

(1) S.C.No.463/2009 (Judgment)

Received on : 18.09.2009

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Decided on : 24.01.2012.

Duration : 02 Y, 04 M 06 D

IN THE COURT OF ADDITIONAL SESSIONS JUDGE-3, AURANGABAD

AT AURANGABAD.

(Presided over by : S.N.Pathak)

SESSIONS CASE NO.463/2009

Exh-203

State of Maharashtra : **Complainant**
through Jinsi Police Station,
Aurangabad.

Versus

1) Jawedkhan @ Tingrya s/o Habibkhan, : **Accused**
Age: 21 years, r/o Dukhinagar, Tq.& Dist.

Jalna.

2) Pradip s/o Askaran Chandaliya,
age:47 years, R/o Pundliknagar,

Jadhavwadi, Aurangabad.

3) Ram s/o Sheshrao Bodkhe,
Age: 32 years, r/o Raje Sambhaji Colony,

Jadhavwadi, Aurangabad.

**Charge:- Under Sections 302,392 r/2w397,394,376,201,
456,457,458,459,412,411,414,109,and 212 IPC.**

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Advocate Shri G.J.Mote, for accused No.1,

Advocate Shri N.S.Ghanekar, for accused No.2,

Advocate Shri S.K.Barlota, for accused No.3.

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JUDGMENT

(Delivered on: 24th of January, 2012)

1/- Accused No.1 by name Jawedkhan @ Tingrya s/o Habibkhan has been prosecuted by Jinsi PSO for the offences punishable under Sections 302,392 r/w 397,394,376, 201,456,457,458,459 of I.P.C. While accused No.2 and 3 have been prosecuted by PSO Jinsi, for the offences punishable under Sections 411,412,414,212 and 109 of IPC.

2/- The prosecution case in short as as follows.

PW-7 by name Aniket Shankarrao Deshpande, filed FIR at Jinsi Police Station thereby contending that he resides in the house at Purva Apartment along with his sister. On 11.6.2009 he had gone to the company where is in service and his

sister Mansi was alone in the house. On 12.06.2009 at 5.00 am he returned to the house and gave telephonic call to Mansi on her mobile No.9764079150. However, the mobile phone was off & she did not open the the door though he knocked it. Therefore, he felt that Mansi might have slept and therefore, he had gone to the house of his friend by name Vivek Agrawal.

3/- At 10 am he again returned to his house and the door was closed from inside. He again tried to wake up Mansi, but no reply was given by Mansi from inside. Therefore he had gone to the gallery of his house from the grill in front of the gallery and entered into the house. At that time, Mansi was found sleeping on the bed on her stomach. Blood was coming out of her mouth and her both hands were tied to back side by head phone wire of mobile. Her legs were also tied by the cloth. Therefore, he was frightened and called Mrs. Soni, who resides in front of his house. The people entered into his house and saw the incident and he gave information to Police.

4/- Thus, Aniket Deshpande had informed by way of FIR that on 11.6.2009 to 12.6.2009 in between 9.30 pm to 10 am some body had entered into his house and

committed murder of his sister Mansi and therefore, he requested to take action. Thus, criminal law was set in motion.

5/- It also appears from the supplementary statement of Aniket Deshpande that he had informed Police about the theft of mobile phone of Mansi, his gold ring and his clothes and some cash.

6/- After receipt of said FIR, crime came to be registered vide Crime No. 65/2009 by Jinsi Police under Sections 302, 201 IPC and said crime was investigated by Police Inspector Shri Sopan Kisan Borse (PW-32). He had visited the spot and in presence of two panchas he had seized blood stained bet-sheet, chaddar, scissor having black coloured handle, one screw driver, one green coloured salwar, one nicker etc and prepared panchnama at Exh-29. The dead body was sent through PSI Akmal to Ghati hospital for post-mortem. Shri Akmal had seized black coloured mobile, one scarf, one T shirt, one blood-stained bracier under separate panchnama. PSI Shri Akmal had prepared inquest panchnama and handed it over to Police Inspector Shri Borse. Shri Akmal had also given the seized articles to him.

7/- During investigation, P.I. Shri Borse obtained the photographs of the

spot in question (Exh-32/1 to 35/5, not disputed by accused No.1.) Then he recorded statements of six witnesses. On 13.6.2009 he sent the seized clothes of Mansi and the viscera etc collected by the Medical Officer to the forensic science laboratory, for analysis. On 13.6.2009 he sent blood sample of Mansi, pubic hair, vaginal swab etc to the forensic science laboratory Mumbai for performing DNA test in order to decide whether she was raped.

8/- On 14.6.2009 he recorded statements of six witnesses. On 15.6.2009 he recorded statements of two witnesses. For investigation of the crime, he established three separate squads. API Shri Gautam Patare was serving with Chavni Police Station. He is having knowledge of syber crimes. They had received an information about the mobile shop from where Mansi had purchased that mobile. Therefore, he recorded statement of shop owner and the salesman of the shop. He also recorded the statement of the lady-mate of Mansi who was with her when Mansi purchased that mobile from “Zee Corner Mobile Shop”. He came to know about the receipt at Exh-39 purchased by Mansi. He obtained said receipt from “**Zee Corner Mobile Shop**” which was containing each and every details of the mobile.

9/- From the IMEI number mentioned on the receipt at Exh-39, API Shri Patare took the information of the mobile on which mobile, said IMEI number was visible. He obtained information from the Air-tel company. From said information, API Shri Patare had come to know that the IMEI number of the mobile of Mansi was visible on the mobile containing Sim-card No.9503667292. From the Tower location, API Shri Patare also came to know the spot from where the mobile was being used and it was being used in hotel "Pancham".

10/- Accordingly API Shri Patare had visited said hotel "Pancham" and seized that mobile and Sim-card from accused No.2 by name Pradip Chandaliya. API Shri Patare gave report to P.I.Bagul, along the seizure panchnama of mobile (Exh-77). He enclosed those papers given by Mr. Patare in investigation papers.

11/- During the course of investigation, Shri Bagul inquired towards Pradip Chandaliya as to how he got possession of that mobile. Pradip Chandaliya told that his son gave the Sim-card and Pradeep further told that his customer by name Javedkhan @ Tingrya gave mobile to him towards the bill of his hotel.

12/- The said Sony Erikson Company mobile was of the Model G-502. IMEI

number of that mobile was 354610029004627. Since the detail information of the mobile purchased by Mansi as per the receipt at Exh-39 tallied exactly to the details of the mobile seized from Pradip Chandaliya, he again made inquiry to Pradip and his son Mayur about the Sim-card.

13/- From the information received from Pradip Chandaliya, P.I.Borse came to know that accused Javedkhan @ Tingrya gave that mobile to Pradip towards the bill of hotel. Similarly Shri Bagul also took accused Javedkhan @ Tingrya in his custody on 22.6.2009 at 2.30 hours by night. In the interrogation made by him to Javedkhan, he admitted that he gave that Sony Erikson Mobile phone to Pradeep Chandaliya and therefore, he arrested accused Javedkhan & Pradip Chandaliya in this case at 3.30 hours by night by preparing arrest panchnamas at Exh-139 & 140.

14/- After arrest of accused Jawed, -P.I.Shri Bagul interrogated towards him. Accused Jawed told that after commission of crime, he changed his clothes and wore the clothes of informant. Accused Jawed also admitted that he took the gold ring from the house of informant and gave it to accused Ram Bodkhe, who incurred the expenses on him. Therefore, P.I.Shri Bagul took the search of accused Ram Bodkhe

and arrested him on 22.6.2009 at 5.00 pm under arrest panchnama at Exh-142.

