to the police station, however, his statement was not recorded and therefore, he was constrained to file FIR.

8           It is also admitted by P.W. 1 that he is into the business of trading shares and that Sayyam Casting belongs to his brother Sanjay. He had filed an application for return of property. It is also candidly admitted that he had not raised any shout for help at the time of incident, neither called his brother Sanjay. According to him, he had informed the police that raw gold worth Rs. 40 Lakhs were robbed and subsequently, he had learnt that 1200 gms. of gold were also taken away. It is also admitted that he had not given description of the raw gold to the police in his FIR nor description of the gold jewellery or the carat of the raw gold and neither description of jewellery was mentioned. The reference to 1200 gms. of gold does not find place in his supplementary statement dated 16/6/2011 and the same is admitted by him.

9           He has given an evasive answer to the effect that he cannot say for sure that the gold nugget weighing 200.180 milligrams and measuring 12.5 cms. was belonging to accused No. 5 Uttam Pawar. He had seen the revolver and empty cartridge on 3<sup>rd</sup> floor prior to registration of FIR. There are several inconsistencies in his substantive evidence.

10           It appears that the entire case rests upon test identification parade and alleged recovery.

11           P.W. 2 Manohar Rudrapathyi is worker/craftsman working in Sayyam Casting since 6 years prior to the incident. It is admitted by P.W. 2 that the worker Amit (absconding accused) was hand in glove with the other accused whereas one of the accused Raju Bangali was known to him and it was Raju

Bangali, who was threatening the other workers. According him, Raju Bangali and Amit had looted all the valuables from the safe. P.W. 2 has identified Raju Bangali in the court as well as Raghunath Muhuri, who was also shown as Raju in the compilation of charge-sheet. According to him, on 11/5/2011 his statement was recorded at Byculla police station by the police and on 14/7/2011 he was called at Arthur Road Jail for the purpose of identification. He could identify only one accused. Thereafter, he had again been to Arthur Road Jail on 10/8/2011 and had identified accused No. 8 Palash. He has reiterated contentions of P.W.1 that Sayyam Casting has only one door, CCTV is installed in the said room and the person standing at the door can be identified on the screen of T.V. and that they opened the door only on confirmation, that the said person who is calling upon them is known to them. They work in closed cabins. That they had not raised any cry for help when they

were assaulted by miscreants. That Taruni was released prior to him. Taruni had helped to untie rope with which other workers were tied. According to him, there are 15 workers in Sayyam Casting, but there is no register.

12           There is omission as far as the contention of the witness that he had scuffle with the culprits and that culprits had assaulted him on his head with a chair. It appears that he had been to jail for the purpose of identification alongwith P.W.1 and that they were both made to sit on the bench in the jail. That P.W. 1 had met him outside jail. It is also admitted that out of 4 culprits 3 culprits had covered their faces. There is contradiction marked at Exh. A which shows that he had disclosed that the culprits had come with their faces covered to the cabin, where Jabirmulla and Kasim and P.W.2 were working. Even according to him, although police had asked him

to describe the culprits, sketch of the said culprits was not prepared on his instructions. It is also admitted that he had visited test identification parade room on 10/8/2011. He had identified the culprits by face and not by their height. He has also admitted that he would be unable to give individual description of the culprit on the day of recording of evidence. The contradictions in the statements are marked at Exh. A, B, C and D which are proved by the investigating officers.

13            P.W.3 Toroni Prabhodh Polla was also working in Sayyam Casting. According to him, four persons had covered their faces by cloth and had followed one person inside the cabin. There was scuffle between Manohar and 2 culprits. Accused Raju had approached him. All the co-workers were brought to his cabin and they were tied together by Tarpatta and had also tied their mouth by cloth strips. Raju was known to all

the workers as he was working in Sayyam Casting. He had attended the test identification parade on 14/7/2011 and on 10/8/2011. It is also reiterated by P.W.3 that door is opened, only if the visitor is known, that too after observing through eye hole. In the cross-examination it is admitted that the first person who entered in Sayyam Casting had also covered his face by cloth and the four culprits who followed first person had also covered their faces. The police had prepared only one sketch of culprit with his help and said sketch of culprits was known to the witness. It is admitted by P.W.3 that he had seen accused Nos. 6 and 8 in the passage of the court while accused were in police custody. P.W.3 has also admitted in the cross-examination that he had named accused No.4 only as Raju and has not mentioned his full name. However, he has further admitted that during last 10 to 12 years 2 to 3 persons by name Raju had

worked in Sayyam Casting. There is specific plea that accused Raju had not covered his face.

