

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

CRIMINAL APPEAL NO.1089 OF 2015

Santosh Prakash Gurav	Appellant
Versus	
State of Maharashtra	...Respondent

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**WITH
CRIMINAL APPEAL NO.836 OF 2016**

Kiran Krishna More	Appellant
Versus	
The State of Maharashtra	...Respondent

.....

**WITH
CRIMINAL APPEAL NO.212 OF 2016**

Imran Shaikh Abdul Sattar Shaikh	Appellant
Versus	
The State of Maharashtra	...Respondent

Mr. Veerdhawal Deshmukh, Advocate appointed for the Appellants in Criminal Appeal No.1089/2015 & 836/2016.

Ms. Ashwini Gaikwad, Advocate for the Appellant in Criminal Appeal No.212/2016.

Mrs. Veera Shinde, APP for the Respondent-State.

CORAM : SARANG V. KOTWAL, J.

DATE : 1st & 2nd AUGUST, 2022

ORAL JUDGMENT :

1. These three appeals are decided by this common judgment because all these appeals are challenging the same judgment and order passed by the Additional Sessions Judge, Khed in Sessions Case No.15/2014. The judgment and order was passed on 15.9.2015. Wherever necessary, the appellants are referred by their names or by their original status as accused. In all, six accused faced the trial. Criminal Appeal No.212/2016 is preferred by the original accused No.1 Imran Shaih, Criminal Appeal No.1089/2015 is preferred by the original accused No.2 Santosh Gurav and Criminal Appeal No.836/2016 is preferred by the original accused No.6 Kiran More. Along with these three appellants, three more accused were also tried but they were acquitted. They were accused No.3 Mahesh Yadav, accused No.4 Rohit Jadhav and accused No.5 Mahadev Magar.

2. At the conclusion of the trial, these three appellants were convicted for the offence punishable under Section 392 read with 34 of the Indian Penal Code and were sentenced to RI for

seven years each and to pay fine of Rs.3000/- each, and in default of payment of fine to suffer RI for three months each. They were further convicted for the offence punishable under Section 451 read with 34 of IPC and were sentenced to suffer RI for two years each and to pay fine of Rs.2,000/- each and in default of payment of fine to suffer RI for three months each. These sentences were directed to run concurrently. They were given set-off under Section 428 of Cr.P.C. All the accused, including the present appellants, were acquitted from the charge of commission of offence punishable under Section 395 of the IPC.

3. Advocate Ms. Ashwini Gaikwad represents the appellant Imran Shaikh. For the other two appellants Shri Veerdhawal Deshmukh is appointed as a Legal Aid Counsel. I have heard both the learned counsel for the appellants and Mrs. Veera Shinde, learned APP for the State of Maharashtra.

4. The prosecution case, in brief, is as follows:

PW-1 Laxmi Khatate was residing at village Pisai, Taluka-Dapoli, District-Ratnagiri. On 25.12.2013, at around 10 a.m., she was alone in the house. Three persons entered her house.

Her legs were tied by a wire. They snatched the ornaments from her person. They opened the cupboard and took the ornaments in their custody. They also took cash of Rs.7,800/- and then they went away. She somehow rescued herself and called her neighbour Nayan Shirke. He came there and opened the door. Then she went to the police station and lodged her FIR. It was registered as C.R. No.95/2013 at Deapoli Police Station. The investigation was carried out. The spot panchnama was conducted on the same day. Different squads were made to trace the accused. It was revealed during the investigation that the accused had used a red coloured Indica Car brought from Mumbai. On 6.1.2014, accused Nos.1, 2 & 3 along with a child in conflict with law were brought to Dapoli police station. On 7.1.2014, accused Nos.4 & 5 were arrested.