15/- Again during the investigation, P.I. Shri Bagul sent accused Jawed to Ghati Hospital for medical examination. He requested the Medical Officer to collect blood sample, pubic hair, nail clippings and semen of the accused for analysis. In the house search of Ram Bodkhe one pistol was found and also one weapon known as “Khanjir” was found. On 22.6.2009 he obtained Police Custody of accused Jawed for 14 days from concerned J.M.F.C.

16/- On 23.6.2009 he interrogated towards the accused Jawed about the clothes on his person at the time of commission of this crime. Accused Jawed showed readiness to produce those clothes and as per the statement given by accused Jawed before him and panchas, he had recovered those clothes at the instance of Jawed from the garbage which was in front of the spot in question. The accused had produced one T shirt and one Jeans pant and therefore, he seized those clothes. There were blood stains on the front side portion of T shirt (Article-28). Hence he had seized those clothes under seizure panchnama (Exh-62). He obtained signature of accused below his statement as well as below the seizure panchnama.

17/- He also obtained Police Custody of accused Pradip Chandaliya and Ram Bodkhe from concerned J.M.F.C. On 23.6.2009 accused ram Bodkhe gave statement regarding the stolen ring which was received by him from accused Jawed and therefore, his statement was recorded in presence of two panchas. Then after, accused Ram Bodkhe led them near Tulsi Chamber and from the room of electric motor, accused Ram took out the gold ring and produced before them which came to be seized by P.I.Shri Borse under seizure panchnama (Exh-65).

18/- Again P.I.Shri Borse interrogated towards accused Jawed on 24.6.2009 regarding the clothes worn by him of informant Aniket, after the incident. Accused Javed showed readiness to show the spot where he had hidden those clothes below the garbage near Tapadiya Natyagraha. Hence statement of accused was reduced into writing before panchas and then from the spot shown by the accused, those clothes of Aniket i.e. one T shirt and one pant were recovered from the heap of garbage which was near Tapadiya Natyagraha. According to him, he prepared seizure panchnama (Exh-57). He sent all the four clothes seized at the instance of accused Jawed to forensic science laboratory for investigation, along with letter (Exh-46).

19/- Then on 25.6.2009 again during interrogation towards accused Jawed, he had recovered the original Sim-card of Vodaphone Company in the mobile phone of Mansi and the Sim-card was recovered from the shutter of the godown of Tulsi chamber at the instance of accused Jawed (Exh-54 and 54-A).

20/- For the DNA test, he called special kit from forensic laboratory Mumbai and in that kit, the controlled blood sample, semen sample of accused Jawed were sent for DNA test to forensic science laboratory, Mumbai. He also issued letter. The C.A.reports and DNA test reports received by him were included in investigation papers.

21/- On 30.06.2009 he sent accused Jawed to Ghati hospital for examination in order to know whether the accused Jawed is capable to perform sexual intercourse or not. Accordingly Jawed was examined and the letter issued by the Medical officer was included in investigation papers by P.I. Shri Borse.

22/- On 7.9.2009 Medical Officer Shri Gadge gave final cause of death certificate of Mansi (Exh-112). He got identified one gold ring and clothes of Aniket by issuing letter to the Executive Magistrate to arrange identification parade of those

articles. Accordingly he has recorded the statement of Executive Magistrate, who conducted the identification parade. He also recorded statement of witness Mayur Chandaliya i.e. son of accused Pradip who gave sim-card to Pradeep. After completion of investigation he filed charge-sheet against accused No.1 under aforesaid Sections and accused Nos.2 & 3 under Sections 411,412,414,109,212 of IPC.

23/- The learned Magistrate, after taking cognizance, committed the case to the Court of Sessions for disposal according to law.

24/- The then Additional Sessions Judge heard learned APP Shri Mugadiya, on behalf of State, Advocate Shri Mote, Advocate Shri Ghanekar and Advocate Shri Barlota for accused Nos.1 to 3 respectively. The learned Additional Sessions Judge had also gone through the Police investigation papers. After considering the arguments and after going through the Police investigation papers, he came to the conclusion that the prosecution had made out prima-facie case against accused No.1 to frame charge under Sections 302,392 r/w 397, 394,376,201,456,457,458,459, of IPC. Similarly, against accused Nos.2 & 3 by name Pradeep Chandaliya and Ram Bodkhe, he had noticed that the prosecution had made out the case against them to

frame charge under Sections 411,412,414,109 and 212 of IPC. Accordingly the learned Additional Sessions Judge had framed charge at Exh-13 under above sections against accused No.1 and charge under Sections 411,412,414,109 and 212 of IPC against accused Nos.2 & 3.

25/- He explained the contents of the charge to all accused in Marathi which they know. Even accused No.1 Javed also knows Marathi language. All the accused pleaded not guilty to the charge levelled against them vide their plea at Exh-14,15 & 16 respectively, recorded in Marathi and English and all of them claimed to be tried.

26/- From the line of cross examination as well as from the statements of all accused persons under Section 313 of Cri.P.C, their defence appears to be of total denial.

27/- In order to prove its case, prosecution has adduced evidence of 33 witnesses.

27/- In the light of the evidence adduced by panch witnesses regarding recovery of clothes of accused, clothes of informant Aniket Deshpande and gold ring, at the instance of accused Jawed and Ram Bodkhe is concerned, Advocate Shri

Mote on behalf of accused No.1 Jawed, and Advocate Shri Barlota, on behalf of accused No.3 Ram Bodkhe, have argued that the said evidence of panch witnesses is not trustworthy and reliable so as to prove the said memorandum-cum-discovery panchnamas as alleged by the prosecution. Advocate Shri Mote, by way of his written notes of arguments at Exh-199 has strongly contended that, therefore, the prosecution has failed to prove the presence of accused at the scene of offence. According to him, there is no direct witness to the incident and circumstantial evidence against Javed is not forming complete chain so as to infer that it was nobody but the accused by name Jawed who entered into the house of informant and Mansi Deshpande in order to commit the offence of theft & robbery and accordingly he committed theft of gold ring, mobile phone and clothes of Aniket & cash of Rs. 450/- and by giving threat to Mansi, he committed rape on her & committed her murder. Thus, in sum and substance, Advocate Shri Mote has submitted that charges levelled against the accused by name Jawed are not proved by prosecution beyond doubt. Advocate Shri Mote has also argued that the ownership of the ring is not established and unless and until it is so established, the offence of theft cannot be

said to be proved. Similarly, Advocate Shri Barlota has also argued that the memorandum-cum-discovery panchnama in respect of alleged gold ring recovered at the instance of accused Ram Bodkhe is not proved and therefore, he has also submitted that the charge levelled against accused Ram Bodkhe is not proved beyond doubt.

29/- So far as accused No.2 Pradip Chandaliya is concerned, Advocate Shri Ghanekar has argued that accused Pradip is not disputing that the mobile is that of Mansi. According to him, said mobile was handed over by accused Pradip to Police and that fact is also not disputed. However, Advocate Shri Ghanekar has submitted that the accused Pradeep had no knowledge that said mobile was stolen by accused Javed from the house of Mansi. Therefore, Advocate Shri Ghanekar has submitted that the fact that the mobile was stolen is not established nor it is proved that Pradip purchased stolen mobile knowingly that it was stolen.

