

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 563 OF 2015

Mohd. Intekhab Mohd. Imtiyaz Shaikh.

Age: 20 yrs. Occ. Business.

R/at Plot No. 26/T/9, Road No. 12,

Baiganwadi, Gowandi,

Mumbai 400043.

... Appellant.

(At present lodged at Nashik Road

Central Prison.)

V/s.

State of Maharashtra.

... Respondent.

(Through DCB CID Unit VI, Mumbai)

WITH

CRIMINAL APPEAL NO. 685 OF 2016

Ganesh @ Gopal Ramchandra Kanojiya

Age: 20 yrs. R/o. Plot No. 251T/9,

Road No. 12, Baiganwadi, Gowandi,

Mumbai 400 043.

... Appellant.

(At present lodged at Nashik Road

Central Prison.)

V/s.

State of Maharashtra.

... Respondent.

(Through DCB CID Unit VI, Mumbai)

WITH

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CRIMINAL APPEAL NO. 1114 OF 2015

Mohd. Istiyak Abdul Salam Shah.

Age: 23 years, Muslim, Occ. Business.

R/at. Plot No. 25/P/1, Road No. 12,

Baiganwadi, Gowandi,

Mumbai 400 043.

(At present in Nasik Central Prison.)

... Appellant.

V/s.

State of Maharashtra.

(Through DCB CID Unit VI, Mumbai

in C.R. No. 95/2012.)

... Respondent.

Mr. Prosper D'Souza, advocate appointed for appellants in Appeal Nos. 1114/2015 & 563/2015.

Ms. Nasreen Ayubi, Advocate appointed for appellant in Appeal No. 685 of 2016.

Ms. M.H. Mhatre, APP for State.

**CORAM : SMT. SADHANA S. JADHAV &
N.J. JAMADAR, JJ.**

**RESERVED ON : SEPTEMBER 22, 2020.
PRONOUNCED ON : OCTOBER 1, 2020.**

JUDGMENT : (PER SMT. SADHANA S. JADHAV, J)

. The appellants herein being aggrieved by the Judgment and Order passed by the Additional Sessions Judge, Bombay dated 22/8/2014 in Sessions Case No. 147 of 2013 have preferred the

present appeals. The appellants are convicted for the offence punishable under section 452 read with section 34 of the Indian Penal Code and sentenced to suffer R.I. for 5 years each and to pay fine of Rs. 2,000/- each I.d. to suffer R.I. for six months each. The appellants are convicted for the offence punishable under section 392 read with section 397 read with section 34 of the Indian Penal Code and sentenced to suffer R.I. for 7 years each and to pay fine of Rs. 5,000/- each I.d. to suffer R.I. for six months each. The appellants are further convicted for the offence punishable under section 302 read with section 34 of the Indian Penal Code and sentenced to suffer Imprisonment for Life Imprisonment and to pay fine of Rs. 10,000/- each I.d. to suffer R.I. for one year each.

2 Such of the facts necessary for the decision of this appeal are as follows :

(i) One Smt. Rajam Parshuraman aged about 79 years old was living with her octogenarian husband, who was about 90 years old. Mr. Parshuraman was working as a priest.

(ii) On 14/9/2012 three persons had visited her house under

the garb of repairing refrigerator. They had visited her house in the past also. They had checked the refrigerator and informed her that it is in a good condition. They had given an invalid bill for carrying out repairs of the refrigerator and assured her that they would get valid bill on the next day.

(iii) On the next day, as promised they visited the flat of Mrs. Rajam. One of them demanded water. The moment she turned to fetch water, she was followed by one person. When she bent to draw water from earthen pot, two persons had gagged her mouth by handkerchief. Thereafter, she lost consciousness.

(iv) At about 6 p.m. i.e. almost after more than 2 hours, she regained consciousness and saw that her husband was lying in a static position partly on the sofa and partly on the floor. Her efforts to wake him up were futile. She called up her younger brother. Her brother admitted her in Das Hospital where she remained as an indoor patient for 2 days. Mrs. Rajam came to know about demise of her husband only after she was taken to crematorium.

