

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.124 OF 2013

Prajakta Shyam Shelar,

Age 21 years, Occ. Nil,

residing at Gour Shankar Wadi 2, Santoshi

Maa Buildign No. 5/6, Panthnagar,

Ghatkopar (East), Mumbai

and

Mumbradevi Colony, Yash Apartment,

Room No. 302, Diva Railway Station.

.... Appellant

Versus

The State of Maharashtra

... Respondent

WITH

CRIMINAL APPEAL NO. 125 OF 2013

Prafulla Mahendra Ghadi,

Age 22 years, Occ. Nil,

Residing at Government Colony,

Building No. 9/1633, Bandra (E),

Mumbai

And

Mumbradevi Colony, Yash Apartment,

Room No. 302, Diva Railway Station.

... Appellant

Versus

The State of Maharashtra

... Respondent

Ms. Payoshi Roy i/by Dr. Yug Mohit Chaudhary for the appellants.

Mr. Arfan Sait, APP for the State.

**CORAM : B.P. DHARMADHIKARI &
SANDEEP K. SHINDE, JJ.
RESERVED DATE : OCTOBER 09, 2019.
PRONOUNCED DATE : DECEMBER 02, 2019**

ORAL JUDGMENT (Per B.P. Dharmadhikari,J.):

Accused no.1 is appellant in Criminal Appeal No.125 of 2013 while accused no.2 has filed Criminal Appeal No.124 of 2013. These appeals are directed against the judgment and order dated 21/12/2012 delivered by 2nd Additional Sessions Judge, Thane in Sessions Case No. 59 of 2011. Accused no.1 was at the time of commission of offence aged about 21 years while accused no. 2 was aged about 20 years.

2. They have been sentenced to life imprisonment for committing offence punishable under section 302, 201 and 379 read with 34 of IPC for killing deceased Nilesh with the help of a string on 23/10/2010. His body was then put into a suitcase which was then abandoned with an intention to cause the evidence to disappear and to screen themselves. A golden chain on his person is also claimed to have been stolen. Thus both the accused persons

are convicted under section 302, 201, 379 IPC read with 34 IPC.

3. The incident occurred on 23/10/2010 at about 4.00 hrs in the afternoon and police got the knowledge on 24/10/2010 when in the morning report of an abandoned bag was received by them. The bag was in front of Pimpaleshwar Mahadev temple and information was given by some unknown person. PW-1 Sunil (the informant) also learnt about it when the police reached the spot & he also went there. As per his version at about 10 pm on 23/10/2010, he ie Sunil Patil was coming in his Auto rickshaw and was proceeding to his house. He reached Katai Pipeline, Kalyan Sheel Road when two persons stopped him. One bag was kept on the ground and they were standing by its side. They told him that they were going to Shirdi and to carry them till the place where his auto rickshaw was going. Accordingly he dropped them at Pimpaleshwar Mahadev temple. These two persons told the watchman of the temple to keep an eye on that bag and they would come back after taking dinner. They again sat in his auto rickshaw and told him to drop them at the place where they could have food. He left them at Chinese hotel situated near Shani temple which was found closed. They paid him Rs.100/- and asked him to go.

4. On the next day i.e. on 24/10/2010 neighbour of Sunil told him that police were doing panchanama of a bag found near the temple. Sunil

therefore came near Pimpaleshwar temple and identified the bag. He informed the police accordingly. The bag was opened and a male body aged about 18 to 19 years with hands and legs tied by rope was found in it. The private parts of the deceased were in burnt condition.

5. Informant Sunil was therefore, taken to Manpada police station where he lodged Exh. 31 FIR. The case papers were then made over to Mr. Dattatraya Pandhare, PW 29 for investigation. Mr. Pandhare came to the spot near the gate of Pimpaleshwar Mahadev temple at about 9.30 am and saw one black colour suitcase lying there. He opened the suitcase in the presence of pancha witnesses and noticed an unidentified dead body of a male dead body in it. PW 3 Digambar Gavade took photographs which are at Exh. 34 to 36. An inquest panchanama was drawn. The bag contained some clothes. The suitcase, clothes, cello tape and a rope were seized by police and panchanama was drawn accordingly vide Exh. 38. The dead body was then sent for post mortem.

6. The investigation revealed that another auto rickshaw driver by name Rahul Chavan, PW 20 had brought accused no. 2 in his auto rickshaw to Yash Apartment and thereafter carried him to accused no. 1 and one bag upto Davdi naka. Then police reached at Yash Apartment and enquiry there from the neighbours disclosed that the bag was taken out of Flat No. 302 in

Yash Apartment by accused persons. Parents of accused no. 2 were residing in Pantnagar, Ghatkopar. On enquiry Sham Shelar, father of accused no. 2 told the police that both the accused had gone to Shirdi and due to return in the evening. Accused persons returned in the night on 24/10/2010 to the house of accused no.2 and were taken in custody by Manpada police. Parents of accused no.2 started shouting at police and then police informed father of accused no.2 that they should enquire from accused no. 1. Father of accused no.2 i.e. husband of witness no. 21 Shamlal Shelar then asked accused no. 1. Accused no. 1 then disclosed the events which led to strangulation of deceased by both the accused persons. He pointed out how they dealt with the body and then they took out the money from the deceased and his golden ring. He also pointed out how the golden ornaments were sold, how big black bag was purchased and how the body of deceased was put in it. They then proceeded in auto rickshaw which broke down near Katai Stop and they called for another auto rickshaw. Thus he disclosed the events up to depositing the bag near Pimpaleshwar temple and then going to Kalyan station from where they went to Nashik by train and thereafter to Shirdi where they stayed in a lodge.

7. In the wake of this extra judicial confession and according to prosecution, further investigation was carried out in which evidence of neighbours, father of the deceased, person who sold the suitcase/bag to

accused persons, jeweler to whom the ornaments were sold were recovered. CDR was also collected and chargesheet was filed.