30/- Advocate Shri Ghanekar has also submitted that because of the aforesaid fact, charge under Section 411 of IPC is not proved and at the most, accused Pradip could have been the best witness of the said fact. He has also argued

that Aniket has admitted that he did not find mobile of Mansi and even Police were also knowing about this fact. According to him, cross examination of Aniket Deshpande (PW-7) makes it clear that he was aware about the stolen articles. According to him, Police kept it secret up to 18.6.2009, since they wanted to trace out that mobile. Even the cross examination of Investigating Officer Shri Borse also shows that he must be aware regarding the theft of mobile of Mansi from the beginning. According to him, why this fact is not mentioned in the FIR by Aniket is no where explained. Hence according to Advocate Shri Ghanekar, because of these facts, no offence is proved against accused No.2 nor presumption under Section 114 of the Evidence Act is attracted here. Hence he has prayed to acquit accused No.2 also.

31/- Advocate Shri Mote has also argued orally that the intention of commission of murder of Mansi is not established. According to him, the motive for committing the crime assumes importance and for that purpose, he has relied on the ratio laid down by Hon'ble Supreme Court in the case of **“Wakkar and another Vs. State of U.P, reported in 2011 AIR (SCW), 1215”**. On this point, he has also relied

on the ratio laid down by Hon'ble Supreme Court in the case of “ **Subimal Sarkar Vs. Sachindra Nath Mondai, reported in AIR 2003, S.C.1108**”. In the light of the ratio Advocate Shri Mote has also argued that the circumstantial evidence should form complete chain so as to infer that the said crime was committed by nobody else but by the accused.

32/- Advocate Shri Mote has also argued that in an appeal against acquittal, inference against accused should be made sparingly in a situation where the findings of the trial Court are perverse and not possible on the evidence and if two views are possible, the one leading to acquittal should not be disturbed. For this purpose Advocate Mote relied on the ratio in the case of “**Rathinam Alias Rathinan Vs. State of Tamilnadu and another, reported in 2011(SCC)11-11-140**”. However in the honest opinion of this Court, the ratio cannot be applicable to this case, since this Court is not deciding any appeal.

33/- Advocate Shri Mote has also relied on the ratio in the case of “**Mustkeem alias Sirajudeen Vs. State of Rajasthan, reported in 2011 Crimes, 118**”. In that case, the material witnesses turned hostile and the recovery of the

weapon on disclosure of the accused was doubtful. There was overwriting in the recovery memos. Hence it was held that the case was vitiated by serious error and hence accused were acquitted.

34/- Advocate Shri Mote has also relied on the ratio in the case of “**Hate Singh Bhagat Singh Vs. State of M.P. reported in AIR 1953, S.C.468**” . In this case, accused put forward a reasonable defence which was likely to be true and in addition it was supported by two prosecution witnesses. Hence it was held that it raises reasonable doubt because of which the accused must get benefit of doubt. Hence accused was acquitted.

35/- Advocate Shri Mote has also relied on the ratio laid down by Hon'ble Bombay High Court in the case of “**Manik s/o Sitaram Jibhkate & Ors, Vs. State of Maharashtra and Another, reported in 2011 ALL M.R.(CRI.)2474**”, in which case of “**Jotiram Indrajeet Gore Vs. State of Maharashtra (2006 ALL MR (Cri.)N.O.C.14)**” was referred wherein it was held that when there are too many contradictions and omissions in the statements of witnesses, such evidence must be set apart.

36/- Thus, relying on the aforesaid ratios Advocate Shri Mote has strongly argued that in the light of said evidence of panch witnesses, the charges levelled against accused by name Javedkhan are not proved beyond doubt and hence benefit of doubt be given to the accused and he be acquitted.

37/- Advocate Shri Ghanekar for accused No.2 has also relied on the ratio laid down by Hon'ble Supreme Court in the case of “ **Trimbak Vs. State of M.P. Reported in 1954 Cri.L.J.335 (Supreme Court) (1)**”. In this case, in order to prove the charge under Section 411 of IPC, the guidelines are given and it is held that to prove the charge it has to be proved that the stolen property was in the possession of the accused and some persons other than the accused had possession of the property before the accused got possession of it, and that the accused had knowledge that the property was stolen property.

38/- Advocate Shri Ghanekar has also relied on the ratio laid down by Hon'ble Supreme Court in the case of “**Karnal Singh Uttam Singh v. State of Maharashtra, reported in 1976 Cri.L.J.842**”. In that case, it has been held that where the explanation which the accused had given was good enough to raise

serious doubts about the sustainability of a charge under Section 411, IPC. Hence it was held that accused was entitled to an acquittal.

39/- Advocate Shri Ghanekar has also relied on the ratio laid down by Hon'ble Supreme Court in the case of “ **Mohanlal v. State of Maharashtra, reported in 1979 Cri.L.J.1328**”, wherein it has been observed that accused must be shown to have reason to believe that the property was stolen.

40/- Thus relying on these ratios, Advocate Shri Ghanekar has argued that the prosecution has not established that accused Pradip Chandaliya was having knowledge that the property was stolen and therefore, he has prayed to acquit the accused.

41/- Advocate Shri Barlota for accused No.3, has relied on the ratio laid down by Hon'ble Supreme Court in the case of “ **Kuldip Singh v. State of Delhi, reported in AIR 2004 Supreme Court, 771**”. In this case, the witness to recovery stated that he had not seen actual recovery and he had not entered inside hut of accused from where articles were recovered. Thus, it was held that recovery of stolen article was not proved. According to Advocate Shri Barlota, when the panch

witnesses turned hostile the recovery of said articles cannot be said to be proved on the said testimony of investigator, he being an interested witness. For this purpose, Advocate Shri Barlota has relied on the ratio laid down by Hon'ble Jammu & Kashmir High Court, in the case of **“Rajkumar Vs. State, reported in 2005 Cri.L.J. 1322”**.

42/- Thus Advocate Shri Barlota has argued that in this case also the recovery panchas on the recovery of gold ring at the instance of accused Ram Bodkhe turned hostile and therefore, such recovery cannot be considered and hence he argued that accused Ram Bodkhe be acquitted.

43/- As against said submissions and the rulings cited on behalf of accused, APP Shri Mugadiya has strongly argued that even though recovery panchas do turn hostile, still the evidence of I.O can be considered and the hostility of the witness is not a reason to vitiate the recovery effected by Police Officer. For this purpose, APP Shri Mugadiya has relied on the ratio laid down by Division Bench of Hon'ble Bombay High Court in the case of **“Nana @ Dnyaneshwar v. State of Maharashtra, reported in 2004(2) B.Cr C 638”**.

44/- APP Shri Mugadiya has also argued that even though the witnesses have turned hostile, still his evidence remains admissible and Court can rely upon the dependable part of that evidence which is found to be acceptable and duly corroborated by other reliable evidence. For this purpose, APP Shri Mugadiya has relied on the ratio laid down by Hon'ble Supreme Court in the case of “**Himanshu @ Chintu v. State of NCT of Delhi, reported in 2011 (1) Bom. Criminal Cases, 682 (S.C.)**”.

45/- In this regard, APP Shri Mugadiya has also placed reliance on the ratio laid down by Hon'ble Supreme Court in the case of “**Gurjinder Singh v. State of Punjab, reported in 2011, (SCW) 1382**” . In this case, it has been held that a Police Officer can be a reliable witness if the Court finds him to be a truthful person and in that event there is no harm in relying upon his statement.

46/- Learned APP has also argued that merely because panch witnesses on the recovery turned hostile, evidence of the witness who effected recovery, would not be vitiated. For this purpose, he has relied upon the ratio laid down by Hon'ble Supreme Court in the case of “ **Mohd.Aslam Vs. State of Maharashtra, reported**

in (2001) 9 SCC, 362 (S.C)”.