(v) On 18/9/2012 statement of Mrs. Rajam was recorded while she was in Das Hospital, Chembur. She has stated before the police that she had lost four golden bangles of 10 grams each and her mangalsutra, which had a pendant of about 28 grams. She informed the police that her niece Shubhlaxmi had visited the house. She called upon Dr. Batle who examined her husband and informed that he has breathed his last. Thereafter, she was admitted in the Das Hospital. She had not given description of the person, who had visited her house on 14/9/2012, 16/9/2012 and 18/9/2012, but had stated that they were in the age group of 20 to 25 years. On the basis of the said report, Crime No. 95 of 2012 was registered at the instance of DCB CID Unit-VI, Mumbai.

(vi) The investigation was set in motion. On 22/9/2012 accused Gopal @ Ganesh, the appellant in Criminal Appeal No. 685 of 2016 was apprehended at Line Bazar Janpath, Jonpur (U.P.) by police officer Mr. Sankpal. The arrest panchanama is at Exh. 62.

(vii) On 22/9/2012 itself he was taken before the Chief Judicial Magistrate, Jonpur seeking transit remand, as he has been

apprehended in Crime No. 221 of 2012 registered at Chembur Police Station. Thereafter, he was produced before the Addl. Chief Metropolitan Magistrate at Mumbai. He was taken into police custody.

(viii) It is the case of prosecution that on 23/9/2012 the accused Gopal had disclosed before the panchas that on 18/9/2012 in the afternoon, he alongwith his 3 friends had been to the house of Mrs. Rajam and that he would show the place where he had concealed the booty, which was stolen in the said incident. He had taken them to Room No. 9 in front of Society Tailor's shop. It was a one storied house. On the ground floor, father of the accused was ironing clothes in a room. He had handed over a bag containing Mangalsutra and Rs. One Lakh in cash to the police. There was a tenant living on the mezzanine floor. The said tenement was being used as laundry shop. They had also seized identity card of Authorised Service Provider Godrej issued in the favour of Service Quality Engineer, bearing photo of Ganesh. I-card was issued by S.T. Service.

(ix) In the course of investigation, Mohd. Intekhab Mohd.

Imtiyaz Shaikh @ Ujale, the appellant in Criminal Appeal No. 563 of 2015 was arrested. Memorandum panchanama under section 25 of the Indian Evidence Act is recorded. He had also led police to a room where he was allegedly staying on the mezzanine floor. The room was occupied by Mohd. Tanvir Mohd. Mushtaq Shaikh@ Tinku Shaikh. He had also handed over rexine bag to police. The said bag was containing one golden bangle and cash of Rs. 1,00,300/-.

(x) On 26/9/2012 memorandum of third accused Mohd. Istiyak Abdul Salam Shah was drawn under section 27 of the Indian Evidence Act. He had also led the police to a room with a tin roof. Person named Mohd. Shahnawaz Mohd. Gilani Shaikh @ Ujale was staying in the said room. He was working as jari-embroidery worker. They both hailed from the same village. He had also given plastic bag to the police containing one golden bangle and cash of Rs. 2,05,000/-.

(xi) After completion of investigation, charge-sheet was filed and the case was committed to Court of Sessions and registered as Sessions Case No. 147 of 2013.

3 The prosecution examined 19 witnesses to bring home the guilt of the accused. The case rests upon the evidence of complainant P.W. 1 Mrs. Rajam, P.W. 5 Ms. Shraddha Hane, working in the service center, P.W. 6 Mohd. Taukir Alam Mustaq Shaikh, who was the owner of the Jari factory, where Accused Intekhab and Istiyak were working with him, P.W. 7 Santosh Mohanti was acquainted with accused Ganesh as he had served with him for 20 days as a pressman, P.W. 8 Mohd. Tanvir Alam, who is the brother of P.W. 6 and running Jari factory alongwith P.W. 6, P.W. 9 Mohd. Shehnawaj Mohd. Gillani Shaikh @ Ujale, who was acquainted with accused Mohd. Istiyak and Mohd. Intekhab, P.W. 11 Ravindra who was residing with accused No. 1 Ganesh, P.W. 14 Vijay Sawant, API, P.W. 18 Dr. Subha Rao, Medical officer and P.W. 19 Narayan Sankpal, who is P.I. of Crime Branch. Rest of the witnesses are panchas for recovery of stolen articles, panch for scene of offence etc.