14           Second bone of contention of the prosecution is that there is recovery of the stolen property from all the accused persons. However, court cannot be oblivious of the fact that there was no description of the gold jewellery by the complainant or the workers. The weight of raw gold was also not mentioned. The recovered articles were kept at police station. Said property was not sealed before being valued as is admitted by the panch witness. The property was valued practically 3 months after the date of offence i.e. 16/6/2011 and 23/7/2011. The valuation officer P.W.25 has admitted that he had taken Rs. 4000/- from the complainant and he was not able to confirm as to whether there are some articles which he had valued.

15           It is difficult to believe that although the offence had taken place on 9/5/2011, accused No. 1 was arrested from West Bengal on 24/5/2011. But the recovery of the stolen articles is from his house in Mumbai on 28/5/2011. Moreover, accused No.1 was himself a jeweller. The panchas are stock witnesses of the police as P.W. 5 who happens to be panch for recovery of gold nuggets and jewellery, resides opposite the police station and was well acquainted with the staff of the police. Panch P.W. 5 has also admitted that he had seen the accused in the court prior to recording of his evidence. Moreover, memorandum prefixed to the recovery are hit by section 25 of the Evidence Act. The raw gold was recovered from the house of one Ms. Payal who is not an accused. However, it is to be noted that Ms. Payal was not examined as prosecution witness. It is also pertinent to note that discovery of four gold nuggets

was not consequent to the disclosure memorandum made by accused No. 2. The disclosure statement of accused No. 2 was purportedly made outside a hotel and at that time Accused No. 2 had made a disclosure statement. Accused was never taken inside the hotel. According to the investigating officer, disclosure was made inside the hotel room. According to P.W.12, the house from where the stolen property was recovered at the instance of accused No. 2, was vacant house and when the police had been to the house, door was open. The recovery panchanama does not state that the articles were sealed.

16 From the evidence adduced by the prosecution, it is more than clear that there is consistency in the evidence of witnesses as far as the fact that the faces of all the culprits were covered. That the door of the unit is never opened without identification of the caller. CCTV is installed in the Unit to

identify the caller. In the eventuality that the caller was not known to P.W. 1, he would not have opened the room. Moreover, accused Raju had quit job a few days ago and there was no reason to open the door for him. The evidence as far as entering into cabin of workers is concerned, there is no consistency. It is more than clear from the evidence adduced on record that the prosecution has miserably failed to prove the test identification parade. It is a matter of record that all the four witnesses examined by the prosecution have categorically stated that they had seen the accused when they were brought for remand. Moreover, from the fact that the faces were covered there was no possibility of either drawing their sketch or identifying the accused upon seeing their faces. The physical constitution of the accused was not described. Hence, it is difficult to believe that such an incident as alleged had occurred

on 9/5/2011 as alleged by the prosecution. Hence, there is no reliable, cogent and consistent evidence.

17 Recovery of the stolen articles at the instance of the accused also cannot be believed in view of the fact that the description of the stolen property was not mentioned in the FIR. That weight and carat of raw gold also was not disclosed to the police and subsequently alleged to have been given to the police. However the said description did not match with the recovery.

18 In view of the above discussion, all the accused deserve to be acquitted by extending benefit of doubt. Hence, following order is passed.

**ORDER**

(i) The appeals are allowed.

(ii) The conviction and sentence imposed on the appellants vide Judgment and Order dated 9/11/2012 passed by the Additional Sessions Judge, Sewree, Mumbai in Sessions Case No. 716 of 2011 is hereby quashed and set aside. The appellants are acquitted of all the charges levelled against them.

(iii) The appellants be released forthwith, if not required in any other case.

(iv) The fine amount, if paid, be refunded.

(v) Writ be issued expeditiously.

19 The appeals are disposed of accordingly.

**(SMT. SADHANA S. JADHAV,J**