8. Counsel for the appellants in this backdrop has submitted that the evidence of PW 1 Sunil Patil is itself not free from doubt. It contains omissions about the material portion like two persons stopping him or possessing bag or then asking him to drop them till the place he was going. He accepted that he had disclosed colour of bag to be blue. He could not explain why the fact that two persons were standing near the bag, that they had told him about going to Shirdi or to drop them at the place where he was going or then next day in morning his neighbour Sham told him about the bag found near Pimpaleshwar temple and police carrying the panchanama did not appear in his police statement.

9. In relation to the evidence of PW 6 Vishnu who is watchman at temple, learned counsel submitted that he never came out of the gate and hence, could not have heard any conversation. The material part that the boy and girl got down from auto rickshaw and kept the bag under the tree is an omission. He identified the bag in court after very long time though there was no identification mark on it. The road in front of the temple is a busy road and as such he could not have remembered the accused persons. He was therefore, shown accused persons after their arrest.

10. PW 27 Willington has claimed that he has sold the suitcase to the accused persons. Learned counsel states that his establishment was visited by several persons and nobody could have remembered the customers. The bill allegedly issued by him is also faulty and does not inspire confidence. Police have not seized any bill book or stock register. The bill at Exh.107 describes article to be sold as trolley-suitcase while the bag produced by the police is not such a trolley-suitcase at all.

11. Evidence of neighbours i.e. PW 8 Swati is questioned on the ground that the police had approached her even before the arrest of accused persons. PW 23 Ramlal is a grocer who claims previous acquaintance with the accused persons as also deceased. It is submitted that he has been planted by the prosecution to falsely implicate the accused persons by recording his S.161 CrPC statement on 30/10/2010. There was no reason for this person to describe the bag or to identify it after two years.

12. PW 20 Rahul had claimed that he carried accused persons as passengers. He also has not given any specific reason for identifying the accused persons. His police statement was recorded by Manpada Police between 7 pm to 8 pm on 24/10/2010 and it is full of omissions.

13. The alleged recoveries on 26/10/2010 from accused no.1 are assailed by pointing out that these recoveries are added without any basis. Accused persons did not have keys to flat no. 302 and panch witness examined in support, is a stock witness. As per prosecution story, he has witnessed the alleged seizure of clothes to be of accused no. 2 on 25/10/2010 at Mumbra Police Station. These clothes were produced by mother of accused no. 2 on 26/10/2010. Learned advocates claims that at 10.20 am accused no.1 Prafulla made a statement agreeing to discover hidden rope, receipt relating to purchase of bag, receipt relating to purchase of golden chain, cello tape and blue jeans. He then pointed out that the accused persons did not have key of lock found on the room and the key maker was called to open it. The alleged recovery pointed out by him is therefore, not genuine. The prosecution does not get anything in the room to demonstrate that it was occupied by accused persons.

14. His deposition also shows that on 25/10/2010, he acted as panch in police station when the gold chain was produced at about 16.00 hrs and seized it in his presence. His cross examination is relied upon to show that there was no sealing on spot and there is no mention of *burkha* put on accused no. 1. He was not aware how many signatures he made on 26/10/2010. Paragraph 8 of his cross examination is relied upon to urge that on 25/10/2010 itself the police had informed him about the disclosure

statement and discovery to be made on 26/10/2010.

15. The evidence of PW 13 landlord is challenged by pointing out that it does not show their possession of flat no. 302 at Yash Apartment or its handing over to accused persons. He had received phone call of police on 24/10/2010 and gone to police station at about 4.00 pm. He was taken to Block No. 302. Thus police had visited Block No. 302 with this witness at 8.00 pm even before arrest of accused persons.

16. Though police have claimed visit to flat No. 302 or recovery of material from it, no panchanama of recovery of material from it has been prepared and flat no. 302 is not established to be the crime spot.

17. Evidence of PW 7 Deviprasad is assailed by pointing out that it shows material improvements, there is omission about the golden chain being handed over to deceased by him. This witness has stated only about sum of Rs.2000/- which he had given to deceased for shopping. It is submitted that this witness has lodged a missing complaint on 24/10/2010.

18. PW 9 Mahendra Singh is the other jeweler who states that the accused persons had visited his shop and pledged a golden ring and borrowed Rs.1300/- against it. He identified accused though there was no

identification parade. He could also remember their names and their place of residence & police did not seize any bill book or stock register from him.

19. Handing over of golden ring by PW 9 to police is a voluntary act and PW 9 went to police station at about 7.00 pm on 29/10/2010. Counsel for the accused states that thus nobody was aware about it & despite this panch, PW 16 was kept ready by police in advance.

20. PW 22 Sudhakar Padalkar is the jeweler who produced the golden chain of the deceased. He claimed exchange transaction with accused persons on 23/10/2010 when against the golden chain, he gave golden ear rings and difference of amount of Rs. 1700/- to accused no. 2. He had received phone call from Mumbra police station on 26/10/2010 itself. He also claimed that the transaction was shot in CCTV but then the said CC tv footage does not show accused no. 2 handing over any golden chain. His explanation for absence of said footage that there was some disturbance in the electric supply at the relevant time is an omission & incorrect. In view of omissions in his deposition, the evidence of the said witness is liable to be discarded. The CC tv was installed by Goodwill company and there is no footage produced or handed over by that company. This witness has also not produced any receipt book.

21. Learned counsel also argues that as this witness has given false version, he has also given incorrect data about handing over of chain to police. It is pointed out that as per prosecution recovery of receipt issued by this witness from Block No. 302 on 26/10/2010 led police to this witness. The dates disclosed by him falsify the story.