5. The car owner brought his car to Dapoli police station on 6.1.2014. Accused Nos.1 to 3 were arrested on 7.1.2014. Accused Nos.4 & 5 were also arrested on the same day. Accused No.6 was arrested on 12.1.2014. Test identification parade was held on 13.1.2014 to enable the witnesses to identity the suspects. On 16.1.2014, accused No.2 Santosh Gurav gave a statement that

he was willing to show the jeweler at Mumbai to whom he had sold Mangalsutra and ear-chain. He led the police and panchas to a shop at Mumbai. Those two ornaments were produced and seized. On 18.1.2014, accused No.6 Kiran More gave a statement that he would produce a *bugdi* which he had kept in the house of his father-in-law. The recovery was effected at his instance. Accused Nos.1 to 5 expressed their willingness to give confessional statements under Section 164 of Cr.P.C.. Accordingly those statements were recorded on 21.1.2014. The CCTV footages of Vashi Toll Naka and Mandangad Petrol Pump were produced. At the conclusion of the investigation, the charge-sheet was filed and case was committed to the Court of Sessions. During trial, the prosecution examined fifteen witnesses. The statements of the appellants and other accused were recorded under Section 313 of Cr.P.C. and at the conclusion of the trial, the appellants were convicted, as mentioned earlier. The other accused were acquitted from all the charges.

Evidence regarding the main incident and identification of the accused:

6. The important evidence in this case is obviously is that of the first informant Laxmi Khatate. She was examined as PW-1.

She has stated that on 25.12.2013, at about 10.00 a.m. she was alone in the house. Her husband had gone to Dapoli. Her mother had gone to another Wadi. One unknown person came to her house asking for water. She gave water in a small glass. He wanted more water as there were others with him sitting in a car. She brought water in a bigger pot. At that time, that person entered her house along with other unknown persons. PW-1 was held. They tied her legs with wire. Her mouth was gagged. They snatched the ornaments from her person and also removed the ornaments and cash of Rs.7,800/- from a cupboard. They then went away. While going, they latched the door from outside. After some time, she rescued herself and called her neighbour Nayan Shirke, who came there and opened the door. She narrated the incident to Nayan. He made a phone call to Dapoli police station. They then went to the police station and lodged FIR. The FIR is produced on record at Exhibit-26. She was called at Dapoli police station on 13.1.2014. She identified the accused. She deposed before the Court that accused No.1 Imran Shaikh, accused No.2 Santosh Gurav and accused No.6 Kiran More were the three persons who had come to

her house and had committed that offence. On 19.1.2014, she was again called to Dapoli police station to identify the two ornaments. She identified those two ornaments as her *Mangalsutra* and *bugdi*. Her statement was recorded.

In the cross-examination, she stated that for the purpose of test identification parade, she had gone to one office. The police left her inside that office. She had identified only three persons at the test identification parade. She was called at Khed Rest House to identify the ornaments and the accused. At that time Suresh Gurav, Siddhartha Nagavekar and Nayan Shirke were with her. At that time, the police, the accused, she herself and these three named persons were present in the Rest House. She has further deposed that she did not remember whether police had shown the accused in the Rest House. She denied all other suggestions that the incident had not taken place etc.. Her FIR was registered at 12.45 p.m. on the same day. In the FIR, she had mentioned that the offenders were in the age group of 20 to 25 years. They were speaking Marathi and they were blackish in complexion. They were wearing full pants and T-shirts.

7. PW-5 Nayan Shirke was PW-1's neighbour, who had immediately gone to the scene of offence and had helped PW-1. He has stated that at around 11.00 a.m. on 25.12.2013, one person approached him and told him that one lady was shouting. He rushed there. He saw that the informant's door was latched from outside. He removed the latch and went inside and found that PW-1's hands were tied on the backside. Her legs were also tied. He helped her. She narrated the incident. He then made a phone call to the police station and took PW-1 to the police station. His evidence, thus, corroborates the fact that the incident had taken place and that PW-1 was in her house. She needed his help as her hands and legs were tied.

