



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

CRIMINAL APPEAL NO. 105 OF 2019

Shrikant @ Rama s/o Narayan Chavan,
Age : 23 years, Occu : Business,
R/o. Ekta Nagar, Pathri, Dist. Parbhani.

...Appellant
(Orig. Accused)

Versus

The State of Maharashtra

...Respondent

.....

Mr. Sudarshan J. Salunke – Advocate for the Appellant
Mrs. S. N. Deshmukh – APP for respondent/State

.....

AND

CRIMINAL APPEAL NO. 132 OF 2021

Satish s/o Panchram Hirwe,
Age : 26 years, Occu : Business,
R/o. Ekta Nagar, Pathri,
Tq. Pathri, Dist. Parbhani.

...Appellant
(Orig. Accused No.2)

Versus

The State of Maharashtra,
through Pathri Police Station,
Dist. Parbhani.

...Respondent

.....

Mr. C. V. Dharurkar – Advocate [appointed] for the Appellant
Mrs. S. N. Deshmukh – APP for respondent/State

.....

**CORAM : R. G. AVACHAT
AND
NEERAJ P. DHOTE, JJ.**

RESERVED FOR JUDGMENT ON : 20.06.2024
JUDGMENT PRONOUNCED ON : 15.07.2024

JUDGMENT [Per Neeraj P. Dhote, J.] : -

1. Both these Appeals filed under Section 374(2) of the Code of Criminal Procedure, 1973, are against the Judgment and Order dated 18.01.2019 passed by the learned Sessions Judge, Parbhani in Sessions Case No. 65 of 2016, convicting the Appellants for the offence punishable under Sections 302, 364, 392 r/w 397, 201 r/w 34 of the Indian Penal Code [hereinafter referred to 'IPC'] and sentencing them as follows : -

Sr. No.	Offence	Sentence
1.	S.302 r/w S.34 IPC	Imprisonment for life and fine of Rs.10,000/-, in default of payment of fine, to suffer further rigorous imprisonment for two years.
2.	S. 364 r/w S.34 IPC	Rigorous imprisonment for five years and fine of Rs.5,000/-, in default of payment of fine, to suffer further rigorous imprisonment for six months.
3.	S.392 r/w S.397 IPC	Rigorous imprisonment for five years and fine of Rs.10,000/-, in default of payment of fine, to suffer further rigorous imprisonment for one year.
4.	S.201 r/w S.34 IPC	Rigorous imprisonment for three years and fine of Rs.5,000/-, in default of payment of fine, to suffer further rigorous imprisonment for three months.

2. The Prosecution's case as seen from the Police report is as under : -

2.1. On 08.02.2016, Somnath Apparao Mode [hereinafter referred to 'deceased'] came to the jewellery shop of his nephew Sachin @ Ramesh Gurulingappa Mode situated at Pathri, Dist. Parbhani. The nephew handed over him gold ornaments weighing 40 tolas, 5 kg silver

and cash amount of Rs.5.00 lakh. Thereafter, deceased proceeded towards Parbhani in a Swift VDI Car bearing No.MH-22/U-6547 with Appellant Shrikant @ Rama Chavan (hereinafter referred to as accused no.1). At Gitanjali hotel at Pathri, Appellant Satish Panchram Hirwe (hereinafter referred to as accused no. 2) joined them. They all went to one Hotel Rajgad situated at Manwat Road, Parbhani, where the Appellants made the deceased consume liquor and thereafter they took him in the car and proceeded towards Parbhani. While proceeding, they stopped vehicle near Tadborgaon around 23:00 hrs on the pretext of urination. While in the car, accused no. 2 caught hold of both the hands of deceased and accused no. 1 slit the throat of deceased by using knife, which resulted in his death. Thereafter, both the accused took the gold and silver ornaments as well as car from the deceased and threw his dead body in a well situated in the agricultural field of one Namdeo Dhana Rathod near Kuppa Pati. The Appellants burnt the blood stained clothes of the deceased, blood stained Car Mat and caused damage to the car in the Kuslamb Ghat by igniting fire. Accused Nos. 3 and 4, who are acquitted, received the gold and silver ornaments from the appellants.