47/- In the light of aforesaid ratios, APP Shri Mugadiya has strongly argued that even though the panch witnesses on recovery of clothes of accused and informant and also on the recovery of rings have not supported the prosecution on some material particulars, still the evidence of investigating officer P.I.Borse is trustworthy and reliable and is self explanatory and hence his evidence cannot be ignored and thrown away only because he is a Police Officer. According to him, the cross examination of P.I.Shri Bagul, has not brought sufficient material on record to disbelieve his evidence. P.I. Shri Bagul has no grudge against accused to depose false and hence he has prayed to accept his evidence in the light of aforesaid ratios.

48/- Learned APP Shri Mugadiya has argued that on the seized T shirt of accused Jawed at his instance, on front side, blood-stains were noticed and the C.A. Report on record makes it clear that, T shirt of accused Jawed which was on his person at the time of incident, the blood of “AB” blood group of Mansi was found. According to him, this is an incriminating circumstance against accused Jawed of which he has not given any explanation. For this purpose, learned APP Shri

Mugadiya has relied on the ratio laid down by Hon'ble Bombay High Court in the case of “**Gangadhar Nair v. State of Maharashtra, reported in 2001(2) B.Cr.C 525**”.

49/- Again learned APP Shri Mugadiya has argued that so far as recovery under Section 27 of the Evidence Act is concerned, the recovery of clothes would become an incriminating circumstance only if they contain blood or such other substance as would connect accused with crime. For this purpose, learned APP Shri Mugadiya has relied on the ratio laid down by Hon'ble Bombay High Court in the case of “**Kannayya @ Kanna Vishnu Vidhate v. State of Maharashtra, reported in 2010(1) B.Cr.C, 91.**”

50/- APP Shri Mugadiya has argued that in this case also blood-stained T shirt having blood of “AB” blood group of Mansi is recovered at the instance of accused Jawed which is incriminating circumstance against him.

51/- APP Shri Mugadiya has argued that recording said recovery of blood-stained T shirt from accused, he did not offer any explanation and therefore that itself is sufficient to prove his involvement in commission of crime. For this

purpose, learned APP Shri Mugadiya has relied on the ratio laid down by Hon'ble Bombay High Court in the case of “**Nazar Mohammad s/o Hayat Mohammad Shaikh v. State of Maharashtra, reported in 2002 (2) B CR C 881**”.

52/- APP Shri Mugadiya has also relied on other two ratios regarding its identification parade and regarding false plea. But in the honest opinion of this Court, these ratios cannot be applicable to the facts of this case. Learned APP Shri Mugadiya has also relied on the ratio in the case of “**Animireddy Venkataraman & Ors v. Public Prosecutor, H.C of A.P**”, which clarifies that the FIR not meant to be encyclopedic. While considering the effect of some omissions in FIR, on the part of informant, Court should consider the probable physical and mental condition of the first informant.

53/- In the light of said ratio, APP Shri Mugadiya has argued that even though Aniket Deshpande has not mentioned about the theft of gold ring, his clothes ,cash amount and mobile phone of Mansi in FIR while looking to his mental condition that fact may not be taken so strictly.

54/- Thus, APP Shri Mugadiya has strongly argued that the evidence on record apparently makes it clear that on the date of incident, accused entered into the house of Mansi in order to commit theft & robbery. When Mansi protested, accused No.1 committed rape on her and then he committed her murder. According to him, the P.M.Report and the evidence of Dr.Mugdalmath categorically discloses the homicidal death of Mansi and also the fact that she was raped. Recovery of mobile phone from accused No.2 also discloses that the accused Jawed handed over that stolen mobile to Pradeep Chandaliya towards his payment of bill and API Patare traced that mobile from the IMEI number of that mobile mentioned in receipt at Exh-39. According to him, that categorically proved the involvement of accused Jawed and accused Pradeep in the crime. Similarly, the recovery of gold ring at the instance of Ram Bodkhe from the electric motor room in Tulsi Chamber also shows that the said accused Ram Bodkhe was knowing that it was stolen property and therefore he had hidden that ring in that electric motor room. Thus he has argued that against accused Ram Bodkhe also the charge under Section 411 is proved.

55/- APP Shri Mugadiy has also argued that the C.A. Reports and D.N.A

test reports categorically prove the involvement of accused Jawed in the alleged crime and hence lastly he has prayed to convict all the accused persons for the charges levelled against them.

56/- I have considered those arguments and I have perused the aforesaid ratios laid down by Hon'ble Supreme Court and Hon'ble Bombay High Court in the cases relied on by Advocates of accused and by learned APP. Certainly as observed in aforesaid cases relied on by APP Shri Mugadiya, the Police witness i.e. Investigating Officer can be a reliable witness if the Court finds him to be truthful person. Similarly it is also ample clear that if on the clothes of the accused, blood-stains of the deceased are found and if he offers no explanation about the same, then that becomes incriminating circumstance against accused. Hence in the light of said ratios, the evidence adduced by the prosecution needs to be scrutinized.

57/- In the light of said arguments and cited rulings by both the parties, following points arise for my determination. Those points and answers to them are as follows for the reasons stated thereunder.

Points**Answers**

- 1) Whether the prosecution has proved : Yes.
that on 11.6.2009 after sunset and
on 12.6.2009 before sunrise, accused No.1
by name Jawed committed lurking house
trespass by night by entering in to the
building and house in possession of Mansi
and Aniket Deshpande?
- 2) Whether the prosecution has further : Yes.
proved that on aforesaid dates, time and
place, accused No.1 by name Jawed
committed lurking house trespass by
entering in the house of Mansi in order to
commit certain offence punishable under
Sections 392,302,376 etc?
- 3) Whether the prosecution has further proved : Yes.
that on same dates, at the same time and
place, accused No.1 by name Jawed
committed lurking house trespass by

entering in the house in possession of Aniket Deshpande and Mansi Deshpande which was used as a human dwelling, having made preparation for causing hurt to any person or to cause wrongful restraint to any person or putting any person in fear of any hurt assault or wrongful restraint, having taking precaution to conceal such house trespass from some person entitled to eject him by any of the six ways as under Section 445 as remaining possession having made preparation for causing hurt or wrongful restraint to any person?

- 4) Whether the prosecution has further : Yes.

proved that on the said dates, at the same time and place, accused No.1 Jawed committed theft amounting to robbery of mobile phone of Mansi, gold ring and cash of Rs. 450/- and at the time of commission

of robbery he used deadly weapons i.e scissor and screw driver and caused grievous hurt of Mansi?

5) Whether the prosecution has proved that, : Yes.

on 11.6.2009 and 12.6.2009, after the sunset and before sun rise i.e. at night time, accused No.1 by name Javed entered into the house of informant situated in Purva Apartment, Ahinsanagar, Aurangabad, and intentionally committed murder of Mansi Deshpande by smothering and by assaulting her with scissor and screw driver?

6) Whether the prosecution has proved that : Yes.

on the same dates, at the same time and place, accused No.1 by name Jawed committed rape on Mansi against her wish and without her consent?

7) Whether the prosecution has further : Proved against
proved that on 12.6.2009 and then after accused No.1

the accused Nos. 1 to 3 were having Javed only. knowledge that accused had committed an offence punishable with imprisonment for life, caused certain evidence connected with the said crime i.e. Sony Erikson Mobile, golden ring, Sim-Card, blood-stained clothes of him, to disappear or knowingly gave false information regarding the same with an intention to screen themselves from legal punishment?

