ABC 2019 (I) 126 BOM
ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(T.V. Nalawade & Vibha Kankanwadi, JJ.)
Criminal Appeal No. 0854 of 2015
Decided on 24 October, 2018
Aurangabad Bench

RAMESH ***- Appellant(s).***

Versus

STATE OF MAHARASHTRA ***- Respondent(s).***

Law Covered:- ***(A) Indian Penal Code, 1860 - Sections 302 & 394 — Conviction under — on the basis of TI parade & discovery memorandum panchanama — not reliable — Absolutely no recovery of a single article which was listed in the FIR — Conviction set aside. (Para 17 & 20)***

(B) Indian Evidence Act,1872 - Section 9 — Test identification parade — other persons made to stand in queue were not approximately of the age of accused — Held, conviction only on the basis of test identification parade cannot be awarded —even if the said test identification parade has been held properly with all safeguards. (Para 15)

(C) Indian Evidence Act,1872 - Section 27 — Discovery — of an article — Absolutely no mention of stealing of the article in the FIR — No supplementary statement of the informant stating about missing of article — Indian Penal Code, 1860 - Sections 302 & 394. (Para 16)

(D) Indian Evidence Act,1872 - Section 3 — Relevant fact — Identification of discovery article — discovery of wrist watch — no model number or any such identification was given — Name is not mentioned on the guarantee card — not explained — long delay between test identification of wrist watch & supplementary statement — Held, no evidence to show that he can be said to be the owner of said wrist watch. (Para 16)

(E) Indian Evidence Act,1872 - Section 27 — Discovery on the pursuance of discloser by accused — discovery from the house of relative of the accused — house owner not examined — fatal to prosecution. (Para 17)

(F) Indian Evidence Act,1872 - Section 27 — Discovery on the pursuance of discloser statement — discovery from the house of

relative of the accused — presence of house owner — not mentioned — Held, how accused could have directly gone into the house & dug the sand, is a question — non-explanation — fatal to prosecution. (Para 17)

(G) Indian Evidence Act,1872 - Section 27 — Discovery on the pursuance of discloser by accused — discovery from the house of relative of the accused — Held, statement of the house owner was necessary to show that the accused was either residing with him or for some time, he went to his house & then concealed the article. (Para 17)

(H) Indian Evidence Act,1872 - Section 27 — Discovery on the pursuance of discloser by accused — discovery from the house of relative of the accused — Held, If we presume that the article is taken out from the house of relative, then he can be said to be in possession of the same. (Para 17)

(I) Indian Evidence Act,1872 - Section 27 — Discovery on the pursuance of discloser by accused — Stated in the panchanama that though the digging was done, only plastic bag was found and gold ornaments & mobile were not found — IO does not say that any further interrogation was made with accused in presence of panchas — fatal to prosecution. (Para 18)

(J) Criminal trial — Hostile panch witness — Panch to the panchanama has turned hostile — fatal to prosecution. (Para 18)

(K) Indian Evidence Act,1872 - Section 27 — Discovery — Blood group — chemical analyzer's report — Blood on the discovered weapon of offence — not matching with the blood group of the deceased — fatal to prosecution. (Para 19)

(L) Indian Evidence Act,1872 - Section 9 — Test identification parade — Eye witness — was not taken at the test identification parade wherein other eyewitness had allegedly identified accused — Serious lacunas — Held, the prosecution story has been made untrustworthy. (Para 19)

(M) Indian Evidence Act,1872 - Section 27 — Discovery on the pursuance of discloser by accused — Accused was in the custody of police in another offence — Held, it appears that there was a highhanded act on the part of the IO to keep accused in custody without being any allegations against him — then showing his arrest belatedly in this case— With this background, the discovery of the wrist watch and the other panchanamas cast doubt— Conviction set aside. (Para 20)

Facts:- *As per the facts of the case three thieves entered in a house assaulted the inmates resulting in to death of one of them. It was found that gold and other ornaments, mobile, etc worth Rs. 72,800/- were stolen by those three thieves. FIR was lodged and on the basis of a secret information the IO came to know regarding the names of the accused.*

Present appellant who was in custody in another offence and on memorandum statement, he discovered the stolen wrist watch and mobile. The test identification parade was held. On the basis of statement of the present appellant, other accused persons were arrested. The third accused transpired to be a juvenile and the charge-sheet was filed against two accused. The learned trial court held present appellant guilty of committing offences punishable u/s 302 & 394, IPC. Another accused was acquitted of all the offences. After considering evidence on record the honourable Bombay High Court acquitted the accused.