2.2. Since deceased did not return home, his nephew (PW.1) lodged missing report with Pathri Police Station on 09.02.2016. On 13.02.2016, he (PW.1) received a phone call from the Police informing

him that one dead body was found in the well. The dead body was that of Somnath Apparao Mode. The valuables which the deceased was sporting, were not found on the dead body. The inquest was drawn. The body was sent for *post mortem*. The last rites were performed and thereafter P.W.1 lodged report with the Police and Crime bearing No. 40/2016 came to be registered with Pathri Police Station. During the investigation, the Appellants and the acquitted accused came to be arrested. The gold ornaments and the vehicle came to be seized. The statements of witnesses were recorded. The knife used in the crime came to be seized at the instance of accused no. 2. The clothes of the accused came to be seized. The seized muddemal was referred for examination to the Chemical Analyzer. It was revealed from the investigation that, with the intent to rob the deceased, the Appellants abducted the deceased, committed his murder, disposed of body as well as the vehicle and thereafter they were provided shelter by the acquitted accused and, therefore, the Charge-Sheet came to be filed against the Appellants and the two acquitted accused.

3. On committal of the case, the learned Sessions Court framed the Charge below Exh. 40 against accused nos. 1 and 2 for the offence punishable under Sections 364 r/w 34, 302 r/w 34, 392 r/w 397, 201 r/w 34, and for the offence punishable under Sections 212 r/w 34 and 412 r/w 34 of the IPC against two acquitted accused. The

Appellants and the acquitted accused denied the Charge and claimed to be tried.

4. To prove the Charge, prosecution examined in all 18 witnesses and brought on record the relevant documents. After the prosecution closed its evidence, the learned trial Court recorded the statements of the Appellants and the acquitted accused under Section 313(1)(b) of the Code of Criminal Procedure. After hearing both the sides and appreciating the evidence on record, the impugned Judgment and Order came to be passed convicting accused Nos. 1 and 2 and acquitting accused Nos. 3 and 4.

5. It is submitted by the learned advocate for the Appellants that the case is based on circumstantial evidence. Though informant lodged report against the Appellants that the deceased accompanied the appellants on the fateful night, appellant no. 2 is not named in the missing report. Since accused no. 1 was a flourishing jeweller, he was falsely implicated in the offence by the informant due to business rivalry. There is a delay in lodging the report. No motive has been brought on record by the prosecution. Though the recovery is shown at the instance of the accused, the ornaments were not having the Hallmark of the informant's shop, therefore, the said recovery was not that of the ornaments which were in the possession of the deceased. It is

unimaginable that after so many days from the date of the incident, the Appellants would carry such quantity of ornaments in their pant pocket. No identification of the recovered articles was made by mixing them with the similar articles. There is four days' delay in the discovery. The places which according to the prosecution were pointed out by the Appellants were already known to the Police and, therefore, it cannot be relevant under Section 27 of the Evidence Act. There is no evidence that muddemal articles were sealed so as to rule out the possibility of tampering. The circumstances brought on record by the prosecution do not conclusively establish the Charge against the Appellants and the conviction recorded by the learned trial Court is required to be set aside and the Appellants are entitled for the acquittal. In support of his submissions, he relied upon the Judgments, which would be considered in the later part of this Judgment.

6. It is submitted by the learned APP that the informant (PW.1) has given the reasons for the delayed report. Informant had seen both the Appellants lastly with the deceased and, therefore, burden shifts on the Appellants. The informant identified the ornaments which were seized from the possession of the Appellants, as the same ornaments which he had given to the deceased soon before the incident. The weapon i.e. knife used in the crime is seized at the instance of Accused No. 2. The reports of chemical analysis show blood of the

deceased on the articles. The prosecution has proved the circumstances which point towards the involvement of the Appellants in the Crime and the learned trial Court has rightly convicted them. He submits that the Appeals may be dismissed.

