

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD**

**CRIMINAL APPEAL NO.507 OF 2019 WITH  
CRIMINAL APPLICATION NO.3220 OF 2021**

Manoj Singh s/o Sikandar Singh Tak  
Age 27 years, Occu. Labour,  
R/o MHADA Colony, Malkapur  
District Buldhana

... APPELLANT

**VERSUS**

The State of Maharashtra  
(Copy to be served on the  
Public Prosecutor, High Court of  
Bombay, Bench at Aurangabad)

... RESPONDENT

.....

Mr. N.S. Ghanekar, Advocate for appellant  
Mr. A.M. Phule, A.P.P. for respondent – State

.....

**WITH**

**CRIMINAL APPEAL NO.98 OF 2020**

The State of Maharashtra,  
through Police Inspector,  
Chalisgaon City Police Station,  
Tq. Chalisgaon, Dist. Jalgaon

... APPELLANT

**VERSUS**

Manoj Singh s/o Sikandarsingh Tak  
Age 27 years, Occu. Labour,  
R/o MHADA Colony, Malkapur  
Tq. Malkapur, District Buldhana

... RESPONDENT

.....

Mr. A.M. Phule, A.P.P. for appellant -State  
Mr. N.S. Ghanekar, Advocate for respondent

.....

**WITH**  
**CRIMINAL APPEAL NO.462 OF 2020**

The State of Maharashtra,  
through Police Inspector,  
Chalisgaon City Police Station,  
Tq. Chalisgaon, Dist. Jalgaon

... APPELLANT

**VERSUS**

Manoj Singh s/o Sikandarsingh Tak  
Age 27 years, Occu. Labour,  
R/o MHADA Colony, Malkapur  
Tq. Malkapur, District Buldhana

... RESPONDENT

.....

Mr. A.M. Phule, A.P.P. for appellant -State  
Mr. N.S. Ghanekar, Advocate for respondent

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**CORAM : R. G. AVACHAT, AND  
R. M. JOSHI, JJ.**

**Date of reserving judgment : 10th October, 2022**

**Date of pronouncing judgment : 10th November, 2022**

**JUDGMENT (PER R.G. AVACHAT, J.) :**

All these three appeals are being decided by this common judgment since they are interconnected. Criminal Appeal No.507/2019 is against conviction. The appellant therein was convicted by learned Additional Sessions Judge, Jalgaon vide order dated 2/5/2019, passed in Sessions Case No.92/2017, for the offence punishable under Sections 459 and 460 of the Indian Penal Code and, therefore, sentenced to

suffer rigorous imprisonment for ten years and to pay fine of Rs.1000/- on both counts, with default stipulation. Along with appellant Manoj Singh, co-accused Sagarsingh was also prosecuted. He has been acquitted. The State has preferred two appeals, being Criminal Appeal No.98/2020 for enhancement of sentence of appellant Manoj Singh and another being Criminal Appeal No.462/2020 against acquittal of co-accused Sagarsingh Suraj Singh @ Fanti Singh of the offence punishable under Sections 459 and 460 of the Indian Penal Code and for conviction of the present appellant and co-accused Sagarsingh for the offence punishable under Section 302 read with 34, 459 read with 34 as well as 460 read with 34 and 380 read with 34 of the Indian Penal Code. This Court, vide order dated 14/8/2020, refused leave in respect of co-accused Sagarsingh and granted leave to the extent of appellant Manoj Singh and admitted the said appeal No.462/2020.

For the sake of convenience, the parties are referred to as has been referred in Criminal Appeal No.507/2019.

2. Facts giving rise to the present appeals are as follows:-

P.W.2 Nitin Devre (informant) was a resident of Adarsh Nagar, Chalisgaon. He has two brothers – Dharamraj and Jitendra. All the three brothers were residing in three different houses adjoining to each other. Their parents namely Dagadu and Jijabai (both deceased) had their house adjoining the houses of their three sons.