4 P.W.1 Mrs. Rajam Parshuraman is the complainant. In her deposition, before the court, she has deposed in consonance with the first information report. She has then admitted that she had received Mangalsutra, two golden bangles and an amount of Rs. 4,25,000/- by

virtue of the order of the Court. According to P.W. 1 Mrs. Rajam after the incident the police had not taken her to any place. However, some boys were brought to her as the persons who had visited her house on 14/9/2012, 16/9/2012 and 18/9/2012. She has fairly stated before the Court that due to weak eye sight, she could not identify said boys, as the same persons who had visited her house on 14/9/2012, 16/9/2012 and 18/9/2012. Even before the Court, she expressed her inability to identify the persons. She had made strenuous efforts to identify the accused before the Court. And thereafter, she identified accused No. 1 Ganesh, who had introduced himself as Gopal and who had gagged her mouth. She had lost cash amount of Rs. 4,25,000/-.

5 In the cross-examination, she had admitted that the said person whom she identified, had disclosed his name as Gopal, but her niece had informed her that he is not Gopal, but Ganesh. It is also admitted that she had not given the description and age of Gopal to the police as she could not see Gopal properly on the day of incident also. It is further admitted that the police had informed her that the said person was Gopal and only because he was shown to her in the house, she had made an attempt to identify him in the court. It is

admitted by P.W. 1 that she did not know as to who had followed her when she was trying to draw water from earthen pot and therefore, had not seen the person who had gagged her mouth with handkerchief. Thereafter, she had fallen unconscious and did not know any thing. She had expressed her inability to mention the design of the four bangles, as there was no known identification mark on the bangles but the police had informed her that the said mangalsutra and bangles belong to her and therefore, she had identified the same as her belongings.

6 P.W. 2 Mrs. Subhlaxmi Kumar was telephonically informed by P.W. 1 on 18/9/2012 that she was not well and therefore, she had reached her aunt. On the way she had informed Dr. Bakhale to visit Mrs. Rajam and thereafter, P.W. 2 had informed about the said incident to Chembur Police Station and shifted Mrs. Rajam to Das Hospital. P.W. 1 aunt of P.W. 2 had disclosed to her the incident that had occurred on 18/9/2012.

7 P.W. 4 Ms. Seema Gangadhar Mitte has deposed before the Court that she was serving in Godrej Service Centre at Vikhroli (W),

as a Tele Caller. And that Ganesh Kanojia was one of the technician. In the cross-examination, it is admitted that Ganesh was not working in the said service centre on 18/9/2012 as he had never visited the service center after 24/12/2011. Similarly, P.W. 5 Ms. Shraddha Santosh Hande was serving in Sanjay Tania (S.T.) Services as supervisor where accused Ganesh was working as technician from January, 2011 to January, 2012. She was unable to tell the Court as to who had filled in the job cards which was seized from the house of accused No. 1 Ganesh.

8 P.W. 6 Mr. Mohd. Taukir Alam Mustaq Shaikh was running Jari Embroidery factory. Accused Mohd. Intekhab Mohd. Imtiyaj Shaikh and Mohd. Istiyak Abdul Salam Shaha were working with him and therefore, he had identified them before the Court. They also hailed from his native place. According to him, both the accused persons alongwith absconding accused Raju Paswan were residing in the factory premises. Sunday was weekly holiday. He has deposed before the Court that on 18/9/2012 he had been to purchase raw material for his factory. When one of his worker namely, Kaushik informed him telephonically that all the 3 accused persons had