22. In relation to cc tv footage, counsel for the accused argues that there is no footage of accused persons actually handing over chain to PW 22 and there is no section 65B certificate issued by Goodwill company.

23. The panchanama at Exh. 73 about CCTv footage is not signed by anybody on behalf of the Goodwill company and the trial court has not decided the objection taken to that certificate under section 65B.

24. The evidence of PW 10 Dr. Ashutosh is pressed into service to show that the reason of death recorded therein is not sufficient to implicate accused persons and to connect them with it. Learned counsel states that burning of private parts of deceased shows some sexual intent or perversity. The deceased happened to be friend of the accused persons and this burning therefore, shows involvement of somebody else. It is submitted that the police has not found any amount being sum of Rs. 2000/- allegedly with the deceased or then his mobile phone.

25. Learned APP Adv. Sait has pointed out how after the recovery of body in the morning hours on 24/10/2010 through PW 1 Auto rickshaw driver, other auto rickshaw driver PW 20 Rahul was reached and how through PW 20 police reached the Yash Apartment. The enquiries made at Yash Apartment disclosed residence of accused in block no. 302 and their leaving the block with a heavy black bag on 23/10/2010. He has taken us through the evidence of all witnesses to urge that these witnesses are all independent and natural witnesses who deposed about the role of accused persons which they have seen. The only interested witness is father Devidas PW 7. However, his being interested, does not in any way affect the other witnesses.

26. He explains that all witnesses who have seen the accused persons with a bag, have got some reason to remember them. PW 7 Deviprasad had last talk with the deceased on his mobile and shortly thereafter the deceased was eliminated.

27. He submits that the material seized under section 27 from flat no. 302 shows that the deceased was killed in that flat by strangulating him and an attempt to burn his private parts was also made therein.

28. Since the accused persons needed a bag to dispose of the body of victim, they removed ornaments on the person of the deceased and then approached the jeweler PW 9 and PW 22 after 4.00 pm onwards. Through the money received, they purchased a bag from PW 27.

29. He submits that in this situation, the PW 6 Vishnu a watchman at temple is important witness as he saw the accused persons getting down of the auto rickshaw of PW 1 and placing the said bag near the tree.

30. He submits that the CDR on record is duly proved and it establishes the movement of the accused persons along with auto rickshaw from their flat to Pimpaleshwar Mahadev temple and thereafter to Shirdi.

31. PW 19 Anil a servant who worked at Yash Apartment to manage water supply, has proved acquaintance of accused persons with the deceased and the frequent visits by deceased to meet accused no. 2, he identified photographs Exh. 43 as that of the boy who used to come to see accused no.2. He has also explained that he was not earlier aware the name of that boy.

32. The accused persons and deceased were all residing in the vicinity and therefore, known to each other. The golden chain and ring of

deceased is identified by PW 7. It is submitted that there is no cross of PW 9 Mahendra Singh on pledge of finger ring of deceased. As Rs.1300/- were insufficient to purchase a bag, accused persons initially booked it by paying Rs. 200/- to PW 27 and then gave the gold chain to PW 22 Shri. Padalkar. He has invited our attention to the fact that the property was seized by police vide Exh. 52 on 27/10/2010 and ring came to be seized on 29/10/2010 vide Exh. 60. He further submits that the transaction recorded in CC tv footage has not been questioned through cross examination and therefore, presence of accused in the shop of PW 22 has been established.

33. According to him though police located block/flat no. 302 on 24/10/2010, it was not accessed till 27/10/2010. Police reached it with accused persons to conduct recovery under section 27 of the Evidence Act. He pointed out that the cello tape recovered from the said block, is also found wrapped around the face of deceased as can be seen in the photographs.

34. Learned APP urges that apart from 4 witnesses who have identified the accused persons, PW 27 is the 5th witness who identified them as the bag was purchased from him vide Exh. 107.

35. The evidence of PW 10 Dr. Ashutosh is relied upon to show that the deceased had ligature mark and post burn injuries. Nylon rope used for

strangulation is seized from flat no. 302 and burn injuries on his body are found to be after death. Various calls in CDR are exchanged. It is submitted that after the call made by deceased to accused no.2 at about 14.15 hrs, there were no phone calls for about three hours. It is further submitted that at 23.06 hrs. accused no.2 had called her mother and it shows that accused no. 2 was at that time near Pimpaleshwar Mahadev temple.

36. PW 28 Sandip Javale proves the stay of accused persons at his hotel at Shirdi from the night of 24/10/2010 till 12.00 hrs in the noon of 25/10/2010. Exh. 141 ticket is relied upon to show how they have returned from Shirdi. Exh. 141 was purchased before starting the journey in auto rickshaw and hence, everything was well planned.

37. In this situation, according to APP Sait holding of TIP was not necessary.

38. To show occupation of flat no. 302 by accused persons, learned APP has invited our attention to the deposition of PW 13 Prakash, PW 14 who has tenancy agreement with the father of accused no. 2 and other witnesses.

39. He relies upon the judgment reported at **2019 (7) SCC 476** to urge

that in such circumstances, there is no need to hold any TIP, as the link between the crime, recovered articles and accused persons is conclusively established.

40. In her brief reply arguments learned counsel for the accused persons submits that there was no last seen and no time of death has been determined in the present matter. Police could not determine the place where the alleged murder took place and hence, the above arguments of learned APP are irrelevant. Not a single witness has seen the deceased entering flat no. 302 on 23.10. 2010.

41. At 14.15.56 hrs on 23/10/2010 there was last telephonic talk between accused no. 2 and deceased. According to prosecution the accused persons went to PW 9 jeweler to sell the ring at 4.00 pm. However, as per CDR and deposition of PW 7, he had talk with the deceased at 4.30.59 hrs on that day & hence, the deceased was alive after the accused persons allegedly visited the shop of PW 9. It is submitted that PW 7 father therefore, is the last person who spoke to the deceased and the subject matter of the talk between them has important bearing. The contents of said talk are not brought on record.