HOMICIDAL DEATH : -

7. The evidence of PW1 – Sachin @ Ramesh show that deceased was his uncle. Since deceased did not return home after leaving their shop in the evening of 08.02.2016, he lodged missing report in the evening of 09.02.2016. On 13.02.2016, he was asked to come at village Kuppa as one dead body was found in a well. Accordingly, he went to the said spot. The dead body was removed from the well and it was of Somnath Apparao Mode. He noticed injury on the neck of dead body, which was caused by a sharp weapon. The ornaments which the deceased was sporting were missing.

7.1. The evidence of P.W.8 – Siddhaling Gurulingappa Mode show that he is the real brother of P.W.1 – Sachin @ Ramesh Gurulingappa Mode. On 13.02.2016, Pathri Police called him at Kuppa Phata. He reached there. He was called to act as a panch for the inquest. There were injuries and white spots on the dead body. The inquest Exh. 91 was drawn. The clothes of the deceased were seized under the panchanama at Exh. 92. The clothes at Article 'W' to 'W-3' were the same. The panchanama of spot at Exh. 94 was drawn, which was the agricultural field having one well in a dilapidated condition.

8. The evidence of PW.10 – Omprakash Gurulingappa Mode, who is the real brother of P.W.1 – Sachin @ Ramesh, show that on 13.02.2016, he came to know that vehicle of their uncle was found in a burnt condition in Kusalamb Ghat. They were called by the Police Officer at Kuppa. They went on the spot. The body of his uncle (Somnath Apparao Mode) was found in a well at Kuppa Phata, which was removed. He noticed injury on the neck. The ornaments which the deceased was sporting were missing.

9. The evidence of P.W.12 – Priyanka Laxman Zade show that she was the Medical Officer at Primary Health Centre [in short 'PHC'], Kuppa, Tq. Wadwani, Dist. Beed. On 13.02.2016, she performed *post mortem* on the dead body of Somnath Mode which was brought to the PHC. On examination of dead body, she found that the *rigor mortis was absent. The body was partly decomposed. There was greenish discolouration over both iliac. Peeling of skin was present around eyes, both thighs laterally, back, right ankle, soles and palms. Left upper limb was abducted as shoulder joint and flex at elbow joint. Lower limbs both extended at hip joint and knee joint. On internal examination, she found cut throat injury (incise wound) of 7.5 x 2.5 cm on left antero lateral side of neck with clear margin. The depth of wound was 4 cm near right side and 2 cm near left side. Tailing present on lateral side and with transection of thyroid cartilage and larynx. Cutting through*

the sin, superficial fascia, platysma sternocleido mastoid muscle on left side, left irregular jugular vein, left carotid artery.

9.1. The further evidence of Medical Officer show that all other organs were congested and intact. On examination of abdomen, she found minimal distension with gases and some semi digested food present in small intestine. In large intestine, minimal distension with gases with fecal matter. The time of death was estimated six hours since last meal. The samples were collected for chemical analysis. She found the cause of death as '*hemorrhage due to grievous injury to neck structures due to cut throat injury (incise wound)*'. The *post mortem* report at Exh. 108 was prepared. The injuries were sufficient to cause death in ordinary course of nature, even if timely treatment was given. The injuries mentioned in Column No. 17 were possible by use of Article '9' knife.

10. The cross-examination of the aforesaid witnesses show that the aforesaid evidence was not seriously disputed. The evidence of aforesaid witnesses is corroborated by the inquest and the *post mortem* report. Even during arguments, the homicidal death of Somnath Mode is not disputed. On the basis of this evidence, the Prosecution has established that death of Somnath Mode, who was the uncle of PW1- Sachin @ Ramesh, PW8 - Siddhaling Mode and PW10 – Omprakash Mode, was Homicidal.

11. Undisputedly, the case is based on circumstantial evidence. The circumstances upon which the Prosecution based its case are (a) last seen together, (b) discovery / recovery under Section 27 of the Indian Evidence Act and (c) Chemical Analysis report. The learned advocate for the Appellants relied upon the Judgment in the case of **Shailendra Rajdev Pasvan and others Versus State of Gujarat and others**, reported in **(2020) 14 SCC 750**, wherein settled principles in respect of the case based on circumstantial evidence are reiterated i.e. (i) that every link in the chain of circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt and (ii) all the circumstances must be consistent pointing out only towards the guilt of the accused. There is also reference of the previous judgments of the Hon'ble Apex Court in respect of the said principles. There cannot be any dispute in respect of the above settled position in law which exists right from the case of **Sharad Birdhichand Sarda v State of Maharashtra, (1984) 4 SCC 116**.