collected their belongings and were leaving the factory, he rushed to the factory and met all the three persons there. The accused, upon enquiry had informed him that they were going for galavantiing. He had asked the accused Mohd. Istiyak to return Rs. 12,000/- which he had been borrowed. The accused had assured to return the said amount. At that stage, Mohd. Istiyak had informed P.W. 6 that he had murdered one person. The witness presumed that it was an excuse for leaving the job. All the three accused had slept in the factory premises on that night. On the next day, i.e. 19/9/2012 all the three accused persons had refused to continue working in the factory as they were suffering from bodily ache. The accused persons had left the factory premises at about 4.30 p.m., when P.W. 6 had gone to market for purchasing raw material. Accused nos. 2 and 3 were not receiving the call from P.W. 6. Their cell phone was switched off. After 3 days, accused Mohd. Intekhab had received his call and informed him that all of them are at their native place. On 22/9/2012, Crime Branch police had visited the factory premises and enquired about the three accused persons who had left the job on 19/9/2012. P.W. 6 had assured the police, of his assistance in securing presence of the accused. P.W. 6 had then proceeded to Darbhanga, Bihar, alongwith P.I.

Mr. Kale. Accused were not found at Pilakhwada, native village of P.W. 6 and the accused persons. He learnt from reliable sources that they had been to village Rayyam, where he found them. Upon enquiry accused persons had confessed before him that both of them, alongwith Ganesh, had caused death of an old man residing at Plot No. 26. The reason for causing homicidal death was money. They had also admitted that they had taken away Mangalsutra and golden bangles from the person of the old lady and stolen cash from cupboard after making her unconscious. He asked the accused to accompany him to Darbhanga and hand them over to the custody of the police. In the cross-examination, he has admitted that he had not disclosed to the police about confessional statement made by accused Nos. 2 and 3. He had no documentary proof to show that both the accused were working as his employees. He had neither given cell phone number of the accused to the police. According to him, his statement was recorded on 22/9/2012 and not on 28/9/2012. But the records show that his statement was recorded on 28/9/2012.

9 P.W. 8 Mohd. Tanvir Alam is the brother of P.W. 6 and jointly running Jari-embroidery factory with P.W. 6. According to him,

the accused were in the Jari factory. He could not recollect as to when the accused had left the job. But he has admitted that on 27/9/2012 had visited the factory premises alongwith accused Istiyak and had recovered a rexine bag containing gold bangles, knives and cash of Rs. One lakh. The said witness has been declared hostile by the prosecution.

10 PW. 9 Mr. Mohd. Shehnwaj Mohd. Jillani Shaikh @ Ujale was also working as Jari Embroidery worker. He was residing in Plot No. 39, a room owned by Mohd. Sultan Abdul Malik Shaikh. In 2012 Mohd. Sultan Abdul Malik Shaikh had gone to his native place and therefore, had handed over the keys of his room to PW. 9. He was acquainted with accused Mohd. Istiyak Abdul Salam Shaha and Mohd. Intekhab Mohd. Imtiyaj Shaikh as well as absconding accused Raju Paswan. He had identified two accused before the court. According to him, accused Nos. 2 and 3 were working with Mintu Shaikh i.e. PW. 8. On 26/9/2012 he was at home when the police arrived alongwith accused Nos. 2 and 3 and in his presence, Mohd. Istiyak had handed over a plastic bag containing Rs. 2 Lakhs and gold bangle to the police. He has further deposed that on 19/9/2012 at

about 11 a.m. Mohd. Istiyak had visited the room of P.W. 9 and had informed him that he was going to his village for 5 to 6 days. He had left blue bag in the room while going to his village and this was the same bag which was handed over to the police. According to him, Mr. Mintu Shaikh also hails from his native village and therefore, P.W.9 had worked with him for 4 years. It is admitted by P.W. 9 that on the day of recording of his statement under section 161 of the Code of Criminal Procedure, 1973, he knew that Istiyak is in the custody of police.

11 P.W.10 Mr. Hemant Salunkhe has acted as a panch for recovery of blue rexine bag at the instance of accused Istiyak. According to him, Istiyak had led the police to Jari factory on 26/9/2012. Mr. Ujale i.e. P.W. 9 was in the said room. He enquired with Mohd. Istiyak as to why he had led police to Jari Factory and in his presence, Mohd. Istiyak had handed over blue colour bag containing Rs. 2,40,000/- to the police.