Law of relief:- ***Taking one eyewitness at test TI parade and leaving other is a serious lacunas.***

Held:- In view of the decision in **State of Maharashtra Vs. Suresh** (supra) by Hon'ble Apex Court, we may not consider the two citations given by the learned Advocate for the appellant. Hon'ble Apex Court has observed that "It is the responsibility of the officer conducting the test identification parade to ensure that the object of the parade is achieved. If he permits dilution of the modality to be followed in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held." After goving through the minutes of the test identification parade, the Hon'ble Apex Court was satisfied that the Executive Magistrate had taken sufficient safeguards to hold the parade. However, in this case, basic purpose can be said to have been frustated when the other persons made to stand in queue were not approximately of the same age. Further, as aforesaid, as per the FIR, the thieves who had come to the house of the informant were between the age group of 20 to 22 years, whereas accused no.01 is 35 years old person. Nobody says that at that time, accused no.01 was looking like a person in the age group of 20 to 22 years. Therefore, conviction only on the basis of test identification parade cannot be awarded, even if it is taken for the sake of argument, that the said test identification parade has been held properly with all safeguards. (Para-15)

Another piece of evidence on which the prosecution intends to rely is the discovery of wrist watch. There is absolutely no mention of

stealing of wrist watch in the FIR. There is no supplementary statement of the informant stating that at a later point of time, her son had disclosed her about missing of his wrist watch and mobile. No doubt, PW 02 Kusum says that golden articles were also stolen. PW 06 Datta, father of PW 05 Vignesh, is also silent on that point. PW 05 Vignesh has identified the wrist watch. He says that he had kept wrist watch and mobile in the window and it was stolen. Definitely, when he was sleeping in the middle room and it has not come on record through PW 02 Kusum that anybody had entered the room in which son was sleeping, it is hard to believe that these two articles were also stolen at the same time. He has not given the model number or any such identification of the wrist watch. According to him, he had purchased the wrist watch from Matoshree Collection of Ghargaon. He had produced the guarantee card but his name is not mentioned on the same. He has not explained as to why he did not get his name mentioned in the guarantee card from the shop owner. He had not disclosed about the theft of his wrist watch till 20.12.2012. The important point to be noted is that the test identification of wrist watch was done at Tahsil office, Shrigonda, on 04.12.2012 but his supplementary statement has been taken on 20.12.2012. This does not inspire any confidence. There is no evidence to show that he can be said to be the owner of said wrist watch. (Para-16)

At the same time, we are also required to consider the discovery *panchanamas* Exhibit 35 and 36. According to PW 07 Bansi Pawar, who was panch to the said memorandum *panchanama*, accused no.01 gave statement that he had concealed the articles in a red colour purse below a centering strip in tin-sheet room below sand in the house belonging to his relative Vishal Chavan. According to the substantial evidence as well as contents of the memorandum panchanama, accused no.01 had taken all these persons to the said place and then he had removed the centering strip, dug the sane and took out a red colour purse in which the wrist watch was concealed. The important point to be noted is that the prosecution has not examined said Vishal Chavan. It is not even the case of PW 07 Bansi Pawar, that when they went to the said place, Vishal Chavan was present. How accused could have directly gone into the house of Vishal Chavan and dug the sand, is a question. The same fact has been also deposed by the Investigation Officer but he has also not answered the fact that where Vilas Chavan was and how the accused could have entered his house directly. The statement of Vishal

Chavan was necessary to show that the accused was either residing with him or for some time, he went to the house of Vishal Chavan and then concealed the article. If we presume that the article is taken out from the house of Vishal Chavan, then he can be said to be in possession of the same. Further, it is also to be noted that the said house was under construction at that time. It is not the case of the prosecution, that since the house was under construction, it was amenable to anybody. Under such circumstance, such scanty evidence cannot be believed. Another fact which has been left unanswered by the Investigation Officer, which is most important, is that he had interrogated accused no.01. What transpired in respect of the gold articles which were stolen from the house of the informant. The prosecution has not come with a case, that after the theft was committed, the accused persons had distributed it amongst themselves and then disposed them off. There is absolutely no recovery of a single article which was listed in the FIR. (Para-17)