[a] **LAST SEEN** : -

12. On this point, learned advocate for the Appellants cited the judgment in the case of **Kanhaiyalal Versus State of Rajasthan, (2014) 4 SCC 715**, in support of his submission that this circumstance does not by itself necessarily lead to inference that accused committed crime.

13. According to P.W.1 – Sachin @ Ramesh, he was running a jewellery shop in the name and style as ‘Shraddha Jewellers’ at Pathri. Deceased came to his shop in a four wheeler on 08.02.2016. He handed over him 40 tola gold, 5 kg silver and cash amount of Rs. 5.00 lakh and thereafter deceased left for Parbhani at about 08:30 p.m. accompanying the Appellants. He received a telephonic call of his aunt [P.W.2] i.e. wife of deceased at about 10:30 p.m. informing him that the deceased did not return home. They searched for deceased. They even searched for deceased with the relatives, but, in vain. On 09.02.2017, at around 08:30 p.m., he lodged a Missing Report with Pathri Police Station, which is at Exh. 51. From the cross-examination, it is seen that there was no reference in the Missing Report that his uncle carried gold and silver with him.

14. As per evidence of P.W.10 – Omprakash Mode, he himself and his brother P.W.1 – Sachin @ Ramesh were looking after their jewellery shop and deceased was their uncle who was working as a teacher at Karanji Kharba, Tq. Manwat and was residing at Parbhani. Deceased used to come to the said shop everyday for collecting and carrying with him the ornaments in his four wheeler. On 08.02.2016, deceased came to the shop at 08:00 p.m. Approximately 40 tola gold, 2 to 2½ kg silver and cash amount of Rs.5.00 lakh, collected by selling

food grains, were handed over to the deceased and the deceased left with Appellant No. 1 in his four wheeler. At about 10:00 pm., he received a phone call from his Aunt [P.W.2] that the deceased did not return home. They tried to call him but could not connect. They searched for him in the night and also on the next day, however, in vain. He called Appellant No. 1, who picked up the call and informed him that he was at Tuljapur and avoided to answer the questions. In the evening of next day, they lodged the Missing Report with Pathri Police Station.

15. The wife of deceased, namely, Mandakini Somnath Mode is examined as P.W.2. Her evidence show that at the time of incident, she was residing with deceased. Deceased was a Teacher by profession. The jewellery shop at Pathri was in her name as 'Shraddha Jewellers'. On 08.02.2016, her husband (deceased) left the house to attend the duty in his four wheeler, however, he did not return home till 09:00 p.m. She tried to contact him on his mobile phone, however, it was not established. Her nephew [P.W.1] also attempted to call, however, it was not connected. They searched for deceased with relatives, but, in vain. On the next day, her nephew [P.W.1] lodged the missing report.

15.1. The evidence of P.W.10 – Omprakash Mode show that he did not corroborate the evidence of P.W.1 – Sachin @ Ramesh that both the Appellants accompanied the deceased. Therefore, there is variance in

the evidence of both these witnesses on the point as to with whom the deceased left their jewellery shop.

16. Secondly, both the witnesses i.e. P.W.1 and P.W.10 deposed about receiving a phone call from the wife of deceased (P.W.2) in the night of 08.02.2016 inquiring about her husband i.e. the deceased. Even the evidence of P.W.2 show that she called P.W.1 and inquired about her husband. The evidence of these three (3) witnesses nowhere show that P.W.1 – Sachin @ Ramesh Mode and P.W.10 – Omprakash Mode informed P.W.2 – Mandakini Mode that deceased had come to their shop and left with the Appellants. It would have been the most natural conduct on the part of P.W.1 and P.W.10 to inform P.W.2 about the same when she had specifically called to inquire about the deceased. Not informing about the deceased to P.W.2 by P.W.1 and P.W.10 leads us to draw an adverse inference in respect of prosecution case that the deceased was lastly seen with the Appellants.