8. PW-6 Suresh Gurav was a rickshaw driver passing from the house of the first informant at the relevant time. He had seen a red-coloured Indica car parked in front of the informant's house. One person was standing near the car and other two persons were sitting in the car. He identified accused No.1 Imran Shaikh as the person who was standing near the car and accused Nos.2 & 3 as the persons who were seen sitting in the car. Afterwards he came to

know that robbery was committed in the informant's house. He went to her house. At that time he informed others that he had seen those three persons. He also told the police about what he had seen. He identified the car during investigation. According to this witness, after about four days, the Tahsildar madam called him for test identification. He went there and identified the accused Nos. 1, 2 & 3 as the persons who were present in front of the house of the informant on that day.

In the cross-examination, he was asked about the details of the test identification parade. He identified the accused on three different occasions in the parade. He admitted that the informant's son and PW-5 Nayan Shirke were his friends.

9. PW-7 Police Constable Siddharth Nagvekar is also important as far as identity of the accused is concerned. He has stated that on 25.12.2013 he had gone to Bharne-Naka as part of his duty. He saw one Maruti car coming from Ratnagiri and proceeding towards Mumbai. He suspected some foul play. He stopped the car. He made enquiries. He identified accused No.1 Imran Shaikh and accused No.2 Santosh Gurav as the persons who

were sitting in the car. They informed this witness that their friend Kiran More's mother had died and they had gone to Dapoli to meet him and that they were returning to Mumbai. This witness then returned to Khed police station. No further action was taken by him on that day. He then came to know in the police station that Kiran More was a habitual offender. Therefore, he narrated the incident to API Jagtap. His statement was recorded on 30.12.2013. He identified a Maruti car on 7.1.2014, in which these two accused were traveling with others. He has further deposed that he identified accused Nos.1 & 2 at the test identification parade held on 13.1.2014 by an Executive Magistrate. Though he had mentioned the number of the car as "MH-46-D-0695" and had written it on a chit, it was not produced by him.

10. PW-10 Prajeep Tayakandi had a tyre-shop. He had attended the puncture work of a red-coloured Indica Car on 25.12.2013 at about 12.00 p.m.. He had seen Head Constable Jadhav taking down the names of the persons who were present in the car. This witness identified accused No.1 as one of the persons who was sitting in the car.

11. PW-11 Preetam Jadhav was serving at a Petrol Pump at Mandangad. On 24.12.2013, around that period (in chief he has stated the date as '24.12.2013' and in the cross he was asked about the incident of '25.12.2013'), a red coloured Indica car had come to his Petrol Pump. There were 5-6 boys in the car. He had filled diesel in the car. He had produced the CCTV camera footage and handed it over to the police.

In the cross-examination, he deposed that CD of the recording of CCTV footage was prepared and he had also seen the recording.

12. PW-13 Police Naik Hemant Suryawanshi had collected the CCTV footage on 25.12.2013 of CCTV at Belapur. In the footage, he saw a red coloured Indica Car. The car bearing registration No.MH-46-D-0695 had passed lane No.4 from Vashi Toll Naka at 3.12 a.m. on 25.12.2013. The prosecution case is that the accused went to Dapoli from Mumbai and then committed this offence.

13. PW-12 Bashir Ahmad was the registered owner of the car. He had purchased it from accused No.1. On 24.12.2013,

accused No.1 had taken this car on a request that he wanted to go to Dapoli to meet someone. Afterwards the car was returned to him and during investigation he produced it before the Khed police station on 6.1.2014.

Recovery evidence :

14. PW-2 Suhas Kadam, was a pancha, in whose presence accused No.2 Santosh Gurav made a statement that he would produce the ornaments which he had sold to Maniratna Jewelers at Mumbai. He made this statement on 16.1.2014. Pursuant to that statement, accused No.2 led this witness and police officers to Maniratna Jewelers, Kalachowki, Mumbai. One Keshavbhai Sarvaiya was present there. He took out the bill book and it was found that accused No.2 had sold these ornaments on 26.12.2013 and 1.1.2014. He produced one *Mangalsutra* weighing 14 grams, another *Mangalsutra* weighing 14 grams, a pair of ear-rings along with ear-chains weighing 3.24 grams. These articles were seized.