12 P.W. 11 Ravindra Kumar Bhullar Yadav @ Neta was residing alongwith father of accused Ganesh i.e. Ramchandra Kanojia. Ganesh

was also residing in the same room and he used to do work of pressing the clothes in the room and was being paid a salary of Rs. 1500/-. Ramchandra was being paid a salary of Rs. 1500/- to 2000/-. On 18/9/2012 he had seen Ganesh returning home at evening alongwith a bag containing cash in it and Ganesh had disclosed that there is cash in the bag. P.W. 11 had accordingly given information to Ramchandra. Thereafter, Ganesh did not return. Said witness is declared hostile. In the cross-examination, the witness has admitted that upon enquiry Ganesh has disclosed to him that he has committed offence. P.W.11 had seen cash in the bag. There was a quarrel between Ganesh and his father. Thereafter, Ganesh had fled from the rear door. He has further admitted in the cross-examination that he had no dialogue with the father of the accused after seeing cash in the bag brought by Ganesh.

13 P.W.13 Mr. Goga Rama More is a habitual panch.

14 P.W. 14 Shri Vijay Sawant was attached to Chembur Police Station as API. He was on duty as station house officer and at about 6.30 p.m. had received a message from relative of Smt. Rajam that Parshuraman has been murdered in Flat No. 12 at Krishna Building, Chembur. He rushed to the spot. The doctor had declared

Parshuraman dead. He had drawn inquest panchanama and registered FIR after recording the statement of Mrs. Rajam. On the basis of the said statement, he had registered Crime No. 221 of 2012. Copy of the first information report is at Exh. 45. The FIR indicates that cash of Rs. 1,70,000/-, golden mangalsutra and 4 golden bangles were stolen.

15 PW. 15 Shashi Pandey is a habitual panch. In the present case, he is a panch for recovery of stolen articles at the instance of accused Nos. 1 and 2.

16 PW.16 is panch for specimen handwriting of accused Ganesh on the receipts given to PW. 1.

17 PW.17 Vijay Mane is the Assistant State Examiner of documents. He had proved Exh. 55 which is opinion issued by him on 21/1/2013. He has opined as follows :

“It has not been made possible to lead any definite opinion as regards the identity or otherwise of the Red-encircled figures marked as Ex. Q-2 when compared with those on the Exs. S-10 to S-18 & N-1, N-4, N-5, N-8, N-9, N-12, N-14 to N-16 for want of sufficient identifying characteristics for comparison.”

Hence, accused Ganesh could not have been signatory of the invalid or valid bills issued in favour of P.W.1 Mrs. Rajam.

18 P.W. 18 Dr. Subha Rao had examined P.W.1 in Das Hospital, Chembur, Mumbai. She had given history of assault.

19 P.W.19 Mr. Narayan Sankpal was attached to Crime Branch, Unit No. VI, Chembur as PI. Investigation of C.R. NO. 221 of 2012 was assigned to him on 22/9/2012. When the investigation of the above crime was going on at Chembur Police Station, parallel investigation was also being carried out by Crime Branch. It had transpired in the investigation that accused No. 1 Ganesh had left for Jonpur, U.P. and therefore, he alongwith his staff had went to Jonpur and had arrested accused on 22/9/2012 at 5 p.m. Transit remand was taken. The accused was brought to Bombay and C.R.No. 95 of 2012 was registered by DCB, CID during the course of investigation in C.R. No. 221 of 2012 registered at Chembur Police Station. According to P.W. 19, while Ganesh was in police custody, he had disclosed involvement of other 3 accused and therefore, a team comprising of PI. Kale and other police staff were deputed to Darbhanga, Bihar to trace other 3

accused and with the help of Mohd. Taukir (PW.6) P.I. Kale had arrested accused Nos. 2 and 3. On 26/9/2012 accused No. 2 was in police custody and had led to the recovery of cash and gold bangles. He has disclosed the steps taken by him in the course of investigation including recording of memorandum and recovery at the instance of all the 3 accused under section 27 of the Indian Evidence Act.