8) Whether the prosecution has proved that : Yes.

On 12.6.2009 and then after the accused Nos.2 & 3 by name Pradeep Chandalia and Ram Bodkhe, dishonestly received and retained stolen property i.e. Sony Erikson Mobile phone and gold ring, respectively belonging to Mansi Deshpande and Aniket Deshpande knowingly or having reason to believe the same to be stolen property?

- 9) Whether the prosecution has further : No.
proved that on same dates and at the same
time at Aurangabad, accused Nos.2 & 3 by
name Pradeep Chandalia and Ram
Bodkhe, dishonestly received and
retained the stolen property i.e. Sony
Erikson Mobile and gold ring of Mansi
Deshpande and Aniket Deshpande, having
reason to believe that the same has been
transferred by committing dacoity?
- 10) Whether the prosecution has further : Proved against
proved that after 12.6.2009 at accused Ram
Aurangabad accused Nos. 2 & 3 by Bodkhe only.
name Pradeep Chandalia and Ram
Bodkhe voluntarily assisted in
concealing the property i.e. Sony
Erikson Mobile and gold ring which
they knew or had reason to believe
to be stolen property?

- 11) Whether the prosecution has further : No
proved that on 11.6.2009 after sun set to
12.6.2009 before sunrise, accused Nos.2
& 3 by name Pradeep Chandalia & Ram
Bodkhe abetted the crime committed
by accused No.1 at the house of Mansi,
punishable under Sections 302,376,392
r/w 397,,356, 356,456,457,458,459 etc?
- 12) Whether the prosecution has further : No
proved that on 12.6.2009 to 21.6.2009
accused Nos.2 &3 voluntarily concealed
accuse No.1 knowingly that accused No.
1 had committed an offence punishable
under Sections 302,376, 392, 457 etc of
IPC?
- 13) What order? : As per final order.

REASONS

58/- Initially, before discussing the aforesaid points, I would like to mention
the admitted facts which are as follows.

- 1) Exh29- spot panchnama of the spot in question at Purva Apartment Ahinsanagar, Aurangabad. The spot panchnama is not disputed by any of the accused.
- 2) Exh-30 - seizer panchnama of the clothes of deceased and witness. In this panchnama Police have seized head phone wire, scarf, T.shirt and bracier. The genuineness of this panchnama is not disputed by any of the accused.
- 3) Exh-31 Inquest Panchnama of the deceased by name Mansi Deshpande.
- 4) Exh-32 P.M. Report of the deceased. Prosecution has also proved it by examining Dr. Mudalimath and Dr.Gadge, who gave final cause of death certificate.

59/- Besides aforesaid documents, it is also not disputed that accused by name Pradip Chandaliya was running hotel “Pancham” on Jalna Rod, Aurangabad.

60/- In the light of aforesaid admitted facts and documents, now it would be proper to give the summary of the prosecution witnesses who are examined by the prosecution in support of its case.

61/- PW-1 to 10 by name Vivek Agrawal (Exh-28), Vaishali Khadke (Exh-33), Baburao Batade (Exh-34), Shantabai Soni (Exh-36), Manoj Mali

(Exh-37), Sheetal Sonawane (Exh-38), Informant Aniket Deshpande (Exh-39), Damodhar Ghuge (Exh-43), Shobhana Patil (Exh-45), and Sindhu Giri (Exh-46).

62/- Basically the evidence of all these witnesses categorically discloses that on 12.6.2009 Mansi Deshpande was found in dead condition and it also discloses that the household articles in the house of Mansi Deshpande and Aniket Deshpande were scattered elsewhere. The evidence of these witnesses coupled with spot panchnama and also coupled with the evidence of Dr. Mudalimath also makes it clear that the culprit had entered into the house of Mansi and Aniket Deshpande at night time with an intention to commit theft and by committing theft amounting to robbery of the mobile phone, gold ring, cash amount and the clothes of the informant, he committed rape on deceased Mansi and then committed her murder. It also appears from the injuries sustained by Mansi as narrated by Dr. Mudalimath that the death of Mansi was homicidal and the Medical Officers had noticed near about 21 injuries on the person of Mansi. Similarly, the evidence of Dr. Gadge below Exh-112 discloses the final cause of death of Mansi as “**Multiple penetrating wound over neck with transection of carotid vessels associated with signs of**

strangulation and smothering with injury over external genitals.

63/- Therefore, the aforesaid evidence of PW-1 to 10 who were not much cross examined except PW-7 Aniket Deshpande and PW-8 Damodhar Ghuge, coupled with the medical evidence, categorically proves the homicidal death of Mansi and also proves the robbery and theft committed by the culprit at the house of Mansi and Aniket Deshpande. So basically the rape on Mansi, her murder, the theft at the house etc are the facts which are being proved by the prosecution from the evidence of these witnesses and also with the help of the evidence of Dr. Mudalimath and Dr. Gadge and also with the evidence of .I.O Shri Borse.

64/- Therefore, it is to be seen now, who actually did the said offence. The prosecution has come with a case that it was nobody but accused No.1 by name Jawed who entered into the house of Mansi with an intention to commit theft and while committing theft since Mansi had awakened, she protested the act of accused and therefore, later on he committed rape on her and then committed her murder by committing theft of mobile phone, gold ring, clothes of Aniket and cash of Rs.450/-. On the basis of remaining evidence it is to be considered whether really the accused

No.1 by name Jawed is the author of said crime.

65/- Prosecution also examined panch witnesses by name Mukram Khan s/o Abdul Gaffar Khan, Hidyat Khan s/o Feroz Khan, Afroz Khan s/o Feroz Khan, and Asif s/o Mohammad Akbar before whom the clothes of accused Jawed, that of Aniket and gold ring of Aniket were seized. Basically these witnesses did not support the prosecution on some points and on some points they have supported. But the cross examination of these witnesses conducted on behalf of accused needs to be decided while scrutinizing their evidence.

66/- The prosecution also examined the Naib Tahsildar and panch witness on the identification parade of the clothes of Aniket and his gold ring. However, in the light of the cross examination of these witnesses, it seems that the presence of Police was there and one identification parade was conducted at Police Station. Hence I am of the opinion that no much weightage needs to be given to these witnesses on identification parade. It need not be considered. Even otherwise the clothes & gold ring were identified by Aniket & Shri Ghuge in the Court. That suffices the matter.

67/- So far as the mobile phone of Mansi is concerned, the prosecution has

adduced the evidence of PW-19 Police Constable Ravindra Bahule and PW-20 API Shri Gautam Patare who were the members of one of the squads to trace out the culprits and it seems that they noticed the IMEI number of the mobile telephone of Mansi on the mobile which was in possession of accused No.2 by name Pradip Chandaliya. It appears that the said mobile was seized from Pradip Chandaliya by API Shri Patare which appears to be major break through in respect of this crime. So far as the recovery of said mobile from accused Pradip Chandaliya is concerned, during the course of his argument, Advocate Shri Ghanekar has not disputed this fact. He has also not disputed that accused Pradip handed over that mobile to Police. Therefore, it seems that from accused Pradip Chandaliya said mobile of Mansi was seized. Accused Pradeep has failed to offer any explanation by way of his statement under Section 313 of Cri.P.C as to how said mobile came with him. Therefore, on the basis of the available evidence, inference needs to be drawn.