3. Wife of the informant woke him up by 2.30 a.m. on 2/3/2017 as she had heard some noise emanating from the house of her parents-in-law. The informant, therefore, came out of his house. He knocked on the door of the house of his brother Jitendra (P.W.3) with a view to wake him up. Jitendra (P.W.3) came out of his house. They saw two persons coming out of the house of their parents, one after another. One of them was armed with a Katawani- कटावणी (instrument used for house-breaking). They had covered their face with handkerchiefs. The informant tried to catch one of them. He threw a bicycle towards one of those two. The duo took to their heels through a runnel that runs from behind the house of the informant. The informant entered the house of his parents to find both of them lying injured, father on the bed and the mother in the kitchen. Household articles were strewn in a room all over. A safe was broken open. The

ornaments were found missing. The parents of the informant were rushed to the hospital. The mother was declared brought-dead. The father passed away five days after the incident. Mortal remains of both, Dagadu and Jijabai were subjected to autopsy.

4. The informant lodged the F.I.R. (Exh.45) at Chalisgaon City Police Station against two unknown persons. It is stated in the F.I.R. that, the culprits were in the age group of 20-25 years. Both were sporting shirts and trousers. Colour of clothes on the person of the culprits was, however, not stated, as the same was not visible due to darkness.

5. Based on the F.I.R. (Exh.45), crime vide C.R. No.24/2017 came to be registered for the offences punishable under Sections 459 and 460 read with Section 34 of the Indian Penal Code. Both the culprits came to be arrested. The appellant herein was subjected to test identification parade. The informant and his brother Jitendra (P.W.3) identified him in the test identification parade. Pursuant to the disclosure statement made by the appellant Manoj Singh, a Katawani and gold ornament came to be recovered. All the seized articles were sent to Central Forensic Science Laboratory for analysis and report. The scene of offence panchanama was drawn. On

investigation, the appellant and the co-accused were proceeded against by filing charge sheet.

6. Learned Judicial Magistrate, First Class, Court No.2, Chalisgaon committed the case to the Court of Sessions for trial in accordance with law. The learned Additional Sessions Judge framed the charge (Exh.33) against both the appellants for offence punishable under Sections 459 and 460 of the Indian Penal Code. The record indicates that, no charge for the offence punishable under Section 302 and/or 394 was framed. Little over 7 ½ years have passed post incident. It would, therefore, not be desirable to remand the matter to the trial Court with a direction to frame the charge for offence punishable under Sections 302 and 394 of the Indian Penal Code more so when the offence punishable under Sections 459 and 460 are punishable with imprisonment for life or imprisonment for a term which may extend to 10 years with fine as well. The State has, therefore, preferred an appeal for enhancement of sentence. The offence punishable under Section 459 is of causing grievous hurt or death while committing lurking house trespass or house-breaking. The ingredients of section 459 take care of the concerned of the State.

7. The prosecution examined 17 witnesses and produced in evidence certain documents to establish the charge. The trial Court, on appreciation of the evidence in the case, convicted the appellant and consequently sentenced him to suffer sentence of imprisonment as stated above.

8. The learned counsel for the appellant Manoj Singh would submit that, the offence is serious one, the prosecution is required to prove the same beyond reasonable doubt. The F.I.R. was lodged against unknown persons. Description of the culprits was not given in the F.I.R. or in the police statement of eye witness so as to fix identity of the appellant herein. According to learned counsel, although on arrest of the appellant Manoj Singh, he was subjected to test identification parade, the rules in that regard have not been followed and on the contrary, those have been breached. The learned counsel took us through the relevant evidence of the prosecution to ultimately submit the same to have failed to establish the guilt beyond reasonable doubt. He, therefore, urged for allowing the appeal.

9. The learned A.P.P. would, on the other hand, submit that, it is a serious offence. Two innocent old aged persons have been murdered. They have been robbed of

their ornaments. The informant gave the description of the culprits in the F.I.R. The appellant thus came to be arrested. The test identification parade was conducted by an Executive Magistrate. The appellant was identified by the eye witnesses in the test identification parade. Pursuant to the disclosure statement made by the appellant, a Katawani and a gold ornament came to be recovered. The same reinforce the prosecution case. According to learned A.P.P., the sentence imposed against the appellant Manoj Singh was grossly inadequate. He, therefore, urged for enhancing the same to imprisonment for life.

10. Although the prosecution examined 17 witnesses, for deciding the appeal the relevant evidence would be that of the informant and his brother, besides the evidence relating to test identification parade and recovery of an iron bar and a gold ornament pursuant to the disclosure statement made by the appellant. A brief survey of the evidence for the prosecution is, however, inevitable.