17. From the evidence of aforesaid three witnesses i.e. P.W.1, P.W.2 and P.W.10, it is clear that P.W.1 lodged missing report [Exh.51] with Pathri Police Station on the next day i.e. 09.02.2016. Admittedly, the said missing report is lodged at the 24th hour from the time the deceased left the jewellery shop. P.W.1 admits that, till 08:30 p.m. of next day the report was not lodged. It is, therefore, clear that for the

first time the Missing Report was lodged at 24th hour since the deceased went missing. From the said evidence it becomes clear that for 24 hours P.W.1 and P.W.10 did not disclose to anyone that deceased left their jewellery shop in the company of Appellant No. 1 or the Appellants. This conduct makes us to draw adverse inference in respect of prosecution's case that the deceased was lastly seen with the Appellants.

18. The evidence of P.W.1 and P.W.10 show that Appellant No. 1 was dealing in jewellery and was having the jewellery shop in front of their shop. Had the deceased left with Appellant No. 1 or both the Appellants, it would have been natural conduct on the part of these two witnesses to inquire with Appellants about the deceased. The evidence of P.W.1 nowhere show that he contacted Appellant No. 1 or Appellant No. 2 in that regard. The evidence of P.W.10 that he called the Appellant No. 1 who informed him that he was at Tuljapur and avoided to answer his questions, was an improvement from his previous statement, which is proved from the evidence of P.W.18, who recorded the statement. This unnatural conduct on the part of these two witnesses makes us to view their evidence that deceased was lastly seen with the Appellants with doubt.

19. Admittedly, the crime came to be registered on the report [FIR] lodged by P.W.1 on 14.02.2016. The same is at Exh. 52. As

already discussed while dealing with the circumstance of homicidal death that the body of deceased was found on 13.02.2016. The Advocate for Appellants relied on the judgment in the case of **Thulia Kali Versus The State of Tamil Nadu**, (1972) 3 SCC 393, wherein the object of insisting upon prompt lodging of the report to the Police is considered and also that delayed First Information Report quite often results in embellishment which is a creature of afterthought. Undisputedly, P.W.1 stated in the report [FIR] that the deceased took with him 40 tola gold, 5 kg. silver and cash amount of Rs. 5.00 lakh and accompanied both the Appellants. Admittedly, P.W.1 did not mention in the missing report at Exh. 51 that the deceased carried with him gold and silver. It is only to the effect that deceased left the shop carrying cash of Rs. 5.00 lakh, with Appellant No. 1. This clearly show material inconsistency in the missing report and FIR.

20. There is one more aspect which creates reasonable doubt about the case put forth by the informant [P.W.1]. The evidence of P.W.17 – Vitthal Panditrao Katore show that, at the relevant time, he was attached to the Local Crime Branch (LCB) at Parbhani and the Police Inspector – Sanjay Hibare directed him and other policemen to conduct inquiry in the missing report and on 13.02.2016, he took Appellant No. 1 in his custody at Pune. That time, Appellant No. 1 was carrying one bag having gold and silver ornaments.

21. The evidence of P.W.18 – API Ajaykumar Laxminarayan Pande - the Investigating Officer, show that on 14.02.2016, he received investigation of this crime and on the basis of Report submitted by P.W.17, he arrested accused no. 1 under the panchanama at Exh. 136. It is, therefore, clear that Appellant No. 1 was taken into custody by LCB on 13.02.2016 and on 14.02.2016, he was arrested. From the above discussion it is clearly established that only after Appellant No. 1 was apprehended, P.W.1 lodged report with the Police that deceased left his shop with the Appellants on 08.02.2016 carrying gold and silver ornaments & cash amount of Rs.5.00 lakh with him and the Appellants murdered him. The evidence of P.W.1 further go to show that, in supplementary statement dated 20.02.2016, he stated that gold ornaments worth Rs. 3,62,000/- were stolen from his shop and again in the supplementary statement dated 30.04.2016 he stated that the gold ornaments worth Rs. 8,47,150/- were stolen from his shop.