In the cross-examination, this witness has stated that all the accused were present with the police. The memorandum panchnama and recovery panchnama were produced on record at

Exhibits-37 & 38. The panchnama shows that the ornaments were recovered in connection with two different offences.

15. In this connection PW-4 Keshubhai Sarwaria is examined. He was the jeweler, who had produced these ornaments. He has deposed that on 26.12.2013, accused No.2 Santosh Gurav came to his shop. He sold him one *ganthan*, ear-chain and ear-ring. On 1.1.2014, he again came there and requested to purchase a *mangalsutra*. He deposed that he was knowing accused No.2 Santosh Gurav's wife and, therefore, he did not suspect him. On 1.1.2014, he had questioned Kiran More about the necessity to sell these ornaments as was told by accused No.2 Santosh Gurav; and on being satisfied about the necessity, he had purchased those ornaments. He deposed that he would be able to identify the *muddemal* if shown to him, but, it appears that the ornaments were not shown to him.

16. PW-3 Sachin Jadhav was another pancha, who was called at the police station on 18.1.2014. Accused No.6 was present at the police station and he made statement that he would produce the ear-ring and ear-chain which he had kept in the house of his

father-in-law at Jaalgaon Brahmanwadi, Dapoli. His statement was recorded. Accused No.6 led the police and the panchas to that house and those ornaments were recovered from one small plastic box which was kept on a plank attached to the wall. The memorandum statement and the panchnama are produced on record at Exhibits-40 and 41.

17. PW-9 Milind Saitwadekar was a jeweler, who had weighed the *bugdi* after it was recovered at the instance of accused No.6 on 18.1.2014. His evidence is not of much importance.

Police Officers' evidence :

18. PW-8 Police Head Constable Mahipati Jamdar was working in LCB Office at Ratnagiri at the relevant time. He carried out part of the investigation. He had gone to Mumbai and was part of a team that had arrested accused Nos.1 to 6.

19. PW-14 ASI Prabhakar Kadam has deposed that during investigation of this offence accused Kiran More and others were arrested but accused No.6 Kiran More ran away from their custody. He was arrested on 12.1.2014 from Mumbai. Some bandage were tied around his knees concealing some ornaments, which were also

seized at the time of his arrest.

20. PW-15 API Navnath Jagtap was the investigating officer. He had recorded the statements and supplementary statements, spot panchnama, had effected arrest, had arranged for test identification parade and for recording of confessional statements. He has also deposed about the recovery made at the instance of various accused, as discussed in the earlier part of the judgment.

. This, in short, is the evidence led by the prosecution in this case.

Submissions :

21. Learned Counsel Ms. Ashwini Gaikwad for accused No.1 Imran Shaikh submitted that accused No.1 Imran Shaikh was not identified in the test identification parade. He was shown to PW-1 by the police in the police station. Therefore, his identification is not proved beyond doubt. There is no recovery at his instance. The other piece of evidence, which is held against him, is his confessional statement recorded under Section 164 of Cr.P.C.. However that statement is exculpatory, and in any case, that cannot form the sole basis of conviction. The Magistrate, who recorded that statement, is not examined. No opportunity is given

to this appellant to explain this circumstance even under the statement recorded under Section 313 of Cr.P.C.

22. Ms. Gaikwad submitted that the confessions of accused Nos.3, 4 & 5 were ignored by the learned Judge and the learned Judge has given benefit of doubt to these accused. The same principles should apply in the case of accused No.1.

23. Learned Counsel Shri Veerdhawal Deshmukh for the accused Nos.2 & 6 submitted that the S.E.M., who conducted the test identification parade, is not examined. Therefore, their identification in the parade is not properly proved. Though allegedly there is recovery at the instance of these two accused, the recovery cannot be connected with the present offence. He submitted that the Magistrate, who recorded the statement under Section 164 of Cr.P.C. is not examined. In any case the confession was retracted immediately and, therefore, it cannot form basis for conviction.