There is another discovery at the behest of accused no.01 upon his statement that he would discover mobile and gold ornaments. Mobile was stated to be concealed in muck heap in front of house of his brother Santosh Kale. The said mobile is also said to have been wrapped in a plastic bag and it was discovered by digging part of muck heap. It is to be noted that in the panchanama itself, it is stated that though the digging was done, only plastic bag was found and gold ornaments and mobile were not found. The Investigation Officer does not say that any further interrogation was made with accused no.01 in presence of panchas. PW 09 Pradip Kshetre, panch to the said panchanama, has turned hostile. (Para-18)

It is to be noted that PW 05 Vignesh has not identified accused no.01. He was not taken at the test identification parade wherein his mother had allegedly identified accused no.01. With such lacunas in the evidence of the prosecution, the prosecution story has been made untrustworthy. No doubt, one more piece of evidence is the discovery of the iron rod at the behest of accused no.01. But it is to be noted that the chemical analyzer's report Exhibit 14 says that the blood on the iron rod was of "B" group, whereas report Exhibit 16 says that the blood group of deceased Shankar Vethekar was "A". The test of blood of PW 06 Datta Vethekar, as per Exhibit 15, was inconclusive. Thus, Chemical Analyzer's report is not supporting the prosecution. (Para-19)

Taking into consideration the above said reasons, it can be concluded that the learned trial court has not appreciated the evidence properly. The apparent test identification parade and discovery memorandum *panchanama* have been believed. One more fact which cast doubt over the role of the Investigation Officer is that, according to him, accused no.01 was in the custody of police in another offence. It has come on record, that in that offence, accused no.01 was arrested on 17-11-2012. If we peruse register Exhibit 102, it is in respect of prohibitory action taken against present accused no.01. He was found on 17.11.2012 in suspicious manner while searching for accused persons in present (Judgment) (20) case. Earlier to that, an offence under Section 379 of the IPC vide C.R. No. 173/2006 was pending against him. However, if we consider the testimony of PW 19 Vishwas Nimbalkar, he had received information on 24.12.2012, that the accused is involved in the case. In cross examination, he has stated that the accused was arrested on 24.11.2012 in a chapter case under Section 110 of the Bombay Police Act and then after his release on bail, he was arrested in this case. He denied the suggestion that accused was taken in custody on 17.11.2012. However, when extract of the register Exhibit 102 was shown to him, he has admitted the same. Thus, it appears that there was a highhanded act on the part of the Investigation Officer to keep accused no.01 in custody without being any allegations against him and then showing his arrest belatedly in this case. With this background, the discovery of the wrist watch and the other *panchanamas* cast doubt. With such doubts, the learned trial court ought not to have convicted accused no.01. (Para-20)

Counsel:- ***For Appellant(s):*** *Mr. Anil M. Gaikwad, Adv.*
For Respondent(s): *Mrs. P.V. Diggikar, Adv.*

Cases Referred:-

1. *The State of Maharashtra Vs. Rajesh alias Kaka Madanlal Soni & others [1998 Bom.C.R. (Cri.) 245], (Para-7)*
2. *Vilas Vasantrao Patil Vs. The State of Maharashtra Through Bhandup Police Station [1996 Cri.L.J. 1854], (Para-7)*
3. *State of Maharashtra Vs. Suresh [2000(1) SCC 471], (Para-8)*
4. *Kalyan s/o. Bansidharrao Renge Vs. The State of Maharashtra & others [2018(1) Bom.C.R.(Cri.) 559], (Para-8)*

JUDGMENT

SMT. VIBHA KANKANWADI, J.: - 1. Present appeal has been filed by the original accused no.01, challenging his conviction for the offences punishable under Section 302 and 394 of the Indian Penal Code, in Sessions Case No. 65 of 2013, by District Judge-4 & Additional Sessions Judge, Ahmednagar, dated 21.10.2015.