68/- Besides aforesaid evidence the prosecution has adduced the evidence of P.I. Shri Bagul who has explained in detail about the recovery of muddemal at the instance of accused Javed and Ram Bodkhe. It also appears that he wrote letters to

the Medical Officers to collect the blood & semen sample of accused Jawed for DNA test and also for chemical analysis and he sent muddemal i.e the aspirated vaginal fluid of Mansi, her blood sample etc to C.A. Laboratory Aurangabad and to Forensic Science Laboratory, Mumbai for DNA test and accordingly the DNA tests are positive and those speak against the accused. Said evidence will be considered and discussed separately.

69/- Medical Officer Dr. Heena Khan (PW-21, Exh-83) had collected the blood and semen sample of the accused for DNA test and she also examined accused clinically she noticed nothing to suggest that the accused by name Jawed is not capable to perform sexual intercourse. Her evidence is clear on the point that accused Jawed is able-bodied person to perform sexual intercourse.

70/- The prosecution has also examined mobile shop owner by name Abdul Rauf and the salesman by name Shaikh Nadeem and both of them have testified that Mansi had purchased that mobile from their shop and the salesman has identified the photograph of Mansi to be the girl who purchased the mobile from “Zee Corner Mobile Shop” of Abdul Rauf. Receipt at Exh-39 is identified by them to be the

receipt given by the shop of Abdul Rauf which contains each and every details of the mobile purchased by Mansi and which was found with accused No.2 Pradip Chandaliya.

71/- So, the aforesaid evidence adduced by the prosecution needs to be considered and scrutinized and on its basis, it is to be seen as to whether the prosecution has proved the charge levelled against accused No.1 and the charge levelled against accused Nos.2 & 3.

As to points No.1 to 7:-

72/- All these points are inter linked with each other and therefore, they are taken up jointly for discussion and decision.

73/- As stated earlier, the prosecution has examined total 33 witnesses to prove the guilt of the accused persons. So far as the accused No.1 is concerned, said evidence needs to be scrutinized.

74/- The evidence adduced by the prosecution can be classified in four to five parts. Those are as follows:

First part:- it consists of the evidence of first 10 witnesses including the evidence of Dr. Mugdalimath and Dr. Gadge.

Second part:- It consists of the evidence of P.C.Ravindra Bahule & API Shri Gautam Patare (Exh-74 & 75).

Third part:- It consists of the evidence of Panch witnesses and I.O. Shri Borse on the memorandum - discovery panchnamas. Panchas on discovery have not fully supported. But on the some points, they support and on some points they did not support. Hence evidence of I.O. Shri Borse needs to be considered.

Fourth part:- It consists of the evidence of Medical Officers Dr. Hina Khan, Dr. Mugdalimath, Dr. Gadge and C.A.reports & D.N.A. Test reports. This evidence is being that of experts, is rather more important. It is to be read along with the evidence of I.O Shri Borse, who seized the muddemal.

Also it consists of two Medical Officers who conducted post mortem. Said evidence discloses the fact that the culprit had entered into the house of informant and Mansi in order to commit theft and committed theft of mobile of Mansi, gold ring of the informant and his clothes along with cash of Rs.450/-. The spot panchnama as well as the evidence of above witnesses by name Vivek Agrawal, Vaishali Khadke,

Baburao Patade, Shantabai Soni, Manoj Mali, Aniket Deshpande, Shobhana Patil and Sindhu Gore shows that the household articles were lying scattered in the house of Mansi and Aniket and the supplementary statement given by Aniket shows that the culprit had committed theft of his gold ring, mobile phone of Mansi and clothes of informant and cash amount.

75/- The evidence of Medical Officer Dr. Mudalimath and Dr. Ghadge categorically discloses as to how Mansi was murdered and at the same time it also discloses that Mansi was raped. The P.M.Report is not disputed on behalf of accused No.1 by name Jawed. Therefore, in the light of said P.M.Report, it can be inferred that Mansi was raped and she was murdered and hence the death of Mansi is homicidal one.

76/- The evidence of informant by name Aniket Deshpande discloses that the mobile of Mansi and his gold ring & clothes were stolen from the house. It is not disputed that at the time of filing FIR, he might be aware of that fact. However, in the FIR he has not stated that said mobile phone, his clothes and his gold ring as well as cash of Rs.450/- were stolen. It seems that at the time of giving supplementary statement he has disclosed that fact.

77/- But if while lodging FIR the said fact was disclosed by the informant, then the culprit must have been become aware of it and he might not have given that mobile to accused No.2. Hence it appears that looking to this fact, even though the theft of above said articles was not disclosed while lodging FIR, still that itself does not affect the prosecution case. It also seems that in order to trace out the culprit with the help of mobile tower, after its use by the accused, the Police might not have allowed to disclose the stolen articles and hence looking to this fact also, the non mentioning of stolen articles in FIR does not affect much. Later on, by supplementary statement that fact was disclosed. Even Advocate Shri Ghanekar for accused No.2 has argued that the Investigating Officer also seems to be aware of said stolen articles on the date of incident itself in view of his cross examination. But if because of the aforesaid facts, the information regarding the stolen articles was not disclosed by the Police Officer also, then on that count the evidence adduced by the witness cannot be discarded. Even otherwise mental condition of informant also needs to be considered while lodging FIR.

78/- That apart, the evidence of PW-8 Damodhar Ghuge, discloses that at

the time of Birth-Day of Aniket, he had gifted that gold ring to Aniket Deshpande which was purchased by him from the shop of R.C. Bafna. The Manager of the shop of R.C. Bafna by name Ashok Kesharlal Chopda (PW-29, Exh-124) has also testified that the said ring was sold from the shop of R.C.Bafna since it bears the logo of R.C. Bafna. Certainly receipt is not produced but evidence of Damodhar Ghuge categorically discloses that he had purchased said gold ring from the shop of RC Bafna and gifted to Aniket on his Birth-Day. Hence the ring was with Aniket Deshpande on the date of incident and that fact has been proved, since nothing has been come out of the cross examination of these witnesses to disbelieve them.

79/- Similarly, the receipt at Exh-39 discloses that Mansi had purchased Sony Erikson Mobile from “**Zee Corner Mobile Shop**”, Nirala Bazar, Aurangabad. In this regard, the evidence of mobile shop owner by name Abdul Rauf (Exh-72) and the evidence of salesman by name Shaikh Nadeem (Exh-97) and also evidence of lady-mate of Mansi by name Sheetal Sonawane, categorically discloses that Mansi had purchased that mobile from “**Zee Corner Mobile Shop**” and its model was G-502. Mobile shop owner was not cross examined. So, Mansi purchased that

mobile in January, 2009. So, Mansi had purchased that mobile and after the incident, said mobile was missing along with gold ring, clothes of Aniket and along with cash of Rs.450/-. So, the prosecution has established the theft of these articles also beyond doubt.