11. P.W.1 Tushant Ahire is a panch witness to the scene of offence panchanama (Exh.43). P.W.2 Nitin Devre is the informant. He lodged the F.I.R. (Exh.45). P.W.3 Jitendra Devre is another eye witness. He is the son of the deceased.

P.W.4 Vijay Patil is a panch witness to the seizure of clothes. P.W.5 Dilip Satre and P.W.7 Sharad Sonar are the police officials who carried the seized articles to the office of the Forensic Science Laboratory. P.W.8 Sharad Shinde is witness to the inquest panchanama. P.W.9 Dhananjay Deshmukh is a witness in whose presence test identification parade was held by P.W.10 Kailas Deore. P.W.11 Dr. Bapu Baviskar and P.W.14 Dr. Nilesh Devraj are the Medical Officers who conducted post mortem examination. P.W.12 Rameshwar Gade, P.W.13 Sunil Gaikwad and P.W.17 Adinath Budhwant are the police officials who did investigation of the crime.

12. Undisputedly, a robbery took place at the house of informant on the night of 2/3/2017 and the culprits, while committing the robbery, killed the parents of the informant. The post mortem examination reports (Exh.97 & 88) of both the deceased Dagadu and Jijabai indicate they died of head injury associated with injury to neck and cardio respiratory failure due to severe head injuries.

13. The informant P.W.2 Nitin testified that, his wife woke him up by 2.30 a.m. on 2/3/2017 as she had heard some noise emanating from the house of his parents. It is undisputed that, the informant and his two brothers were

residing in their respective houses adjoining to each other. It is further in his evidence that, he woke up his brother Jitendra (P.W.3). Then he moved towards the house of his parents. He saw one thief came running out of the house of his parents. He rushed to catch him, but in vain. He picked up a bicycle and threw towards a thief. The thief ran away. Then another thief came out of the house of the parents. Jitendra (P.W.3) tried to catch him, but not successful. Both the thieves ran away. They were in the age group of 25 years. Their heights were approximately 5.2 to 6.00 ft. Both of them were stout. One of them was sporting turban and beard as well. Both of them had their faces covered. It is further in his evidence that, Jitendra (P.W.3) and himself entered house of their parents to find both of them lying injured. Father on the bed and mother in the kitchen room. Both were rushed to the hospital. Mother was declared dead before admission. Father passed away five days after the incident.

14. On the same lines is the evidence of P.W.3 Jitendra. The same is, therefore not reiterated. It has come in the evidence of Jitendra (P.W.3) that, they had given an intimation of proceeding on hunger strike if there was no headway in the investigation.

15. It appears that, both the appellant Manoj Singh and co-accused were arrested by police in connection with some other crime. They were taken in custody in connection with the present crime. The appellant Manoj Singh was subjected to test identification parade. He was identified by both, the informant and his brother Jitendra in test identification parade and before the Court as well.

16. During investigation, the appellant gave a disclosure statement (Exh.13), pursuant to which Katawani and golden ornaments came to be seized under the panchanama (Exh.114). The C.A. reports indicate that, the blood sample of deceased Dagadu was unsuitable for blood grouping. The blood group of appellant Manoj Singh is 'O' while the blood group of deceased Jijabai was 'A'. Admittedly, the seized gold ornaments were not subjected to test identification nor those were shown to witnesses, namely the informant and/or his brother Jitendra (P.W.3). It, therefore, cannot be said that, the said gold ornaments were property stolen by the appellant from the house of the informant. The C.A. report as regards blood stains on the seized Katawani is inconclusive. The Katawani seized pursuant to the disclosure statement made by the appellant, therefore, could not be connected with the offence in question.

17. The question is, whether the appellant is proved to be the author of the crime. True, the offence is very serious. Evidence to prove the same also requires to be of sterling quality. The informant identified the appellant in the test identification parade and before the Court as well. It is in his evidence that, both the culprits were in the age group of 25 years. The culprits had covered their faces with handkerchiefs. One of the culprits was sporting a turban and beard. The handkerchief on the person of the appellant got slightly removed. The informant wanted to suggest that, because of the same, he could have glimpse of the face of the appellant, based on which he could identify the appellant in the test identification parade and before the Court as well.