2. The prosecution has come with a case, that informant Kusum Dattatraya Vethekar (PW 02) is resident of Ghargaon Khomne, Taluka Shrigonda, District Ahmednagar. She used to reside with her husband, parents-in-law, one son and one daughter. Her husband was serving as driver with M.I.D.C., Ranjangaon Ganpati. He used to visit the house on every Saturday and Sunday. Their house is situated in the field. All of them including her husband had taken dinner around 08.00 p.m. and watched T.V. till 11.30 p.m. on 11.11.2012. Thereafter, she and her husband went to sleep in one room. Her son went to sleep in the middle room. Her parents-in-law and daughter slept in the third room. While going for sleeping, they had locked the gate to the veranda (Padvi) of the house. But the three doors of the house were open. Around 01.00 a.m. of 12.11.2012, she heard shouts of her father-in-law and, therefore, she woke her husband up and they came out. At that time, three thieves came near her, who were holding iron rods. Till then, she saw that her husband was laying down on a cot in the veranda in injured condition. There were blood stains on his clothes. One of the thieves asked her to give her ornament from the neck and then he himself snatched her Mangalsutra and also silver anklets. Two thieves were standing near gate. One of them went in the room where she was sleeping. He had opened the iron cupboard, took the things from the cupboard out. Another thief told her that she should open another cupboard, otherwise she should be assaulted by iron rod. But then, he gave blow of the iron rod on her leg. Out of fear, she went to the room where her inlaws were sleeping. At that time, her mother-in- law was in the veranda but father-in-law was found unconscious in injured condition on the cot. His clothes were also soaked in blood. She, therefore, shouted from the window towards the neighbouring house. After her shouts were heard, the thieves ran away. Her son and neighbour Anna Khomne took her husband and father-in-law in jeep for treatment. Thereafter, she searched for the articles and found that gold and other ornaments, mobile, etc worth Rs. 72,800/- were stolen

by those three thieves. Those thieves were talking in Marathi and were between the age group 20 to 22. Out of them, one was heighted and thin. All of them were wearing black colour clothes and half pant. One of them had covered his mouth. Other two were short in height as compared and were thin. Her father-in-law and husband were admitted in Dr. Kalamkar's hospital but her father- in-law was declared dead. She went to Police Station and then lodged the first information report. On the basis of her first information report, offence vide C.R. No. I-139/2012 came to be registered and investigation was undertaken.

3. During the course of investigation, *panchanama* of the spot was carried out. The inquest *panchanama* of the dead body of the father-in-law was also carried out and then dead body was sent for post mortem. Statements of witnesses were recorded. Dog squad was called. Around 24.12.2012, secret information was received regarding the names of the accused by the Investigation Officer PW 19 Vishwas Nimbalkar. Earlier to that, by way of statement, son of the informant had produced guarantee card of his wrist watch which was seized by executing *panchanama*. Accused no.01 was in custody in another offence and on memorandum statement, he discovered the stolen wrist watch and mobile from Falsundar Mala at Ahmednagar. The test identification parade was held. On the basis of statement of accused no.01, other accused persons were arrested. Further statements of witnesses were recorded. The third accused transpired to be a juvenile and, therefore, a separate charge-sheet was filed against them before Juvenile Justice Board. The property, which was seized at the time of *panchanama*, was sent for chemical analysis. After completion of investigation, charge-sheet was filed against two accused.

4. After committal of the case, both the accused were produced before the learned trial court. Charge was framed. Contents of the charge were read over and explained to the accused. They pleaded not guilty and claimed to be tried. Trial was conducted. The prosecution has examined as many as 20 witnesses in order to bring home guilt of the accused. Taking into consideration the evidence on record and hearing both sides, the learned trial court has held accused no.01 i.e. present appellant guilty of committing offences punishable under Section 302 and 394 of the Indian Penal Code and has been sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 10,000/-, in default of payment of fine, to suffer rigorous

imprisonment for one year. Accused no.01 was acquitted of the offence under Section 342 read with Section 34 of the IPC. Accused no.02 has been acquitted of all the offences. Hence, this appeal by original accused no.01.

5. Heard learned Advocate Mr. A.M. Gaikwad for the appellant and learned Additional Public Prosecutor Mrs. P.V. Diggikar for the respondent - State. Perused the record and proceedings.