22. From the above discussion, it is clear that P.W.1 went on to develop the story or kept adding in the story. At the cost of repetition, for 24 hours he and his brother kept mum and did not disclose anyone that the deceased accompanied Appellant No.1 or the Appellants. Secondly, in the missing report he names Appellant No. 1 as the one who accompanied the deceased and states that the deceased carried Rs.

5.00 lakh from him. Thirdly, he did not lodge any report immediately on 13.02.2016 when dead body was found in the well. Though he deposed that he ought to have filed report on 13.02.2016 but due to ill-health of his Aunt (PW.2) he could not approach the Police, it is difficult to digest this version in the light of his evidence that there were several members in his family. The evidence on record go to show that PW.10 and PW.8 were his brothers. Despite this, there was no prompt Report. Fourthly, it is only after Accused No.1 was taken into custody, PW.1 lodged the report with Police with the version that deceased left his shop with gold and silver ornaments and cash amount of Rs.5.00 lakh, accompanied by both the Appellants.

23. There is one more aspect which creates doubt about prosecution's story. According to PW.1 – informant, deceased asked for Rs. 5.00 lakh for his shop and, therefore, he gave the said amount. However, the evidence of PW.2-Mandakini, who was the wife of the deceased, show that the said shop under the name and style 'Shraddha Jewellers' is in her name and owned by her. When the shop which was run by PW.1 was owned by the wife of deceased, there was no occasion for deceased to ask for such an amount for his shop.

24. From the above discussed evidence on record, the prosecution's case and the evidence that the deceased lastly left in the

company of Appellants or was lastly seen in the company of the Appellants is required to be seen with doubt. The evidence of P.W.1 and P.W.10 on the point of last seen together does not inspire confidence. No reliance can be placed on such inconsistent evidence led by the prosecution on the point of last seen. Thus, in our considered view, the circumstance of last seen together is not firmly and conclusively established by the prosecution.

SEIZURE OF ORNAMENTS : -

25. According to the prosecution, the Appellants were found in possession of gold and silver ornaments. As per evidence of P.W.17 – Katare, he apprehended Appellant No. 1 at Pune and found one bag containing gold and silver ornaments in his possession. According to him, the gold ornaments comprised of ladies finger rings, gents finger rings, golden beads, nose rings, golden beads of different shapes, seven piece pendent, ear tops, silver finger rings. Whereas, P.W.4 – Gajanan Ramkishan Waghmare in his evidence deposed that on 14.02.2016, he acted as a panch in Pathri Police Station. The Police Officer, Jeweller – Prabhakar Udawant (PW16), P.W.1 – Sachin @ Ramesh and Appellant No. 1 – were present. Appellant No. 1 was possessing gold in his pant pocket comprising gold necklace, gold beads, mangalsutra pendants, bormal, some silver ornaments and cash amount of Rs. 10,000/-, which was removed.

26. There is complete variance in the evidence of P.W.17 and P.W.4. According to P.W.17, Appellant No. 1 was possessing gold ornaments in one bag and according to P.W.4, the ornaments were in his pocket. The prosecution is unable to throw light on these material aspects.

27. So far as Appellant/Accused No. 2 is concerned, according to P.W.5 – Sarjerao Anantappa Patne, he acted as a panch on 25.02.2016. He was called by Police near Renuka Goddess Temple at Mahur. Police, accused no. 2, P.W.5 and his friend were present there. Appellant No. 2 was possessing gold articles in his pocket comprising gold beads, viz. ashtapailu, seven piece pendent, ear tops, earrings, finger ring and mangalsutra pendent. Cash amount in the form of 24 currency notes of denomination of Rs. 500/- and one phone was found with Appellant No.2. The P.W.18 – Ajaykumar Laxminarayan Pande - Investigating Officer deposed of arresting Appellant No. 2 on 26.02.2016. According to him, the gold ornaments of Rs. 9,80,287/- were seized by the Police Constable of LCB from the possession of Appellant No. 2.