24. Shri Deshmukh relied on two judgments of the Hon'ble Supreme Court as follows:

- i. **Pyare Lal Bhargava Vs. The State of Rajasthan¹**, and
- ii. **Parmananda Pegu Vs. State of Assam²**

According to Shri Deshmukh both these judgments lay down the ratio that the retracted confession cannot form basis of conviction in the absence of any corroborative material. He submitted that there is no corroborative material. There is no corroborative piece of evidence in this case because the recovery is doubtful and the test identification parade is not proved as the S.E.M. is not examined.

25. Learned APP Smt. Veera Shinde, on the other hand, submitted that there is sufficient evidence against these appellants. The prosecution has proved its case beyond reasonable doubt as far as these appellants are concerned.

26. Learned APP Smt. Shinde submitted that the evidence of PW-1 Laxmi Khatate itself is sufficient to convict these appellants. Her evidence is corroborated by PW-5 Nayan Shirke. PW-6 Suresh Gurav had also seen some of the accused and his

1 AIR 1963 SC 1094

2 AIR 2004 SC 4197

evidence also lends corroboration to PW-1's evidence. PW-7 Police Constable Siddhartha Nagvekar had seen six persons in the car and he had identified accused Nos.1 & 2 at the parade. PW-10 Prajeep Tayakandi has identified accused No.2 in the Court. PW-12 Bashir Ahmed has deposed about the connection of the car with accused No.1. The recovery of the articles at the instance of accused No.6 and accused No.2 are duly proved and the witnesses in that connection have supported the prosecution case.

27. Learned APP Smt. Shinde further submitted that it was not necessary to examine the learned Magistrate who had recorded the statements of the accused under Section 164 of Cr.P.C.. She relied on the judgment of the Hon'ble Supreme Court in the case of **Madi Ganga Vs. State of Orissa**³ to support this contention.

28. She further submitted that the confessional statements as well as the test identification parade memos are already exhibited and, therefore, they could be read in evidence. The witnesses were cross-examined about conducting of test identification parade. Therefore, it was strictly not necessary to

3 AIR 1981 SC 1165

examine the S.E.M. who had conducted the test identification parade.

Reasons :

29. I have considered these submissions. The prosecution case can broadly be divided into three aspects - (i) identification of the accused, (ii) recovery of ornaments and (iii) confessional statements recorded under Section 164 of Cr.PC.

(i) identification of the accused:

30. As far as evidence of test identification parade is concerned, the S.E.M. Smt.Gode who conducted the test identification parade, is not examined in this case. The parade was held in three parts. The first one was conducted at 1.00 p.m., the second part was conducted at 2.30 p.m. and the third part was conducted at 4.00 p.m.. The witnesses i.e. PW-1 Laxmi Khatate, PW-6 Suresh Gurav and PW-7 Siddharth Nagvekar were asked to identify the suspects. Different accused were asked to stand in the parade on different occasions. The memorandums of the test identification parades were produced on record at Exhibits-100, 101 and 102 respectively. These documents were produced on record through the evidence of PW-15 API Navnath Jagtap.

A reference is found in the deposition of PW-15 API Navnath Jagtap, who has stated in paragraph-9 of his deposition that the reports of test identification parade were at Exhibits-100, 101 and 102, when his deposition was recorded on 28.7.2015.

Before that on 8.7.2015, the Public Prosecutor had made an application before the Court for exhibiting these reports and for reading them in evidence. The accused had specifically objected for reading these documents in the evidence, however, there was no objection on their part for giving exhibit numbers to these reports of test identification parades.