6. It has been vehemently argued on behalf of the appellant, that for convicting accused no.01, the learned trial court has relied on the alleged confessional statement i.e. memorandum, discovery and the test identification parade. However, the learned trial court has not appreciated the evidence properly. If the first information report is perused, it does not disclose stealing of watch which is alleged to be belonging to the son of the informant. PW 05 Vignesh is the son of the informant. He has also stated that he had not stated regarding stealing of his wrist watch when earlier statement was recorded. His statement came to be recorded regarding stealing of his wrist watch after it was allegedly recovered under Section 27 of the Indian Evidence Act. None of the other articles have been recovered by the Investigation Officer. As regards the test identification parade is concerned, it can be, in fact, used only for corroborative purpose. The test identification parade, in this case, has not been held as per the guidelines given in the criminal manual. The incident had taken place in the intervening night of 11.11.2012 and 12.11.2012, whereas test identification parade has been held on 09.12.2012. PW 02 Kusum has not specifically identified accused no.01 though in substantial evidence she says that the accused before the court are same thieves. As per the prosecution story, accused no.01 was arrested on 17.11.2012 in another case, but was arrested in the present case on 24.11.2012. The alleged confessional statement does not make any statement as to what has been done with the stolen articles. PW 18 Ramesh Ghodke is the panch to the test identification parade and the *panchanama* is at Exhibit 64. The educational qualification of the said panch is only 5th standard and according to him, the Tahsildar had conducted test identification parade. The test identification parade is, in fact, carried out by Executive Magistrate. Further, he has many admissions in the cross conducted on behalf of respondent no.01. PW 20 Prakash Tade is another panch to the test identification parade and PW 14 Bhaskar Bhos is Special Judicial Magistrate. He has stated that

the place of test identification parade is just near to the lockup in the police station. Therefore, place where test identification parade was conducted is also required to be considered. As per PW 05 Vignesh, his mobile and wrist watch was kept in the window and it has been stolen. As per the FIR and the substantial evidence of PW 02 Kusum, it has not been stated that any of the thieves had gone to the room of PW 05 Vignesh. Even the test identification of wrist watch has been done on 04.12.2012. But then, supplementary statement of PW 05 Vignesh had been taken on 20.12.2012. He has stated that the fact of theft of wrist watch was not disclosed due to fear. But then in cross, he admits that during the period of investigation from 12.11.2012 to 20.12.2012, police were visiting his house many times. Therefore, there is no substance in the say, that due to fear till 20.12.2012, he had not disclosed the fact of missing his mobile and wrist watch. That is the only piece of evidence which is connecting the appellant to the crime. Otherwise, there is nothing on record. As per PW 07 Bansi Pawar, the recovery *panch*, the watch and the mobile has been discovered on 24.11.2012 from open space. The panch to the seizure of guarantee card i.e. PW 04 Mahesh Jagtap has turned hostile. PW 10 Kisan Jagtap was another *panch* to the same *panchanama*. But he has also not supported the prosecution. PW 08 Munir Jamadar, PW 15 Anil Dhaunde and PW 17 Bandu Nilankar have been examined in order to prove the identification of the wrist watch. PW 05 Vignesh has not produced the receipt on record which would have clarified the model of the wrist watch which he had purchased. It is also surprising that the mother was not having any knowledge about the purchase of the wrist watch by the son. The guarantee card does not bear the name of PW 05 Vignesh. Therefore, there is no cogent evidence to connect the recovery of the wrist watch to the ownership of PW 05 Vignesh. It has been further submitted that the evidence in the form of Chemical Analyser's report is not supporting the prosecution. There is also recovery of iron bar by accused no.01 which is said to be two feet long. Blood stains were found on the same but they did not match. With such shaky evidence, the learned trial court ought not to have convicted accused no.01. On the basis of same evidence, accused no.02 has been acquitted.

7. Learned Advocate appearing for the appellant has relied on decision of this Court in ***The State of Maharashtra Vs. Rajesh alias Kaka Madanlal Soni & others [1998 Bom.C.R. (Cri.) 245]***. In this case, it has been held that, to secure evidence of an identification to be fair

and beyond reproach, it is expected that the suspect should not be shown to the identifying witnesses. The identification parade should be held in the manner stipulated by the criminal manual issued by the High Court of Judicature, Appellate Side, Bombay. It provides that the guidelines are illustrative and not exhaustive. When it is admitted that there are lapses in holding the test identification parade, then such identification cannot be relied upon. He further relied on the decision of this Court in ***Vilas Vasantrao Patil Vs. The State of Maharashtra Through Bhandup Police Station [1996 Cri.L.J. 1854]***. In this case also, insistence has been given on adhering to the guidelines given in the criminal manual regarding holding of identification parade.