42. The mobile claimed to be of accused no. 2 is in fact in the name of

one “Bhelar” and PW 24 has unauthorizedly corrected it as “Shelar”. It is argued that going to Shirdi cannot be seen as an incriminating circumstance. If the material recovered from the flat no. 302 is independently considered, there is nothing incriminating in it. The CA report of that material is also not against the accused persons. It is submitted that the bag allegedly purchased by accused persons from PW 27 is not correctly identified and PW 1 Sunil has given different colour of the bag. Hence, for proper identification of the bag, arranging the TIP was essential.

43. Learned counsel has submitted that in the case based upon circumstantial evidence, absence of motive is fatal in such case. She draws support from **1992 (2) SCC 153** for this purpose. **2009 Cr.L.J. 4459** is relied upon to submit that in these facts failure of prosecution to establish motive is fatal.

44. Learned counsel lastly urged that the chain of circumstances indicating accused persons only and ruling out involvement of any third person as culprit has not been established. The investigation does not consider the circumstances which are incompatible with the presumption of innocence of accused or which may show involvement of some third person. As the involvement of accused persons is not established beyond reasonable doubt, she prays for allowing the appeals by acquitting both the accused

persons.

45. Circumstances relied upon by the prosecution are 1- previous acquaintance of the deceased with accused & visiting terms between them, 2-accused selling golden ring of deceased in evening on 23'10'10 & then exchanging his golden chain to raise money, 3- purchase of a large suitcase thereafter, 4-- accused leaving flat or block no. 302 with that suitcase which was very heavy (in an attempt to dispose off the body concealed in it), 5-- accused reaching Pimpaleshwar Mahaev Temple at odd hour & 6-- abandoning the bag/suicase there.

46. The identification of bag in which dead body was found appears to be a strong circumstance relied upon by the prosecution. PW-27-Wiligton Nadar has shown that bag to accused persons. Accordingly it was shown on 23/10/2010 after 7.30 p.m. Accused persons wanted to purchase the bag on display for keeping temple. They did not have that amount and hence gave him advance of Rs.200/- informing him that they would withdraw the balance amount from ATM. They arrived after about 1½ hour and gave him Rs.1,500/-. He gave them bag and also issued receipt. One week thereafter he was called at Mumbra Police Station. He was shown the bill which he accepted to be his own. The photograph of bag was shown to him and he accepted that said bag was purchased from his shop. He identified that bag Article-1 in

Court. He identified Bill No.183(Article 17) as receipt. He claimed that it was having his signature and it was in his handwriting. Portion was then marked Exhibit 107.

47. His cross shows that he was not aware of actual date on which police recorded the statement. He was shown receipt Exhibit 107 in police station. He could not remember whether he went to police station on 30/10/2010 after receipt of call from police. He had gone to police station only once. Average 20-25 customers come to his shop every day and most of them arrive in evening. He denied that he was deposing falsely about visit of accused persons or then about the transaction.

48. He accepted that he paid sales tax and was maintaining bill books and that the bill book must contain a carbon copy. He was also maintaining stock register. Police did not come to his shop to check either bill book or stock register. He or his brother worked in the shop and shop was located in the market place at Dombivli at a distance of 3-4 buildings from the railway station. He accepted that article sold under Exhibit 107 was described as trolley suitcase. He accepted that customer's name is not mentioned in that exhibit and there is no mention of name of company or colour of bag in that receipt. He denied that on his own he surrendered receipt to police and it was prepared as required by police. He was getting the

bags from Dharavi and Madanpura, for saling in shop.

49. This witness therefore brings on record the purchase of large suitcase & time after 7.30 p.m. when said bag was purchased by accused persons. Ex. 107 is being considered little later in this judgment.

50. As per the prosecution, the sequence of events can also be ascertained from evidence of PW-22 since it is a case of prosecution that for purchase of said bag accused disposed of golden chain of deceased and purchased one set of earring and accepted balance amount in cash. PW-22- Sukhdeo goldsmith is having his jewellery shop at Dombivli and according to him between 7.00 to 7.30 p.m. both accused arrived in his shop. He has C.C. TV camera installed. Accused No.1 was wearing black shirt and he was not remembering the type of clothes worn by accused No.2. He accepted gold chain and gave them earring and also difference of Rs.1,700/- in cash. The said gold chain was weighing about 6.5 gms. Earring given by him was weighing between 4.5 to 5 gms. Accordingly, he prepared the receipt and gave amount of difference of Rs.1,700/- in cash to accused.

51. He received phone call from Mumbra police on 26/10/2010. He was asked whether he could identify accused persons. He could identify them and hence he answered in affirmative. He knew them because of exchange

transaction mentioned supra. Police asked him to deposit gold chain in police station. Accordingly, on 27/10/2010 he handed over that chain to police. Police also asked for CCTV footage dated 23/10/2010. Receipt of article was identified by him. It was in his handwriting and with his signature. It was marked Exhibit 89. He also identified gold chain at Article 21.

52. He had given DVD of CCTV footage after about one month to police and it was at Article 25. Panchanama to that effect was prepared through Exhibit 73 and it carried his signature. He saw DVD and stated that correct position was shown therein. He pointed that apart from accused persons he himself and his wife are also seen in DVD.