In this connection, provisions of Section 291-A of Cr.P.C. are important. The said Section reads thus :

“291A. Identification report of Magistrate. – (1) Any document purporting to be a report of identification under the hand of an Executive Magistrate in respect of a person or property may be used as evidence in any inquiry, trial or other proceeding under this Code, although such Magistrate is not called as a witness:

Provided that where such report contains a statement of any suspect or witness to which the provisions of section 21, section 32, section 33, section 155 or section 157, as the case may be, of the Indian Evidence Act, 1872(1 of 1872), apply, such

statement shall not be used under this sub-section except in accordance with the provisions of those sections.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or of the accused, summon and examine such Magistrate as to the subject matter of the said report.”

31. It is, of course, true that the witnesses were cross-examined in respect of the test identification parade and their identification in the Court is important. In the present case, the most important evidence is that of PW-1 Laxmi Khatate. She has deposed that she was shown accused Nos.1, 2 & 6 in the Court. She identified them in the Court as the persons who had come to her house and had committed that offence. In this connection in the examination-in-chief, she has stated that the police had called her to Dapoli police station on 13.1.2014 to identify the accused and accordingly she identified them. According to the prosecution case the test identification parade was held in the office of the Tahsildar, Dapoli. So the place where she identified the suspects itself is doubtful.

In her cross-examination, she has stated that the police

had called her to Khed Rest House to identify the ornaments and the accused. At that time, Suresh Gurav, Siddhartha Nagavekar and Nayan Shirke were with her. It is her case that at that time the police and the accused were present in the Rest House. This is another occasion when PW-1 had an opportunity to see the accused. She has specifically deposed that the police had called her to Khed Rest House not only to identify the ornaments but also the accused. She further has stated that she did not remember whether the police showed the accused at the Rest House. Thus, she is not giving clear answers about the identification of the accused; and that has created sufficient doubt about her evidence regarding identification of the accused. In any case even as per the prosecution story after the arrest of the accused, PW-1 Laxmi had an opportunity to see the accused on a few occasions. The prosecution has not led any evidence to show that sufficient precautions were taken to conceal the identity of the suspects before they were identified in the parade.

In the test identification parade held in the first part at 1.00 p.m. on 13.1.2014, PW-1 was asked to identify the suspects.

At that time, accused No.1 was made to stand along with dummies. However, PW-1 had failed to identify him at the time of parade. The memorandum of that part of the test identification parade is produced at Exhibit-100. In spite of this evidence, it is also important to note that PW-1 had identified the accused in the Court at the time of her deposition. Thus, her ability to identify the suspects becomes doubtful and it is not safe to rely on her evidence as far as identification of the appellants is concerned.

32. PW-6 Suresh Gurav has seen accused No.1 near the car and accused Nos.2 & 3 inside the car. However, accused No.3 Mahesh Yadav is acquitted. This witness (PW-6) is not examined regarding the actual incident, but, he has seen some persons, around that time, near the house of the complainant. His statement was recorded on 26.12.2013. He has stated that after recording of his statement within 5 to 6 days, the police had called him and at that time the police had shown the accused to him. After that the identification parade was held. Therefore, this identification in the parade carries no weight at all because he has admitted that the police had shown him the accused.

33. PW-7 Police Constable Siddhartha Nagavekar has also not deposed about the offence. He has seen some suspects at 12.30 p.m. near Bharne-Naka. He has deposed that the suspects were traveling in a Maruti Car. However, the prosecution case is not about the Maruti Car at all, their specific case that a red coloured Indica car was used by the accused. PW-7's weak evidence therefore has become weaker because of these discrepancies.

34. Considering this evidence, it is obvious that the prosecution has failed to prove the identity of the accused Nos.1, 2 and 6 as the persons who had entered the house of PW-1 and had committed the offence.