8. Per contra, the learned Additional Public Prosecutor has submitted that in ***State of Maharashtra Vs. Suresh [2000(1) SCC 471]***, it has been held that "the object of conducting test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the subject is the real person whom the witnesses had seen in connection with the said occurrence. So, the officer conducting test identification parade should ensure that the said object of the parade is achieved." It has been further observed, "if potholes were to be ferreted out from the proceedings of the magistrates holding such parades possibly no test identification parade can escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated every test identification parade would become unusable." Relying upon this pronouncement by the Hon'ble Apex Court, this Court in ***Kalyan s/o. Bansidharrao Renge Vs. The State of Maharashtra & others [2018(1) Bom.C.R.(Cri.) 559]*** held that though there are lapses in holding test identification parade, the evidence in that respect cannot be discarded. Therefore, she submitted that the guidelines issued in criminal manual are not mandatory. The evidence of the prosecution, in this case, was direct evidence coupled with circumstantial evidence. It has been proved by the prosecution that death of father-in-law of the prosecutrix, namely, Shankar Vethekar was homicidal in nature. The post mortem report gives probable cause of death as head injury. Those three persons had come with an intention to stealing the property and, therefore, there was assault by means of iron rod on Shankar. The said iron rod has been

discovered by accused no.01. Further, he has also discovered the wrist watch which was stolen at the same time belonging to PW 05 Vignesh. This evidence was sufficient to connect accused no.01 to the crime. She, therefore, supported the reasons given by the learned trial court while convicting accused no.01.

9. The prosecution has examined PW 12 Dr. Pravin Bothe, who had conducted post mortem of deceased Shankar Vethekar. Probable cause of death is head injury. He had noted one CLW over left ear, size 3 X 2 X 1 cm. Internal examination showed fracture of left parietal and temporal bone. In clear terms, he has stated that it was homicidal death. Such kind of head injury is possible due to forceful blow of iron rod. This fact is not seriously disputed by accused no.01. Therefore, there is no hesitation in holding that death of Shankar Vethekar was homicidal in nature.

10. PW 16 Dr. Rahul Pandit had examined Dattatraya Vethekar, husband of the informant. He had found fracture to skull bone depressed with head injury and the said injury was grievous in nature. At that time also, history of assault by unknown thieves was given. That means, the injury had connection with the incident.

11. The prosecution has come with a case, that the present appellant i.e. accused no.01 is one of the author of the crime. In fact, as per PW 02 Kusum, there were three thieves. Accused no.02 has been acquitted by the learned trial court and prosecution has not preferred any appeal against the acquittal. It is stated that the third accused was held to be a juvenile and, therefore, he might have been tried before the Juvenile Justice Board. Under this circumstance, it is now required to be seen as to whether accused no.01 can be said to be the author of the crime.

12. PW 02 Kusum, PW 05 Vignesh and PW 06 Datta are corroborating each other on the fact that they went to sleep around 11.30 p.m. The informant and husband woke up around 12.30 to 01.00 a.m. after hearing shout of deceased Shankar. PW 06 Datta came out of the room and later on when PW 02 Kusum came out, she found PW 06 Datta laying on cot in injured condition. PW 06 Datta says that when he came out, he was assaulted from the backside and he is not aware as to who had assaulted him. Immediately he had become unconscious. Therefore, his testimony is not at all helpful to connect accused no.01 to the crime. At the cost of repetition, it is stated that definitely crime has been committed but the only fact that is required to be assessed as to whether accused no.01 is the author of the crime.

13. From the testimony of PW 02 Kusum, it can be seen that she had opportunity to see the accused persons. No doubt, none of these three witnesses have stated that they have put on the lights of either their respective rooms or from the veranda. But then, in her examination in chief, PW 02 Kusum has stated that her house is full of electricity supply and the lights were on at the time of incident. Even if it is taken as a true fact, she had the opportunity to see the accused persons. Out of the three thieves, one had concealed his face under a scarf. It is stated that one accused had height and other two were short (dwarf). It has not been extracted from her that accused no.01 was not the person who had covered his face and was not the tall person. If we consider the arrest *panchanama*, height of accused no.01 is stated to be 5 feet 4 inches. The most important fact is that according to the first information report as well as substantial evidence of PW 02 Kusum, the age group of thieves was 20 to 22 and 22 to 23, respectively. She has not given further details like complexion. Interestingly, in the identification parade *panchanama*, age of accused no.01 is mentioned as 35 years. So also, the arrest *panchanama* and the judgment of the trial court shows that the age of accused no.01 is 38 years. According to the prosecution, the informant had identified accused no.01 at the time of test identification parade. In order to prove the test identification parade, the prosecution has examined PW 18 Ramesh Ghodke and PW 20 Prakash Tade. Both were panchas and PW 14 Bhaskar Bhos is the Special Judicial Magistrate. All these three persons are supporting the prosecution. They have stated that PW 02 Kusum had identified accused no.01. The Investigation Officer is not coming with a case that he had held or requested to hold a separate test identification parade for accused no.02. Why no such identification parade was held in respect of accused no.02, is a question which has been left unanswered.