18. During cross-examination of the informant, it has come on record that, although he did state in the F.I.R. that the appellant was sporting turban, the F.I.R. is conspicuously silent to make mention thereof. He also claimed to have had stated in the F.I.R. that the handkerchief on the face of the appellant got slightly removed. He again could not offer any reason as to why the said fact was not mentioned in the F.I.R. (Exh.45). The F.I.R. is also silent to state that, one of the culprits was sporting beard.

19. In our view, when a culprit was sporting turban and beard, the informant had no difficulty to make mention in the F.I.R. that one of the culprits was probably a 'Sikh'. The F.I.R. is conspicuously silent to make mention thereof. In our view, the omission in the F.I.R. as regards handkerchief on the person of the appellant slightly slipped and he was sporting turban and beard is a material omission that goes a long way to help out the appellant herein. It is not known on the basis of what material the appellant came to be taken into custody in connection with the present crime for investigation purpose. There is no evidence in this regard.

20. Same is the case about the evidence of another eye witness, P.W.3 Jitendra. He has not given description of the culprits in his police statement.

21. P.W.9 Dhananjay is a witness in whose presence P.W.10 Kailas Deore conducted test identification parade. True, in test identification parade both, the informant and his brother Jitendra (P.W.3) identified the appellant. The panch witness has stated in his cross-examination that, he was present in the hall whereat the test identification parade was held. The witnesses were also present in the very hall. During their presence, the appellant was brought there. His

face was in veil. The dummies were brought thereafter. The dummies were present outside the cabin of the Tabsildar. This witness undoubtedly suggests that the informant and the eye witness Jitendra (P.W.3) had a clue to identify the appellant in the test identification parade since the appellant was brought in veil first.

22. Moreover, the evidence indicates that, whilst the culprits were in the age group of 20 to 25 years, the dummies with whom the culprit was mingled for being identified were in the age group of 45. The memorandum of test identification parade is at Exh.79.

23. In short, the recovery of Katawani and the gold ornaments pursuant to the disclosure statement made by the appellant could not be connected with the offence in question since the gold ornaments were not subjected to identification during investigation nor those were shown to the informant or his brother during recording of evidence so as to identify same to be the property stolen by the appellant from the house of the informant. The C.A. report as regards the seized Katawani is inconclusive. The same also, therefore, could not be connected with the crime in question. Then what remains is identification of the appellant by the informant and his

brother Jitendra (P.W.3), first in test identification parade and then before the Court. It is reiterated that, the F.I.R. is silent to mention that the appellant was sporting turban and beard. Admittedly, the appellant had his face covered with handkerchief. The F.I.R. is silent to make mention of the fact that the handkerchief on the face of the appellant got slightly slipped. As such, whatever has been deposed to by the informant in this regard before the Court for the first time was an improvement over the averments in the F.I.R. Same is the case as regards the evidence of P.W.3 Jitendra. He admittedly did not give description of the appellant in his police statement. The evidence of the panch witness to the test identification parade indicate that, both, the informant and P.W.3 Jitendra had a clue to identify the appellant in the test identification parade since when they were in the hall, the appellant was first brought, he was in veil. Then the dummies were called. All these things happened in the presence of the informant and his brother Jitendra (P.W.3). The identification of the appellant in the test identification parade, therefore, loses its efficacy. The Tahsildar Kailas Deore (P.W.10) also did not follow the rules as regards the test identification parade. Based on such evidence, the trial Court ought not to have convicted the appellant. We are, therefore, not at one with

the findings recorded by the trial Court. Interference with the impugned order is, therefore, called for.

24. In the result, the Criminal Appeal No.507/2019 succeeds. Hence the order :-

**ORDER**

(i) Criminal Appeal No.507/2019 is allowed. The impugned order of conviction and sentence dated 2/5/2019, passed by learned Additional Sessions Judge, Jalgaon in Sessions Case No.92/2017 is hereby set aside. The appellant is acquitted of the offences punishable under Sections 459 and 460 of the Indian Penal Code. The appellant be set at liberty forthwith if not required in any other case. Fine amount, if paid, be refunded to him.

(ii) Consequently, Criminal Application No.3220/2021 filed for suspension of sentence and releasing the appellant on bail is disposed of.

(iii) Criminal Appeals No.98/2020 and 462/2020 filed by the State are dismissed.

**( R. M. JOSHI, J. )**

**( R. G. AVACHAT, J. )**

fmp/-