(ii) recovery of ornaments:

35. The prosecution case is that at the instance of accused No.2 Santosh Gurav some ornaments were recovered from a shop of a jeweller in Mumbai. In this connection, the important witnesses are PW-4 Keshubhai Sarwaria and PW-2 Suhas Kadam. PW-4 Keshubhai Sarwaria has deposed that accused No.2 Santosh Gurav had come to his shop on 26.12.2013 and had sold a *ganthan*, ear-chain and ear-ring. On 1.1.2014, accused No.2

Santosh Gurav again had come to his shop and had sold a *mangalsutra*.

PW-2 Suhas Kadam was a pancha for this panchnama. PW-15 API Navnath Jagtap was investigating the case at that time. On 16.1.2014, the police and the panchas had gone to Maniratna Jewelers, Kalachowki, Mumbai at the instance of accused No.2. The memorandum statement of accused No.2 mentions that he was willing to show the place where he had sold the *ganthan*. The memorandum panchnama mentioned that besides the *ganthan*, ear-rings, ear-chains and a *mangalsutra* were also recovered. The panchnama was completed at 11.30 p.m. on 17.1.2014. PW-1 has stated that she was called to Dapoli police station on 19.1.2014 and she identified *mangalsutra* and *bugdi*. In her cross-examination, as mentioned earlier, she has also stated that the police had called her to Khed Rest House to identify the ornaments and the accused. Thus, it appears that she was already shown the ornaments and the accused at Khed Rest House. This evidence in respect of identification of the ornaments is doubtful. No separate panchnama for identification of those ornaments is made. The

ornaments were not identified in presence of any independent person and there is no other contemporaneous reports to show that PW-1 has identified those ornaments. PW-4 the jeweler Sarwaria was not shown the ornaments in Court for proper identification.

36. Same defect in the prosecution case carries in respect of recovery of *bugdi* at the instance of accused No.6. In that connection, the important witnesses are PW-3 Sachin Jadhav who was a panch and PW-15 Investigating Officer API Navnath Jagtap. Accused No.6 has produced that *bugdi*. It was recovered from the house of father-in-law of accused No.6. Here again identification of that ornament was important to connect it with the present offence. However, there was no separate identification of that *bugdi* in the presence of independent persons. No contemporaneous record is maintained of such identification and, as mentioned earlier, PW-1 was shown the accused and the ornaments at Khed Rest House. Therefore, the evidence of recovery of ornaments is also doubtful in this case.

(iii) confessional statements recorded under Section 164 of Cr.P.C.:

37. That leaves the other major evidence against the

appellants in the form of the confessional statements recorded under Section 164 of Cr.PC. These statements are produced on record at Exhibits-68 to 72. These statements are purportedly given by accused No.1 Imran Shaikh, accused No.2 Santosh Gurav, accused No.3 Mahesh Yadav and accused No.4 Rohit Jadhav. All these statements, are inculpatory, but, accused Nos.3 and 4 are acquitted because there was no corroboration to their statements. Accused No.5 has not given any statement. All these statements are produced on record pursuant to the order passed below Exhibit-58 on 8.7.2015 by the learned trial Judge. The prosecution had made an application for exhibiting these documents and for reading them in evidence. The accused had given no objection for giving exhibit numbers, but, had objected to reading those statements in evidence. Learned counsel for the appellants submitted that even the Magistrate who recorded their statements is not examined and, therefore, these statements cannot be read in evidence.

38. Learned APP relied on the case of **Madi Ganga** (supra) in this connection. Paragraph-5 of that judgment is relevant in this connection, which reads as under :

“5. We desire to express no opinion on the question whether the extra-judicial confession made to P.Ws. 2 to 5 is barred under Section 24 of the Evidence Act. It is unnecessary for us to say anything on this question, since we are satisfied that the learned Sessions Judge was wholly wrong in excluding and the High Court was certainly right in acting upon the confessional statement made to the Magistrate. The learned Magistrate has put to the accused all the necessary questions to satisfy himself that the confession was voluntary. He has also appended the necessary certificate. We do not accept Shri Jain's submission that the learned Magistrate should have been examined as a witness. Section 80 of the Evidence Act makes the examination of the Magistrate unnecessary. It authorises the Court to presume that the document is genuine, that any statements as to the circumstances under which it was taken are true and that such confession was truly taken in accordance with law. Shri Jain submitted that if the Magistrate had been examined as a witness, the accused might have been in a position to show, by cross examination that the confession recorded by the Magistrate was not voluntary. The Magistrate has

appended a certificate that he was satisfied that the confession was voluntary. No circumstance has been brought out in the evidence justifying the calling of the Magistrate as a witness. We do not think that the circumstances of the case justify any comment on the alleged failure of the prosecution to examine the Magistrate as a witness.”