20 In the cross-examination, PW. 19 has admitted that the flat where the incident had occurred, is situated in a society, all the flats are not occupied and he could not find out any witness, who had seen the ingress and egress of the accused to the flat of PW. 1 at the time of incident. It is also admitted that at the time of recording of statement of PW.1 under section 154 of the Code of Criminal Procedure, 1973, the complainant had not given description of the four gold bangles, details of currency notes and neither any proof that she was possessing those four bangles or any documentary proof about having huge cash amount in the flat. In the course of investigation, he could not trace any finger prints at the place of incident.

21 PW. 19 has further deposed that the arrest panchanama of

accused Nos. 2 and 3 have been prepared after they were produced in the police station by one Mintu Shaikh. But name of Mintu Shaikh is not mentioned in arrest panchanama and neither there is any entry in the station diary about producing of accused Nos. 2 and 3 in the police station by Mintu Shaikh. It has transpired through the deposition of P.W. 19 that the complainant had not identified the accused Nos. 2 and 3 in the test identification. Arrest panchanama of the accused Nos. 2 and 3 is prepared on 25/9/2012 but the statement of Mintu Shaikh is recorded on 28/9/2012.

22 Admitted facts in the present case are as follows :

- (i) There was a robbery in the house of P.W. 1 on 18/9/2012.
- (ii) The husband of P.W. 1 had expired in the said incident in all probabilities at the hands of the robbers.
- (iii) The cause of death is manual strangulation.
- (iv) P.W.1 was about 79 years old at the time of incident and had a weak eyesight.
- (v) After the incident police had taken the accused No. 1 to the

house of P.W. 1, but she could not identify him, as the same person who had visited her house as technician to repair refrigerator, gagged her mouth, stolen booty, caused homicidal death of her husband.

(vi) P.W.1 had disclosed the name of one of the thieves as Gopal and she was informed by her niece that it was not Gopal, but Ganesh.

(vii) P.W.1 could not identify accused no. 1 in the court also. But after taking strenuous efforts, she had identified him. P.W. 1 had not identified any of the accused at the time of test identification parade nor in the court.

(viii) Accused No. 1 was apprehended at Jonpur (U.P.) and was brought to Bombay after obtaining transit remand. He was produced before the Magistrate.

(ix) Accused Nos. 2 and 3 were also apprehended at village Rayyam by P.W. 6 and were given in the custody of P.I. Kale at Darbhanga.

(x) Accused Nos. 2 and 3 were not produced before Magistrate either at Rayyam or at Darbhanga. They were in the custody of police from 25/9/2012. There is no arrest panchanama of accused Nos. 2 and 3 recorded at village Rayyam or Darbhanga. Instead specific case of the prosecution was that P.W. 8 had handed over the accused Nos. 2 and 3 in the custody of police on 25/9/2012. The statement of P.W. 9

was recorded on 28/9/2012.

(xi) All the booty that was stolen in the incident dated 18/9/2012 was recovered at Mumbai whereas the accused were found in U.P. and Bihar.

(xii) The room from where the recovery of cash and mangalsutra is shown, at the hands of the accused No. 1, was occupied by two other persons namely Ramchandra Kanojia and P.W. 11 Ravindra Kumar.

(xiii) P.W. 9 claims that the rooms from where recovery is made at the instance of Mohd. Istiyak was owned by Mohd. Sultan and was occupied by P.W. 9 at the relevant time and that Istiyak had handed over the bag containing cash and golden bangles to the police in the said room. Whereas P.W. 10 Mr. Salunkhe, who is a panch for the recovery of the bag at instance of Istiyak has stated that on the first floor there was one Jari factory at Baiganwadi and Mr. Ujale was in the said room. Upon seeing the police accompanying Mohd. Istiyak asked him as to why he had led police to the said room.

(xiv) According to P.W. 8, bag was recovered at the instance of Mohd. Intekhab from Jari factory on 27/9/2012.

(xv) On 19/9/2012 extra judicial confession was made by accused Ganesh before Ravindra Kumar that he had committed offence

and therefore was leaving for his native village.

(xvi) Extra judicial confession was made by accused Nos. 2 and 3 before P.W. 6 in Mumbai on 18/9/2012.