53. His cross examination shows that his statement under section 161 of Cr.P.C. was recorded on 27/11/2010. He could not explain why the fact of handing of gold chain to police on 27/10/2010 did not find mention in it. He stated that he never told police that he handed over chain to police on 26/10/2010 and portion marked "A" in his statement was not correct. During transaction with accused persons regular electric supply was disrupted and therefore he had gone to lessen the power to reduce the burden on inverter. Hence, footage relating to handing over of chain by accused to him was not there. He had disclosed this to police but he could not explain why it was not appearing in his police statement. He was not aware what was the storage

capacity of CCTV and CCTV was installed by Goodwill Company. Goodwill Company staff had come to his shop 3-4 days after the incident and he had told that staff to get CCTV footage of relevant day. He was not aware after how many days DVD was provided by Goodwill company. He could not remember whether official of Goodwill company had taken away machine for providing CCTV footage. He was not remembering any Deviprasad Sonar. He was called to police station for inquiry about his license and he was not aware whether he had given that license to police when police came to his shop. He denied that Goodwill company has prepared a false CCTV footage.

54. Cross examination by learned counsel for accused No.2 shows that there was no service contract with Goodwill Company.

55. After getting telephone call from police he did meet PI Nerlekar. That PI sent letter to Goodwill Company for footage and he also had informed the company accordingly. He did not inform PI Nerlekar that he had contacted Goodwill company. He has stated that he maintained receipt book but police did not ask for it. It is not the case of the prosecution that Goodwill Company gave CCTV footage to police or it refused or avoided to furnish S. 65B certificate. In any case, the CCTV therefore shows presence of accused No.2 in shop but it does not specifically reveal transaction of exchange of gold chain. When this evidence is read with evidence of PW-27, it can not

show that accused couple arranged for balance amount by visiting shop of PW-22 in the vicinity, paid that amount to PW-27 and purchased the bag.

56. The other important witness in this connection is PW 9 Mahendrasingh. According to story of State, the accused have pledged the golden finger ring of deceased with him and he gave Rs. 1300/- to accused no. 2. The accused then told him that they were residing in Room No. 302 of Yash Apartment. He learnt through newspaper about the murder committed by them and therefore, on his own on 29/10/2010 he went to Mumbra Police station along with the golden finger ring. The said finger ring was weighing 2.03 gms. Facts like his getting knowledge of the murder through newspaper or weight of finger ring are found to be omissions in his police statement. He accepted in the cross examination that he had the stock register in which he used to make entries. It is important to note that the panch PW 16 on recovery of golden ring from him was at police station already half an hour before him. Cross examination of Mahendra also shows that Yash Apartment is at a distance of 10 minutes walk from his shop. He also accepted that the finger ring like article 22 can be made by any jeweler and is available in any jewellery shop.

57. It therefore has not been proved beyond reasonable doubt that the accused exchanged the chain or got any money from this witness PW-22.

The circumstance of accused selling deceased's golden ring to PW 9 Mahendrasingh is also not established by clinching evidence. Fact that siad chain or ring was with the deceased is also not established since it appears as an omission in evidence of PW-7 Deviprasad.

58. PW 7 Deviparasad Sonar is the father of the deceased. He has stated that he had asked his son to shut shop at about 2.00 pm and to keep the golden chain and finger ring in the house. He also gave him Rs.2000/- for the purpose of shopping to him. He has identified article 21 as said golden chain and 22 as said golden finger ring. His cross examination shows that on 23/10/2010 he left the shop at about 12.30 pm. He had telephonic talk with his son Nilesh at 1.00 pm. He further stated that his shop is at the distance of 15 minutes walk from his house while Yash Apartment is at the distance of 100 ft from his house. The omission in his police statement about handing over of the golden finger ring and golden chain to deceased and asking him to keep it in the house has been proved. This becomes fatal since this witness tells police about the amount of Rs. 2000/- given to his deceased son for shopping. It can not therefore be accepted that the omission about the golden ornaments is an inadvertent error. Thus even on this count the circumstance of accused removing the ornaments with deceased, disposing of the same & arranging amount to purchase the big suitcase or bag has not been proved by the State.

59. But the circumstance of purchase of a large suitcase from shop of PW-27 Wiligton Nadar is sufficient to connect the accused with the crime. Evidence of PW-27 needs to be independently considered for this purpose. Receipt Exhibit 107 mentions words "S. Trolly" in print while word "suitcase" has been added by hand thereafter. The bill Exhibit 107 therefore shows sale of suitcase and not of suitcase trolly. This document mentions amount of Rs.1750/- as cost which has been altered as 1700/-. It mentions advance of Rs.200/-, balance amount has been corrected to 1500/- from 1550/-. If PW-27 Wiligton Nadar was to prepare any document to oblige police machinery, said overwriting would not have appeared there.

60. The prosecution story begins with auto driver PW-1 which during investigation led them to witnesses who have seen accused persons leaving Flat No.302 with suitcase. PW-13 Prakash has pointed out that Flat No.302 in Yash Apartment was to be purchased by him for Rs.5 Lakhs from Vendor Virendra Mhatre. He paid Rs.2.50 and balance amount was to be paid. Possession of that flat was with the builder. Trial Court has recorded his deposition on 26/9/2012 and he has stated that possession of block is still with the builder. Thus according to him even on 26/9/2012 flat was in possession of the builder.

61. This witness knows Shambhau Shelar who is father of accused No.2. Shambhau wanted a room on rent and he therefore took him to builder PW-14-Virendra Mhatre. Tenancy agreement was executed between builder and Shambhau in respect of flat No.302. Thereafter accused No.2 daughter of Shambhau and her friend accused No.1 went to stay in that flat. They also visited his block sometimes.

62. About two years back he was called by Mumbra Police and made inquiry with him about that flat/block. He told police that both accused were staying in it. Police told him that murder has taken place in that block. Then he was called at Manpada Police Station. Manpada police also informed him similarly. In cross examination he accepted that he received phone call from Manpada police station on 24/10/2010 and he went there between 11.00 to 11.30 a.m. He was in that police station up to 2.30 in the afternoon. Manpada police did not inquire with him regarding block No.302. Thereafter he went to Mumbra police station at about 4.00 p.m. He was in that police station till 10.30 p.m. Police recorded his statement. Ashok Jadhav had accompanied him to Mumbra as also Manpada Police Station.