28. It is strange that such quantity of valuables were being carried by the Appellants in their pant pocket. Admittedly, Appellant No. 1 was having his Jewellery Shop. Mere possession of such valuable

with the Appellants is not sufficient. It is only when the valuables found in their possession was relating to the Crime, it will be an incriminating circumstance.

29. The evidence of P.W.1 show that, during his evidence before the learned trial Court, he was shown the gold and silver ornaments seized in the crime and he identified the same. In his cross-examination, he admitted that the Police had not shown him the gold and silver ornaments by mixing them with other ornaments. Learned advocate for the Appellants relied on the judgment in the case of Ashish Jain v. Makrand Singh and Ors., 2019 Cri.L.J. 1316, in support of their submission that identification of the ornaments without mixing them with similar or identical ornaments was not in accordance with due procedure. There cannot be dispute on the said aspect.

30. Moreover, the evidence of P.W.1 show that the articles which were prepared in his shop were having Hallmark of his shop and when small beads or big beads were prepared, they were not having hole. His evidence show that the beads which were shown to him were old and having hole and there was no Hallmark of his shop on the ornaments. His evidence show that the old beads were not have shining. His evidence show that the articles which he identified during his evidence, did not bear the Hallmark of his shop.

31. The further evidence of PW.1 show that he did not provide the list of pledged ornaments to the police. The evidence of PW.18-API Pande show that no document was seized from the shop of informant (PW.1). His evidence further show that he issued a notice to the informant (PW.1) to submit documents, but he did not produce any receipt or document from his shop. His evidence further show that neither he visited the informant's shop nor had he verified the documents, stock register or sale or purchase receipts. His evidence further corroborate the evidence of PW.1 that there was no Hallmark on the articles which were seized during the investigation. Further, the evidence of PW.4 – Gajanan Waghmare show that when the ornaments were seized from the possession of Appellant No. 1, PW.1 informant was present in the Police Station.

32. With the above discussed evidence on record, it is clear that the prosecution has failed to establish that the ornaments/valuables found in the possession of the Appellants or seized during the course of investigation were that of the informant / PW.1 or that they were from the shop of the informant. Thus, possession of the valuables from the possession of Appellants cannot become an incriminating circumstance.

DISCOVERY / RECOVERY

33. Evidence of PW.3 – Vilas Punjaji Anandrao show that on 17.02.2016, he acted as a panch. Appellant No. 1 gave a statement that

he would show the places of alleged incident and his memorandum in that regard was prepared at Exh.66. Appellant No. 1 showed the places which included the jewellery shop, namely, 'Shraddha Jewellers' of P.W.2 and the well wherein the dead body was found. P.W.18 – API Pande also deposed on the same lines. The evidence on record clearly show that the Police knew those places and, therefore, it cannot be the discovery under Section 27 of the Evidence Act. As regards the other places, there is no evidence that anything was recovered or seized at the instance of Appellant No. 1. Thus, the said evidence will not be relevant.

34. Further, the evidence of P.W.3 show that on 19.02.2016, Appellant No. 1 gave statement to show the places where the blood stained clothes were destroyed and Memorandum at Exh.68 to that effect was prepared. Appellant No. 1 led them to a place i.e. Kaij – Ambajogai road, which was used for throwing the waste material, from where the police seized one half burnt rubber mat, one half burnt spectacle, one half burnt pen and ash of burnt clothes under the panchanama at Exh.69. However, his evidence nowhere show that the said articles were sealed.

35. P.W.18 – API Pande deposed of seizure of one half burnt rubber mat having blood stains, one half burnt spectacle, one pen and ash of burnt clothes at the instance of Appellant No. 1 on 19.02.2016

pursuant to his disclosure statement. Even his evidence nowhere show that the said articles were sealed.

36. The said discovery of the articles as deposed by P.W.3 and P.W.18 receives dent from the evidence of P.W.3, wherein he deposed that P.W.18- API Pande disclosed him that the accused had disclosed him some places and they have to visit those places. From this, the presence of panch witness at the time of disclosure statement by the Appellant is required to be seen with doubt. Further, his evidence show that the column of place in the Memorandum was blank.