14. As per PW 02 Kusum, she was called for identification parade. She had identified only one person as thief. The report of PW 14 Bhaskar Bhos regarding test identification parade is at Exhibit 64. It can be seen that the said report is very much cryptic. In all seven persons were made to stand in a queue. The age of each one of them is given which ranges from 21 to 40.

15. In view of the decision in **State of Maharashtra Vs. Suresh** (supra) by Hon'ble Apex Court, we may not consider the two citations given by the learned Advocate for the appellant. Hon'ble Apex Court has observed that "It is the responsibility of the officer conducting the

test identification parade to ensure that the object of the parade is achieved. If he permits dilution of the modality to be followed in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held." After goving through the minutes of the test identification parade, the Hon'ble Apex Court was satisfied that the Executive Magistrate had taken sufficient safeguards to hold the parade. However, in this case, basic purpose can be said to have been frustated when the other persons made to stand in queue were not approximately of the same age. Further, as aforesaid, as per the FIR, the thieves who had come to the house of the informant were between the age group of 20 to 22 years, whereas accused no.01 is 35 years old person. Nobody says that at that time, accused no.01 was looking like a person in the age group of 20 to 22 years. Therefore, conviction only on the basis of test identification parade cannot be awarded, even if it is taken for the sake of argument, that the said test identification parade has been held properly with all safeguards.

16. Another piece of evidence on which the prosecution intends to rely is the discovery of wrist watch. There is absolutely no mention of stealing of wrist watch in the FIR. There is no supplementary statement of the informant stating that at a later point of time, her son had disclosed her about missing of his wrist watch and mobile. No doubt, PW 02 Kusum says that golden articles were also stolen. PW 06 Datta, father of PW 05 Vignesh, is also silent on that point. PW 05 Vignesh has identified the wrist watch. He says that he had kept wrist watch and mobile in the window and it was stolen. Definitely, when he was sleeping in the middle room and it has not come on record through PW 02 Kusum that anybody had entered the room in which son was sleeping, it is hard to believe that these two articles were also stolen at the same time. He has not given the model number or any such identification of the wrist watch. According to him, he had purchased the wrist watch from Matoshree Collection of Ghargaon. He had produced the guarantee card but his name is not mentioned on the same. He has not explained as to why he did not get his name mentioned in the guarantee card from the shop owner. He had not disclosed about the theft of his wrist watch till 20.12.2012. The important point to be noted is that the test identification of wrist watch was done at Tahsil office, Shrigonda, on 04.12.2012 but his supplementary statement has been taken on 20.12.2012. This does not inspire any confidence. There is no evidence to show that he can be said to be the owner of said wrist watch.

17. At the same time, we are also required to consider the discovery *panchanamas* Exhibit 35 and 36. According to PW 07 Bansi Pawar, who was panch to the said memorandum *panchanama*, accused no.01 gave statement that he had concealed the articles in a red colour purse below a centering strip in tin-sheet room below sand in the house belonging to his relative Vishal Chavan. According to the substantial evidence as well as contents of the memorandum panchanama, accused no.01 had taken all these persons to the said place and then he had removed the centering strip, dug the sane and took out a red colour purse in which the wrist watch was concealed. The important point to be noted is that the prosecution has not examined said Vishal Chavan. It is not even the case of PW 07 Bansi Pawar, that when they went to the said place, Vishal Chavan was present. How accused could have directly gone into the house of Vishal Chavan and dug the sand, is a question. The same fact has been also deposed by the Investigation Officer but he has also not answered the fact that where Vilas Chavan was and how the accused could have entered his house directly. The statement of Vishal Chavan was necessary to show that the accused was either residing with him or for some time, he went to the house of Vishal Chavan and then concealed the article. If we presume that the article is taken out from the house of Vishal Chavan, then he can be said to be in possession of the same. Further, it is also to be noted that the said house was under construction at that time. It is not the case of the prosecution, that since the house was under construction, it was amenable to anybody. Under such circumstance, such scanty evidence cannot be believed. Another fact which has been left unanswered by the Investigation Officer, which is most important, is that he had interrogated accused no.01. What transpired in respect of the gold articles which were stolen from the house of the informant. The prosecution has not come with a case, that after the theft was committed, the accused persons had distributed it amongst themselves and then disposed them off. There is absolutely no recovery of a single article which was listed in the FIR.