63. He stated that statement of his brother was not recorded in his presence. He volunteered that his signature was taken as witness only. He was taken by Mumbra police to Block No.302. He went in said block at about

8.00 p.m. on 24/10/2010. He has stated that except him and police officer nobody had gone to that block. Police carried out inquiries with the residents of said building in his presence.

64. PW-14-Virendra Mhatre is builder and he has supported deposition of PW-13. He has stated that daughter of Mr. Shelar and one boy was residing in Block No.302.

65. On 24/10/2010 he received phone call from Mumbra police inquiring about occupants of block No.302. He then told police that block was given to Prakash Jadhav and it was on rent with Mr. Shelar. Police then took from him phone number of Prakash Jadhav and Mr. Shelar. On 25/10/2010 he was called at police station, Mumbra and he learnt about murder in flat No.302. His statement was recorded on 26/10/2010. His cross examination brings on record the fact that he had given phone number of Prakash Jadhav to police did not appear in his police statement.

66. PW-19-Anil used to manage supply of water in Yash Apartment and was serving there. He was staying there only since about 5 years. He knew both accused as they were staying in Flat No.302 of Yash Apartment. He also stated that one boy whom he could identify by face, used to come to meet accused No.2. He told Court that he would be in position to identify that

boy. Photograph Exhibit 43 was shown to this PW-19 and he identified it to be of same boy. It is of deceased Nilesh.

67. His cross examination shows that in his police statement name of this boy has figured. Witness has deposed that he was not knowing name of that boy and he had not told police that Nilesh used to come to meet Accused No.2. He could not explain how police mentioned name as Nilesh in his statement. He could not explain why police have recorded in his statement that both accused persons were residing together. He also could not state who used to come to meet accused persons. However he proves fact that block 302 was in possession of the accused & deceased used to visit that block.

68. PW-23-Ramlal Chaudhari runs a grocery shop on ground floor of Yash Apartment and both accused persons used to purchase articles of kirana from him. He knew them and they were residing in Flat No.302. He also knew deceased Nilesh Sonar who used to come to purchase articles from his shop. He had seen Nilesh talking with accused persons on one or two occasion. PW-7-DeviPrasad is shown to be residing in Diva (E) i.e. in the vicinity of PW-23 only. This part has not been seriously assailed by the accused in cross examination.

69. PW-23 has also deposed that on 23/10/2010 between 8.30 to 9.00 p.m. he saw accused persons carrying heavy bag in front of his shop. Both accused persons were not able to get it in auto rickshaw and hence auto rickshaw driver helped them. Accused persons thereafter sat in that Auto and left.

70. Later on he learnt from police that accused persons had murdered deceased Nilesh Sonar and took his body in the bag. He identified the bag shown to him. His cross examination reveals that police came to his shop and taken his statement on 30/10/2010. Accused persons could not bring out anything material in his cross examination. Thus grocery articles were purchased by the accused jointly from this grocer.

71. PW-8 is residing in Yash Apartment only. Her deposition shows that accused persons were residing in Flat No.302 of Yash Apartment. On 23/10/2010 between 8.30 to 9.00 p.m. she heard sound of something on staircase. She opened the door and noticed that both accused were going down with the bag. The bag was being dragged on the staircase. She inquired and accused told her that they were going to Shirdi. She requested them to bring *Prasad* for her. She disclosed that she could identify the bag. She identified the suitcase (Article 1) as the same bag.

72. Her cross examination shows that Yash Apartment is 4 storied building and there are four flats on each floor. Police came to Yash Apartment on 24/10/2010 and she told police that accused persons had gone to Shirdi. She could not explain why said fact did not form part of her police statement. She could not remember the colour of clothes put on by accused persons on 23/10/2010. She never went to Mumbra Police Station. She denied that she was giving false evidence.

73. Another witness in this respect is PW-21-Shamal Shelar who is the mother of accused No.2. She was knowing accused No.1 also as he was in love with accused No.2. She has stated that accused No.2 was staying in her house when she was arrested by police. Prior to two months of her arrest accused No.2 was staying along with mother of accused No.1 at Bandra. She stated that police never inquired with her about the incident. She denied that her husband had arranged a room on monthly rent of Rs.2000/- for residence of both accused persons.

74. Learned APP was then permitted to cross examine her. She stated that portions marked "A", "B", "C", "D" or "E" in her statement were not correct. She has denied that on 24/10/2010 at 9.30 a.m. any phone call was made by her daughter informing that they have reached Shirdi. She accepted that on 24/10/2010 accused Nos.1 and 2 had come to her house at about

9.30 to 9.40 p.m. When they were drinking water police came. She has denied the other part of her statement also. Her cross examination by accused No.1 shows that police had taken accused away without giving any opportunity to father of accused No.2 to speak. Thus fact that police arrived immediately after the return of accused from Shirdi is accepted by her.

75. Evidence of above witnesses therefore shows that accused Nos.1 and 2 were living together in Flat or Block No.302 in Yash Apartment. Deceased Nilesh was acquainted with them. PW-8-Swati saw accused Nos.1 and 2 leaving Yash Apartment with huge heavy bag. PW-23 saw them loading it in auto rickshaw and going away.

76. PW-20 Rahul is the driver of Auto rickshaw who drove the accused Nos.1 and 2 from Yash Apartment. On 23/10/2010 he had taken auto rickshaw for plying at about 8.00 p.m. He had taken that auto rickshaw for filling petrol to Shil phata at about 8.00 p.m. At Diva station one lady passenger asked him to take her to Manpada. She told that she has to take luggage from Mumbra colony. He brought her to Mumbra colony and after some time one boy came out pulling one bag along with him and he along with the girl who had hired him lifted bag and kept it in auto rickshaw. That bag was black in colour. Girl thereafter told him that since they are going to Shirdi for some *navas* along with articles and asked him to keep the bag

carefully. He took them to Shil phata. At Shil phata they told him to drop them somewhere for dinner. Accordingly, when he was proceeding clutch wire of auto rickshaw broke down at Davdi naka. The girl then called another auto rickshaw and went away towards Dombivli side.