In the present case, the JMFC at Dapoli had mentioned that the accused were produced before him separately on 22.1.2014. The statement is followed by noting of the learned JMFC in consonance with Sub-section (4) of Section 164 of Cr.P.C. He has also given his reasons as to why he believed that the confession was genuine. These confessional statements were recorded after 6.15 p.m.. The record of the case shows that the Advocate of the accused Nos.2 & 3 had made an application before the Magistrate that their statements should not be recorded and that further time may be given to them. That application was made on 22.1.2014 itself. Similar application was made on behalf of accused Nos.4 & 5 because the Advocates wanted to have discussion with the accused. Accused No.1 had retracted his

confession on 3.2.2014. On 2.5.2014, accused Nos.1, 2, 3 and 4 through joint application had retracted their confessions. Thus, the confessions were retracted by the accused on these dates. The application dated 22.1.2014 is particularly important because a specific request was made on behalf of the accused that four days time should be given to them after removing the influence of the police. This application was rejected. The prosecution could have explained this particular circumstance by examining the Magistrate.

The observations in paragraph-5 in **Madi Ganga's** case (supra) shows that there could be certain circumstances which can be brought in evidence justifying calling of the Magistrate as a witness.

39. The record shows that the confessional statements were retracted by the accused. In such cases, the ratio of the Hon'ble Supreme Court in the case of **Pyare Lal Bhargava** (supra) as well as in the case of **Parmananda Pegu** (supra) is relevant.

. Paragraph-7 of **Pyare Lal Bhargava's** case (supra) reads thus:

“7. The second argument also has no merits. A retracted confession may form the legal basis

of a conviction if the court is satisfied that it was true and was voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only rule of prudence. It cannot even be laid down as a flexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars.”

40. In **Parmananda Pegu’s** case (supra) reliance was placed on an earlier judgment of the Hon’ble Supreme Court in the case of **Subramania Goundan Vs. State of Madras**⁴ and the ratio of that judgment in respect of retracted confession was approved. In **Subramania Goundan’s** case (supra) it was observed that as a

4 (1958) SCR 428

matter of prudence and caution which has sanctified itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated. But it does not necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession.

41. In the present case, there is not a single circumstance which corroborated the confessional statements. As discussed earlier, the circumstances of identification of the accused and the ornaments are not proved beyond a reasonable doubt. There is only a cursory reference to the confession in the statements recorded under Section 313 of Cr.P.C. The accused have denied having given such confessions.

42. From the above discussion, it has to be held that the

prosecution has failed to prove its case against the appellants beyond reasonable doubt and, therefore, they deserve to be acquitted. Hence, the following order :

:: O R D E R ::

- i. Criminal Appeal Nos.1089/2015, 836/2016 and 212/2016 are allowed.
- ii. The appellants Santosh Prakash Gurav, Kiran Krishna More and Imran Shaikh Abdul Sattar Shaikh are acquitted from all the charges which they faced in Sessions Case N.15/2014 before the Additional Sessions Judge, Khed.
- iii. Accused No.1 Imran Shaikh Abdul Satta Shaikh is on bail. His bail bonds shall stand discharged.
- iv. Criminal Appeals are disposed of accordingly.

(SARANG V. KOTWAL, J.)

PRADIPKUMAR
PRAKASHRAO
DESHMANE

Deshmane (PS)

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