80/- Second set of evidence adduced by the prosecution witnesses consists of the evidence of Police Constable Shri Ravindra Bahule and the evidence of API Gautam Patare as per Exh-74 & 75. It appears from the evidence of these witnesses that they were the members of the squad, formed by P.I. Borse for the investigation of said crime bearing No.65/2009. They had received the IMEI number of the mobile phone of Mansi and then after it seems from the evidence of P.C.Ravindra Bahule that Police had received an information that the stolen mobile was brought in use in Maheshnagar area, in hotel “Pancham”. Therefore, they had gone there with panchas and one person i.e. accused Pradip was sitting near the counter. When Pradip was asked about said mobile possessed by him, he produced one mobile of Sony Erikson Company, having G-502 model. It also seems from the evidence of P.C. Bahule that Pradip told them that accused Javed Khan is daily customer and the

bill of meals and the beer was due towards accused Jawed, and towards the bill he had given that mobile to him. It appears from the evidence of both these witnesses that the IMEI number of stolen mobile and mobile seized from Pradip was the same. Therefore, API Shri Patare seized that mobile from accused Pradip under panchnama. It also seems from the evidence of API Shri Patare that, accused Pradip had inserted Sim-Card of Air-Tel Company in that mobile, having number 9503667292 and the evidence of the son of Pradeep by name Mayur Chandaliya, (Exh-113,PW-26) also corroborates this fact. It appears that then after, API Shri Patare, along with his report at Exh-78 handed over said mobile to P.I. Shri Borse who was investigating this crime. The battery number of that mobile was 438197. It tallied with the battery number mentioned in the receipt at Exh-39. API Shri Patare had also prepared seizure panchnama of said mobile at Exh-77 before two panchas. No doubt both the panch witnesses by name Mukram Khan and Amir Khan did not support the prosecution on some material particulars. But both P.C. Bahule and API Shri Patare had no grievance against accused Pradip so as to depose false against him. Their evidence is totally trustworthy and reliable so far as the seizure of said

mobile phone from accused Pradip. Much less to say that during the course of argument advanced by Advocate Shri Ghanekar on behalf of accused Pradip, he did not dispute said fact. Even otherwise the evidence of both the Police officials is trustworthy and reliable and in the light of the ratio laid down by Hon'ble Bombay High Court, in the case of **“Gurjinder Singh Vs. State of Punjab, reported in 2011, AIR SCW 1382”**, said evidence can be accepted since I find it to be truthful. Even said evidence is not shaken much during the course of cross examination. Therefore, the prosecution has succeeded in proving the fact that accused No.1 by name Javed Khan handed over said mobile to accused No.2 by name Pradip Chandaliya who had inserted his own Sim-card in it and utilized it for his use. The evidence of PW-26 Mayur Chandaliya also discloses that he had given said Sim-card to his father. He also admits that he had given that Sim-card to his father. He also admits in cross examination conducted by Advocate Shri Bangar, for accused No.2 that his father was required to go to Shani-Shingnapur on 18.6.2009. He admits in cross examination that his father told him that he was having one mobile of one customer who was not having money to pay bill of hotel and his father told that he

will insert the Sim-card given by him in that mobile and he will take that mobile with him while going to Shani-Shingnapur. This witness Mayur has also admitted that then after his father activated that mobile on 18.6.2009 itself. The evidence of Nodal Officer Ganesh Pawar who was serving with Air-Tel Company, shows that Police had demanded the call details of mobile phone No.9503667292 w.e.f. 12.6.2009 to 21.6.2009. Said mobile was activated on 16.6.2009 and hence he gave that information of said mobile w.e.f. 16.6.2009 to 21.6.2009. He has also testified that lastly said mobile number was used on 21.6.2009 on which it was seized by API Shri Patare under panchnama at Exh-77 dated 21.6.2009.

81/- So, this second set of prosecution witnesses categorically discloses that accused Jawed handed over said mobile of Mansi Deshpande to accused No.2 Pradeep on 14.6.2009 i.e. after two days from the date of incident, towards the bill which was due to him of hotel Pancham owned by Pradip. From tower location, Police came to know about IMEI number of that mobile which was visible and then Police took the search of said mobile and they received information that it was being used in hotel Pancham. Hence API Shri Patare seized it. It was handed over to

P.I.Shri Bagul. So, said evidence categorically discloses that accused Jawed had given that mobile to accused No.2 Pradip who used it on 18.6.2009. Hence from tower location, Police succeeded in tracing out that mobile and also in tracing out the real culprit in this crime by name Jawed. Unless and until accused Jawed had committed theft of that mobile from the house of Mansi Despande, on the date of incident, there was no reason for him to hand it over to accused No.2 Pradeep. Even the son of accused No.2 Pradip has admitted that his father i.e. accused No.2 Pradip told him that his one of the customers had given that mobile to him and hence, Mayur gave Sim-card to his father of Air-Tel Company.

82/- All these witnesses were cross examined by the Advocates of the accused persons. But in order to disbelieve their testimony, nothing had been brought on record. So far as the evidence of Police Constable Shri Bahule is concerned, his cross examination was not conducted on behalf of accused No.1 nor recovery of said mobile from Pradip and the information given by Pradeep that he received that mobile from accused was denied at all on behalf of accused No.1 Jawed. The evidence of these witnesses shows that they might be knowing about

said mobile and its IMEI number since 12.6.2009. But in order to trace out the real culprit, that information was kept secret by the Police, then it was but natural. The seizure of said mobile from accused No.2 was a major break through for the investigation of this crime because of which Police could trace out accused No.1 Jawed who seems to be the main culprit in this crime.

83/- Third set of evidence adduced by the prosecution consists of evidence of panch witnesses before whom accused Jawed had given the statement regarding the production of his clothes which were on his person at the time of incident and also production of the clothes which were stolen by him from the house of informant Aniket. Similarly third set of evidence also consists of the evidence of panch witnesses before whom accused Ram Bodkhe gave statement regarding the recovery of gold ring which was given to him by accused Jawed towards the expenses incurred by him on accused Jawed and which was concealed by him in the electric motor room in Tulsi Chamber. Similarly, this set of evidence also consists of the evidence of panch witnesses before whom the Sim-card in the stolen mobile was kept by accused Jawed in the shutter of Tulsi chamber and it was recovered at his

instance by P.I.Shri Bagul.

84/- The evidence of Amir Khan s/o Gaffar Khan, Mukram Khan s/o Abdul Khan, Hidayat Khan s/o Feroz Khan, Afroz Khan s/o Feroz Khan, Asif Khan s/o Mohmmad Akbar, Mohammad Mobin s/o Mohammad Abbas was adduced, so far as the aforesaid seizure of clothes, gold ring and Sim-card in the mobile phone of Mansi are concerned. These witnesses do not support the prosecution on some material particulars and therefore, learned APP cross examined them with the permission of the Court. In that cross examination, some of them have admitted certain facts and some of them have denied.

85/- But so far as the said recovery is concerned, the prosecution has adduced the evidence of investigating officer by name Police Inspector Shri Borse (Exh-134, PW-32).

86/- At the outset, it would not be out of place to mention that API Shri Borse was not having any enmity against accused Jawed and accused Ram Bodkhe. No such enmity is brought on record by way of his cross examination so as to infer that he had adduced false evidence. So, he is equally competent witness about the

facts which had happened before him. Only because he is a Police Officer, his evidence cannot be discarded in the light of the ratio laid down by Hon'ble Supreme Court in the case of **“Gurjinder Singh v. State of Punjab, reported in 2011,AIR SCW 1382”**, since his evidence is truthful and completely reliable. Even in the case of **“Nana @ Dnyaneshwar v. State of Maharashtra, reported in 2004(2) B.Cr.C 638”**, Hon'ble Bombay High Court has observed that even though the panch witnesses before whom recovery panchnama under Section 27 of the Evidence Act is prepared, turned hostile, it is not a reason to vitiate the recovery effected by Police Officer. In this case, Hon'ble Bombay High Court has referred the ratio laid down by Hon'ble Apex Court in the case of **“Mohd.Aslam Vs. State of Maharashtra, reported in (2001) 9 SCC, 362 (S.C)”**, in which the recovery panch witnesses turned hostile and it was argued on behalf of accused that in the light of the hostility of the panch witnesses, the evidence of Police Officer remained unsupported. But the Hon'ble Apex Court had observed that though panch witnesses turned hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. The Hon'ble Apex Court did not agree with

the contention that the testimony of I.O was unsupported or uncorroborated.