(xvii) On 19/9/2012 accused Nos. 2 and 3 had left for their native village. P.W.6 had not informed the police in Mumbai that accused Nos. 2 and 3 have confessed before him that they have caused homicidal death of old man in Krishna Niwas, Gavthan Road No. 3, 2nd floor, Room No. 12, Chembur.

(xviii) P.W.6 accompanied P.I. Kale to Darbhanga. Accused were apprehended by P.W. 6 at village Rayyam. P.W. 6 handed over accused Nos. 2 and 3 to P.I. Kale and they all had returned to Mumbai and accused Nos. 2 and 3 were produced before Magistrate's Court at Mumbai on 25/9/2012.

(xix) P.I.Kale has not been examined by the prosecution.

(xx) There is no evidence that the accused No. 1 is the author or signatory of the valid and invalid receipts issued to P.W. 1.

23 Learned Counsels for the appellants have demonstrated before us the lacunas in the investigation and have vehemently submitted that the prosecution has utterly failed to bring home the

guilt of the accused and hence, they deserve to be acquitted of all the charges levelled against them.

24 It is true that PW. 1 who is the star witness in the present case has failed to identify any of the accused persons. The fact that the accused No. 1 was taken to the house of PW. 1 and showed to the witness, would frustrate the very purpose of holding test identification parade and although identification in the court is a substantive evidence, it cannot be relied upon in the present case, for the reason that initially, PW. 1 was unable to identify accused No. 1 even before the court and has subsequently admitted that since the accused was shown to her at home, she was able to identify him from close distance.

25 In fact, it is the complainant who has to point out an accused to police and not vice-versa. In the case of **Ahmed Bin Salam v.s State of A.P Reported in 1999 Cri. L.J. 2281**, the Hon'ble Apex Court has held that-

“The so-called identification also is of peculiar nature and the witness in his evidence stated that the police asked him whether

he could identify the persons who were on scooter to which he replied in affirmative and then two accused persons were shown for the purpose of identification and he identified them. We fail to understand as to how the so-called identification done in the aforesaid manner will assist the prosecution in any way and this cannot be held to be a test identification parade.”

In the present case also, the accused No. 1 was taken to the house of PW. 1 and shown to her as being the person who was involved in the said offence. Despite that PW. 1 could not identify accused No. 1 either at the test identification parade or in the court.

26 In so far as the place from where the incriminatory articles were recovered at the instance of the accused on the basis of their memorandum under section 25 of the Evidence Act, it is clear that the witness i.e. Ravindra Kumar (PW.9) Ujale and PW.8 were having full knowledge that the said articles are concealed where it is shown to be recovered. The said places were not within exclusive possession of the accused to treat the same as recovery at the instance of the accused as they were occupied by and accessible to many persons during the period from 18/9/2012 to 26/9/2012.

27 In the case of **Pulukuri Kottaya & ors. v/s. Emperor,** reported in AIR 1947 PC 67, it was held that -

“it is fallacious to treat the —fact discovered within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact.”

It is further held that -

“The condition necessary to bring section 27 into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly, can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.”

It is surprising that all the 3 accused had left the stolen articles at Bombay and fled to their native villages. It does not appeal to a

prudent mind that none of the persons to whom i.e. Ravindra Kumar, Mohd. Taukir Mohd. Tanvir or P.W. 9 before whom extra judicial confession was made, did not disclose about it to the police till the accused were arrested and taken in police custody.

28 Except the statement of P.W.6, there is no material on record to even remotely indicate that accused Nos. 2 and 3 were found at their native place. No reason is assigned as to why they were not produced before the Magistrate at Darbhanga and there is suppression of this fact by P.W. 19 Shri Sankpal that they were arrested at Darbhanga, Bihar. P.W. 6 had disclosed about the confession made to him to the police only on 25/9/2012 after accused Nos. 2 and 3 were taken into custody.

29 It is settled principle that the sanctity of extra-judicial confession would depend upon veracity and credibility of the witness to whom it was made. It is a weak piece of evidence and an accused can be convicted on the basis of the same provided that there is corroboration to making of the extra judicial confession, the conduct of the person to whom such confession was made, soon after the incident

would inspire confidence of the court. To make extra judicial confession reliable, it has to be necessarily clear, consistent and convincing. There are extenuating circumstances which make extra judicial confession unreliable.