77. On next day at about 10.00 a.m. he was in the garage for repairing auto. At 2.00 p.m. he received phone call from police. Police had found rickshawala who carried that girl and boy after his rickshaw broke down. Police brought that rickshawala to garage to identify PW-20. Police then made inquiries and he narrated the story. He led police to Yash Apartment. He stated that he could identify the girl and boy if shown to him. Accordingly he identified them in Court. Similarly he identified bag Article-1. In cross examination he initially accepted the suggestion that on 24/10/2010 he had taken auto rickshaw at 10.00 a.m. till 1.00 p.m. and thereafter from 7.00 p.m. to 10.00 p.m. However, he immediately corrected himself and stated that he had not taken auto rickshaw on 24/10/2010 as it was in garage for repairs.

78. After taking police to Yash Apartment he waited there for about 15-20 minutes and returned to his house. He was then called to Manpada police station at about 8.00 to 8.30 p.m. Police did not inquire from him anything. However, he stated that police recorded his statement in Manpada Police station between 7.00 to 8.00 p.m. He has stated that he was fined for

overcrowding at 4-5 times. He was never called at Mumbra Police Station and he had gone to Manpada police station only once. At that time other rickshawala was also present there.

79. After 4-5 days he learnt about identity of accused persons. He could not explain why the fact that one boy with bag pulling it and keeping it in auto rickshaw did not appear in his police statement. He also stated that he could not explain why the fact of girl stopping other auto rickshaw did not appear in his police statement. He denied that he was deposing falsely.

80. Cross examination of PW 20 by accused no. 2 shows that at the relevant time he was staying in Mumbra. Yash Apartment is at the distance of 7 to 8 minutes by auto rickshaw from Diva Railway Station. He left Yash Apartment along with accused persons at about 7.30 pm on 23/10/2010. He accepted that Davdi Naka is beyond Sheel phata. He could not state definitely whether Katai naka is situated before or after Davdi naka. He has stated that Davdi Naka is at the distance of 1 hour by auto rickshaw from Diva Railway Station. He has stated that highway was going from Mumbra Sheel Phata. He cannot give distance between the place from where he had returned because auto broke down and Manpada police station. He denied that police had imposed a fine on him for over crowding or that he was deposing falsely to support police.

81. This witness therefore, brings on record the fact that at about 8.00 pm when he was at Diva station, accused no. 2 hired him for taking her to Manpada. He also pointed out boarding of his auto by accused no.1 and 2 with a bag article 1 and then their shifting to another auto rickshaw and proceeding towards Dombivali side. PW 1 Sunil is the driver of later auto. He has stated that on 23/10/2010 at about 10.10 pm he was coming from Lodha Heavens and proceedings towards his house. When he reached near Katni pipeline of Kalyani Steel Road, two persons stopped him. They were having a bag. These persons told him that they have to go to Shirdi and he should drop them till the place where he was going. Rest of his deposition is already mentioned by us supra while narrating how he in the morning he went to spot where the bag was found near Pimpaleshwar Temple. The mentioning of bag as blue by him does not in any way cause prejudice to the prosecution because PW 20 has also identified the bag in which dead body was found.

82. Homicidal death of the victim is not in dispute before us. PW 10 Dr. Ashok has brought on record. He has pointed out the ligature mark and also the possibility of strangulation with a nylon rope like article 2, asphyxia due to compression of neck is the cause ascertained by him.

83. The prosecution has strongly relied upon the CDRs of accused

no. 2 to show her movements. PW 24 Sanjay Parekar has pointed out the call details of mobile no.9773996691 for the period from 01/10/2010 to 24/10/2010. The effort has been made to show that in application for this connection, the applicant is one Shamlal Sham Bhelar but after clarification it has been corrected as Shamlal Sham Shelar. Though effort has been made by the accused to urge that "Bhelar" could not have been corrected as "Shelar", there is no effort by accused no. 2 to show that she was not using any mobile or she was using some other mobile number. Similarly PW 25 Vijay Shinde of Idea mobile has brought on record the call details of mobile no.9594453677 belonging to PW 7 Deviprasad. There is no serious challenge to this CDR. PW 26 Prashant Padawale has brought on record the call details of telephone no.9224924700. This number was also in the name of PW 7 and it appears that the phone with number 9594453677 was being used by the deceased while mobile no. 9224924700 was being used by PW 7. He has pointed out that the mobile no.9220590247 and 9220123074 were also with father and mother of accused no. 2 respectively. These numbers are in the name of father Shah and mother Mrs.Neha respectively.

84. On 22/10/2010 i.e. a day prior to the incident, deceased had made four calls to accused no. 2. While on the day of incident again there are four calls including one made to mother by accused no. 2. We can safely refer to these calls since there is no challenge to certificates issued under

section 65B of the Evidence Act in respect of any call data records.

85. Deceased Nilesh had used phone no. 9594453677 while accused no. 2 has used Phone No. 9773996691. At 15.20 hrs on 22/10/2010 accused no.2 had made a call to the deceased. She has made other call at 18.57.25 hrs. The deceased had called her at 21.26.51 hrs and thereafter on 21.27.19 hrs on that day.