37. P.W.4 – Gajanan Waghmare, who acted as a panch on 14.02.2016 when Appellant No. 1 was brought to the Police Station deposed in his further evidence that, on 21.02.2016 he was called at Pathri Police Station where another panch and informant (P.W.1) were present and the Police had shown half burnt pen and half burnt spectacle and the informant (P.W.1) identified the said articles as that of his uncle (deceased) and Panchnama at Exh. 81 was prepared to that effect.

38. From the above discussed evidence, it becomes clear that the said half burnt articles were not sealed and were shown to the informant. From this, the submission of the learned advocate for the

Appellants that the possibility of tampering with these articles cannot be ruled out, cannot be brushed aside. From the above discussed evidence, the CA report indicating blood group 'A' on the half burnt mat is liable to be discarded as there is no substantive evidence that the articles were having blood stains and that the said articles were sealed. The evidence clearly show that they were opened and shown in the Police Station. Thus, the said evidence of discovery/recovery at the instance of Appellant No. 1 will not be relevant and takes the prosecution's case nowhere.

39. The evidence of P.W.3 - Anandrao show that on 26.02.2016, Appellant No. 2 gave statement that he will show the places where the weapon of offence was thrown (*only admissible part is to be considered*) and article 'O' knife was seized at his instance from one agricultural field under the Memorandum at Exh.74 and Seizure Panchanama at Exh.75. The evidence of P.W.18 - API Pande is also on the same lines. This evidence is liable to be discarded in view of P.W.3's evidence that the said places were known to him, to another panch and to PW18 – API Pande prior to 26.02.2016. Moreover, the evidence of both these witnesses nowhere show that there were blood stains on the said knife and it was sealed after it was seized. Thus, the evidence in the nature of CA report showing stain of blood group 'A' on the knife will not be relevant.

40. Though the evidence of PW.4 – Waghmare show that Appellant No. 1 produced his baniyan, which was article 'O1', his evidence nowhere show that the said baniyan was having blood stains and it was sealed. Even otherwise, the CA report indicating Human Blood on the baniyan would not be of any assistance for the prosecution as the result of analysis is shown to be inconclusive.

41. In view of the above discussion, the evidence or circumstance in the nature of discovery/recovery and seizure is liable to be rejected and will not be relevant under Section 27 of Evidence Act.

MOTIVE :-

42. Though according to PW.18 – API Pande, the deceased was abducted by the Appellants with intent to commit robbery, the evidence of PW.1, who was the nephew of deceased, show that there was no previous enmity between his family and Appellant No. 1. Even the evidence of PW.10, who is the brother of PW.1 informant show that there was no previous enmity between him and Appellant No. 1. There is no evidence that Appellants had any motive to commit the Crime in question. Thus, the prosecution has failed to establish the Motive in the Crime.

CONCLUSION :-

43. On scrutiny and evaluation of the evidence on record as discussed above, we hold that the prosecution has miserably failed to conclusively prove the circumstances to link the Appellants with the crime. The circumstances brought on record by the prosecution, as discussed above, do not conclusively prove the Charge against the Appellants. The evidence of other witnesses takes the case of prosecution no further. In the backdrop of the above discussion, it is not possible to maintain the conviction and sentence of the Appellants recorded by the learned trial Court. Consequently, we pass the following order : -

ORDER

- [i] The Appeals are allowed.
- [ii] The conviction and sentence recorded by the learned Sessions Judge, Parbhani, in Sessions Case No.65 of 2016, vide Judgment and Order dated 18.01.2019, convicting the Appellants for the offence punishable under Sections 302, 364, 392 r/w 397, 201 r/w 34 of the Indian Penal Code and sentencing them as referred to in foregoing paragraph no.1, is quashed and set aside.
- [iii] The Appellants are acquitted of the offence punishable under Sections 302, 364, 392 r/w 397, 201 r/w 34 of the Indian Penal Code .

[iv] The Appellants be set at liberty, if not required in any other case.

[NEERAJ P. DHOTE]
JUDGE

[R. G. AVACHAT]
JUDGE

SG Punde