18. There is another discovery at the behest of accused no.01 upon his statement that he would discover mobile and gold ornaments. Mobile was stated to be concealed in muck heap in front of house of his brother Santosh Kale. The said mobile is also said to have been wrapped in a plastic bag and it was discovered by digging part of muck heap. It is to be noted that in the panchanama itself, it is

stated that though the digging was done, only plastic bag was found and gold ornaments and mobile were not found. The Investigation Officer does not say that any further interrogation was made with accused no.01 in presence of panchas. PW 09 Pradip Kshetre, panch to the said panchanama, has turned hostile.

19. It is to be noted that PW 05 Vignesh has not identified accused no.01. He was not taken at the test identification parade wherein his mother had allegedly identified accused no.01. With such lacunas in the evidence of the prosecution, the prosecution story has been made untrustworthy. No doubt, one more piece of evidence is the discovery of the iron rod at the behest of accused no.01. But it is to be noted that the chemical analyzer's report Exhibit 14 says that the blood on the iron rod was of "B" group, whereas report Exhibit 16 says that the blood group of deceased Shankar Vethekar was "A". The test of blood of PW 06 Datta Vethekar, as per Exhibit 15, was inconclusive. Thus, Chemical Analyzer's report is not supporting the prosecution.

20. Taking into consideration the above said reasons, it can be concluded that the learned trial court has not appreciated the evidence properly. The apparent test identification parade and discovery memorandum *panchanama* have been believed. One more fact which cast doubt over the role of the Investigation Officer is that, according to him, accused no.01 was in the custody of police in another offence. It has come on record, that in that offence, accused no.01 was arrested on 17-11-2012. If we peruse register Exhibit 102, it is in respect of prohibitory action taken against present accused no.01. He was found on 17.11.2012 in suspicious manner while searching for accused persons in present (Judgment) (20) case. Earlier to that, an offence under Section 379 of the IPC vide C.R. No. 173/2006 was pending against him. However, if we consider the testimony of PW 19 Vishwas Nimbalkar, he had received information on 24.12.2012, that the accused is involved in the case. In cross examination, he has stated that the accused was arrested on 24.11.2012 in a chapter case under Section 110 of the Bombay Police Act and then after his release on bail, he was arrested in this case. He denied the suggestion that accused was taken in custody on 17.11.2012. However, when extract of the register Exhibit 102 was shown to him, he has admitted the same. Thus, it appears that there was a highhanded act on the part of the Investigation Officer to keep accused no.01 in custody without being any allegations against him and then showing his arrest

belatedly in this case. With this background, the discovery of the wrist watch and the other *panchanamas* cast doubt. With such doubts, the learned trial court ought not to have convicted accused no.01.

21. For the aforesaid reasons, we proceed to pass following order :-

(a) The appeal is hereby allowed.

(b) The conviction and sentence awarded to the appellant - original accused no.01, in Sessions Case No. 65 of 2013, for offences punishable under Section 302 and 394 of the Indian Penal Code, by the District Judge-4 & Additional Sessions Judge, Ahmednagar, on 21.10.2015, are hereby quashed and set aside. Present appellant - original accused no.01 is hereby acquitted of the offences punishable under Section 302 and 394 of the Indian Penal Code. He be set at liberty forthwith, if not required in any other case. He be released on P.R. of Rs. 15,000/- [Rupees fifteen thousand] with one surety of the like amount, in compliance of Section 437A of the Code of Criminal Procedure, 1973. The duration of the said bonds would be for six months. Fine amount paid, if any, be refunded to him.

(c) It is clarified that there is no change in the order of disposal of Muddemal.

Result:- Appeal allowed.

ABC 2019 (I) 142 BOM
ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(M. G. Giratkar, J.)

Criminal Revision Application (Revn) No. 06 Of 2010
With
Criminal Revision Application (Revn) No. 209 Of 2009,
Criminal Revision Application (Revn) No. 214 Of 2009
Decided on 30 October, 2018
Nagpur Bench

DINGURAM RAMAJI SANGORE & ORS. - Applicant(s).

Versus

STATE OF MAHARASHTRA & ORS. - Respondent(s).

Law Covered:- (A) Code Of Criminal Procedure,1973 - Sections 173 & 195 — Indian Penal Code, 1860 - Sections 120-B, 463