86. On 23/10/2010 accused no. 2 had called the deceased at 13.41.42 hrs and thereafter at 13.44.29 hrs. The deceased gave call to her at 14.15.56 hrs. After this call there is gap of about 3 hours and then there is call at 21.03.29 hrs by accused no. 2. The location of accused no. 2 at that time is Diva East. This is followed by call received by her at 21.40.41 hrs which shows her location to be Sheel Phata-3. One of the calls is made by accused no. 2 to her mother at 23.06.23 hrs which shows her location at MIDC Dombivali East. The call before that at 22.31.21 hrs received by her shows that accused no.2 was at Katai naka at that time. Learned APP has submitted that at that time she changed auto rickshaw. The call at 21.03.29 hrs is made thereafter to mother and then location of accused no.2 is near Pimpaleshwar Mahadev temple. Next three calls in CDR show that she is shown as roaming ie she must have then proceeded to Shirdi.

87. On 23/10/2010 at about 19.03.43 hrs accused no.2 has received a phone call and then her location is near Jewelry shop of PW 22.

88. As we are looking at CDR we may also point out that the father of the deceased has on 23/10/2010 made a phone call to deceased at about 4.30 pm in the afternoon. Accused have urged that the talk between the deceased and PW 7 father has not been brought on record by the prosecution. Here we may point out that the previous acquaintance between accused and deceased Nilesh is not in dispute. Similarly the journey by accused no. 1 and 2 to Shirdi on 23/10/2010 and their returning back on the next day in the night is again not in dispute. It is in this backdrop that the tower location of CDR mentioned supra reveals availability of accused near their residence initially. It also shows their presence near jewelry shop of PW 22 and then journey to Pimpaleshwar Mahadev temple where they deposited the bag. The presence near Pimpaleshwar Mahadev temple is also established due to call made at 23.06.23 hrs by accused no. 2 to her mother. This CDR therefore, support the deposition of auto rickshaw driver PW 1 Sunil and PW 20 Rahul.

89. PW 6 Vishnu is the watchman at temple and he has fully supported the evidence of PW 1 Sunil in so far as accused persons depositing the bag near the temple is concerned. We are considering his

evidence immediately after this. He was the security/watchman. On 23/10/2010 at about 10.30 pm accused persons arrived there. He has pointed out how after enquiry, the suit case/bag was kept near Jambhul tree. Though this may be an omission, he has identified the bag and stated that its colour was black.

90. Perusal of evidence of PW-6-Vishnu who worked as watchman at Pimpleshwar temple shows that during his duty hours, at 10.30 p.m. one boy and girl arrived in auto rickshaw near the temple gate. Girl inquired from him whether it was Pimpleshwar temple. He answered in affirmative. She took one bag and placed it under a Jambhul tree outside the gate, sat in auto rickshaw and went away. The did not return thereafter. Bag was black in colour. That boy and girl were present in Court and he identified them. He informed about bag of Mr. Nandalal Shukla and Shukla told him not to bother.

91. He finished his duty at 6.00 a.m. on 24/10/2010 and whether he was called bag at about 8.00 to 8.30 a.m. Police officers were there and they open bag in his presence. It contained deadbody. Handa and feet of dead body were tied and there was rope around its neck and adhesive tape around face. He came to police station along with bag containing dead body where his statement was recorded. He identified suitcase Article 1 as that bag. 9-10 days thereafter his supplementary statement was recorded.

92. His cross examination shows that he did not come out of temple premises when boy and girl came there and bag was placed under Jambhul tree. The said tree is at a distance of 20-25 ft. from temple on right side of gate while going out of temple. The fact of black bag being kept is found to be omission in his statement and he could not explain it. He accepted that the vicinity of temple is MIDC area and there are no residential houses there. There is lot of traffic of autorickshaws and other vehicles on said road. Temple is open to devotees from 5.00 a.m. to 10.00 p.m. Within 24 hours of police making complaint, police had brought two accused persons to him at temple where he was on duty. He stated that accused persons were not shown to anybody else except him.

93. This evidence therefore shows that this witness had talk with accused No.2 who thereafter placed bag near a Jambhul tree and both accused persons vanished. In very same bag dead body of Nilesh was found on the next day. This witness was not knowing either deceased or accused persons and has no reason to depose falsely. Police has recorded his statement immediately and as such there is no question of any embellishment in his statement.

95. Even if we accept that no panchanama of Flat No.302 to show

stay of accused or no panchanama of Flat No.302 to show it as a crime spot is drawn, the prosecution has succeeded in showing their occupation of said flat. It is true that nobody saw deceased visiting Flat No.302 on 23/10/2010 or leaving it, the fact that his body was found in the suitcase with which the accused were seen leaving the flat. Said suitcase was bought by them from PW-27. The police did not collect any incriminating material like weapon, fingerprints in Flat No.302 or details of last call by PW-7 Father to deceased at 4.30 p.m. on 23/10/2010 are not there, these are not material defects which can exonerate accused. Same can be said about the golden chain or the golden ring alleged to be with the deceased or the accused using it to arrange funds or the police not explaining missing Rs. 2000/ or mobile of the deceased. These circumstances do not break the chain of incriminating circumstances at all.

96. Circumstances like previous acquaintance between the deceased and accused, Accused purchasing a large suitcase & then leaving "Yash Apartment" with it, they going all the way to the Pimpaleshwar Mahadev Temple and abandoning that suitcase there, Police finding body of deceased in that suitcase near temple on next day in the morning are all proved. It is also clear that for going to Shirdi for a day, it was not necessary for them to purchase such a large suitcase & to travel right upto Pimpaleshwar Mahadev Temple situated at the long distance & vanishing after dropping the suitcase

there, all show the oblique motive which induced the accused-appellants.

97. In view of the discussion above, we find that the guilt of both the accused persons is established by the prosecution beyond reasonable doubt. Their conviction is theroeffre, upheld and both the appeals are dismissed.

(SANDEEP K. SHINDE, J.)

(B.P. DHARMADHIKARI, J.)