30 The onus would lie upon prosecution to prove the complete chain of circumstances, which would eliminate any doubt about innocence of the accused and must positively establish the guilt of the accused and therefore, besides the chain of circumstances, credibility of the witness through whom the circumstances are being established also assumes importance.

31 Direct evidence or a strong circumstantial evidence as to the occurrence of the incident gets strengthened by convincing extra judicial confession. But in the present case, all the witnesses who had deposed about extra judicial confession made to them were aware of the day and date of the incident itself i.e. 18/9/2012 but had not disclosed about it in their statement under section 161 of the Code of Criminal Procedure, 1973 which was recorded only after the accused were arrested. There is no plausible explanation offered on behalf of

the prosecution as to why the statement of P.W. 6 and P.W. 8 were not recorded under section 164 of the Code of Criminal Procedure, 1973.

32 The record and proceedings would indicate that accused No. 1 was produced before the Magistrate for recording of his statement under section 164 of the Code of Criminal Procedure, 1973. However, the accused had informed the Magistrate that he was forcibly brought before the Magistrate by the police under threat and coercion and therefore, he had not disclosed any transaction leading to the said incident from which the guilt of the accused could be inferred.

33 In the present case, the complainant had not given description of the ornaments that were stolen. After the same were handed over to her without any special identification, P.W. 1 has claimed the said articles to be belonging to her. Hence, by logical inference, it can be said that the prosecution has miserably failed to establish beyond reasonable doubt the identity of the perpetrator of the incident dated 18/9/2012. The fact of arresting accused Nos. 2 and 3 at Darbhanga, Bihar is also not proved and hence, it leads to an inference that the accused had not fled from Mumbai and were not

arrested at Darbhanga, Bihar. Silence of the witness to whom extra judicial confession was made on the date of the incident till the accused were remanded to police custody speaks volumes for itself and therefore, the credibility of such witness would be doubtful and cannot be made the basis for recording conviction against the accused.

34 The complicity of the accused in the present case firstly fails for want of identification by P.W. 1. Failure to identify all 3 accused in court. The fact that accused No. 2 and accused No. 3 had fled from Bombay soon after the incident, has not been proved by P.W. 6, as they were shown to be produced by Mintu Shaikh i.e. P.W. 8 in Bombay. The abscondance of accused Nos. 2 and 3, if proved, could have been considered under section 8 of the Indian Evidence Act. The recovery of the stolen articles was not from the exclusive custody of the accused, but from the places, which were accessible to the witnesses, who have disclosed the same only after arrest of the accused. The substantive evidence of P.W. 6 and P.W. 8 to the extent that the accused Nos. 2 and 3 were found at Rayyam or Darbhanga and given in the custody of P.I. Kale becomes irrelevant, as the same is not corroborated by any documentary or substantive evidence. Regard

being had to the totality of the evidence adduced by the prosecution, the conviction of the accused for the alleged offences is unsustainable in the eyes of law.

35 In view of the above observations, the appeals deserve to be allowed and the appellant deserve to be acquitted of all the charges.

36 Both the Learned Counsel are appointed through Legal Aid Committee and have assisted the Court to the best of their capacity to espouse the cause of the appellants. Hence, they are entitled to the professional fees as per rules.

37 Hence, following order is passed:

ORDER

- (i) The appeals are allowed.
- (ii) The Order of conviction and sentence imposed upon the accused/appellants vide Judgment and Order dated 22/8/2014 passed by the Additional Sessions Judge, Bombay in Sessions Case No. 147 of 2013 is hereby quashed and set aside.
- (iii) The appellants are acquitted of the charges levelled against

them.

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

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

(vi) The appeals are disposed of accordingly.

38 This order will be digitally signed by the Private Secretary of this Court. All concerned will act on a digitally signed copy of this order.

(N.J. JAMADAR, J)

(SMT. SADHANA S. JADHAV, J)