87/- Hence in the light of said ratios laid down by Hon'ble Supreme Court, Hon'ble Bombay High Court, had also considered the recovery effected at the instance of accused, even though the panchas turned hostile.

88/- In the light of said ratios laid down by Hon'ble Supreme Court as well as by Hon'ble Bombay High Court, and if those are applied to the facts of this case, then even though the panch witnesses referred above, have not supported the prosecution on some material particulars, still the evidence of I.O by name P.I. Borse is fully trustworthy and reliable and therefore, I am of the opinion that it can be considered so far as said recoveries are concerned. In the light of these facts, the ratios in the cases regarding said recovery, on which Advocate Shri Mote has placed his reliance cannot be strictly applicable here, which have been mentioned above.

89/- Now, coming to the evidence of Investigating Officer P.I. Shri Borse, it seems that after API Shri Patare handed over his report, and Pradip Chandaliya to him, he came to know from the information given by accused Pradeep to him, that the mobile purchased by Mansi was given by accused Jawed to him and therefore, he

arrested Jawed at 3.30 hours on 22.6.2009. His evidence also discloses that on 22.6.2009 at 2.30 hours by night, he interrogated to accused Jawed, who also admitted that he had given said mobile phone to Pradip Chandaliya. Therefore, he arrested accused Pradip at 3.30 hours by night. It also appears that on 22.6.2009, P.I. Shri Borse had also arrested accused Ram Bodkhe by preparing arrest panchnama. It seems that on 30.6.2009 he sent accused Jawed for medical examination. It also appears that on 22.6.2009 he produced accused Jawed before concerned J.M.F.C and he got extended his Police Custody from the concerned J.M.F.C for 14 days. Therefore, it is ample clear that since 22.6.2009 accused Jawed was in Police custody.

90/- The evidence of P.I. Shri Borse, also discloses that on 23.6.2009 he interrogated towards accused Jawed about his clothes which were on his person at the time of incident. It seems that accused showed readiness to produce those clothes and hence he called two panchas. His evidence further shows that, then accused gave statement before him and panchas that he had hidden those clothes below the heap of garbage which was in front of said building in question i.e. Purva

Apartment. Hence Shri Borse reduced his statement into writing (Exh-61) and he obtained the signatures of panchas and that of accused and thumb mark of accused below it. He also signed it.

91/- His evidence further discloses that then after accused Jawed led them to the spot in question i.e. opposite to Purva Apartment where the incident took place. The evidence of I.O further discloses that near Purva Apartment, accused Jawed asked to stop the vehicle and then accused got down and they also got down. Then accused had gone near the heap of waste articles which was there and he took out carbon coloured Jeans pant of Spaykar Company and one green coloured T shirt on which “Western Country Jamboree” was written. Accused Jawed Khan produced those clothes before P.I. Borse and panchas and at that time, P.I.Borse noticed blood stains on the front side portion of that T- shirt. Therefore, those clothes (Article-27 & 28) were seized by P.I.Borse on the spot itself under panchnama at Exh-62.

92/- Therefore, the evidence of P.I.Borse categorically discloses that at the instance of accused Jawed he had recovered those clothes i.e. T shirt (Article-28) and Jeans Pant (Article-27) of accused Jawed which were on his person at the time

of incident. Regarding this recovery it was argued on behalf of accused Jawed that it is very difficult to believe that said heap of garbage might be there after 5 to 7 days of the incident. But since it appeared to be there on the date of recovery, it can be concluded that it was not lifted by Municipal Corporation, Aurangabad and hence those clothes were recovered from the said heap of garbage. The said place was exclusively known to accused Javed and he had hidden those clothes below the garbage and hence they were not visible to others even though it was by the side of road on open place. Hence this recovery of clothes at the instance of Javed is important and material and discloses the involvement of accused Javed in the crime.

93/- It also appears that said clothes of accused Jawed which were recovered at his instance were sent by P.I.Borse, for chemical analysis. Similarly the blood of deceased Mansi was also sent for chemical analysis to trace out the blood group. The C.A.Report at Exh-111 categorically discloses that the blood group of deceased Mansi was "AB". The C.A.Report at Exh-117 produced on record by the prosecution, categorically discloses that on half T shirt of accused (Exh-28) the Chemical Analyzer had noticed the blood of "AB" blood group which was that of

Mansi. The finding of 'AB' blood group on the T shirt of accused Jawed cannot be said to be a mere co incident. Unless and until accused Jawed had entered into the house of Mansi and unless and until he had committed said act of murder of Mansi with the help of scissor and screw driver, there was no possibility of finding of Mansi's blood of deceased Mansi on his T shirt. So, the finding of Mansi's blood on the T shirt of accused Jawed is certainly incriminating circumstance against accused Jawed of which he has offered no explanation at all. So far as this recovery is concerned, nothing has been brought out from the cross examination of P.I. Shri Borse so as to disbelieve his evidence. So, I find the evidence of P.I. Shri Borse to be trustworthy and reliable so far as the recovery of clothes of accused Jawed are concerned which were on his person at the time of incident.

94/- So far as this recovery of blood-stained T shirt is concerned, again the ratios in the cases of **“Gangadhar Nair v. State of Maharashtra, reported in 2001(2) B.Cr.C 525”**, **“Kannayya @ Kanna Vishnu Vidhate v. State of Maharashtra, reported in 2010(1) B.Cr.C, 91”** and **“Nazar Mohammad s/o Hayat Mohammad Shaikh v. State of Maharashtra, reported in 2002 (2) B.Cr.C**

881” are required to be considered. Those speak that finding of blood stains of deceased on the clothes of accused and non offering of any explanation by accused about it, is an incriminating circumstance against accused in the crime. Here Mansi's blood group “AB” was found on T shirt of accused Javed recovered at his instance of which he did not offer his explanation. Hence it proves involvement of accused Javed in said crime.

95/- It also appears from the evidence of P.I. Shri Borse that on 24.6.2009 he again interrogated towards accused Jawed regarding the clothes of Aniket Deshpande which were worn by him after the incident. On 24.6.2009 itself accused Jawed showed readiness to produce those clothes which were hidden by him below the garbage near Tapadiya Natyagraha. It appears that before panchas and P.I.Shri Borse, accused Jawed Khan made statement that he had hidden those clothes worn by him after the incident below the garbage near Sakar Press which is to the backside of Tapadiya Natyagraha. Accordingly the memorandum statement of Javed at Exh-56 was reduced into writing by Police Inspector Shri Borse which bears the signatures of panchas, that of accused and his thumb mark and i.e. that of P.I.Shri

Borse.

96/- The evidence of P.I.Shri Borse discloses that then after accused Jawed took them behind the back of Tapadiya Natyagruha spot which was near Sakar Press. Accused got down from the Jeep and P.I. Shri Borse and panchas also got down. It seems from his evidence that from the heap of garbage near Sakar Press, accused took out one Jeans pant of black colour and black coloured T shirt and produced those clothes before Police and panchas. Hence P.I.Shri Borse seized those clothes under seizure panchnama Exh-57 on the spot itself. Said seizure panchnama also bears the signature of accused Jawed and his thumb mark to show that the recovery was effected at his instance. Pertinent to note that on these clothes, the Chemical Analyzer did not notice any blood stains, since the accused had removed blood stained T shirt, after the incident and worn this T shirt of Aniket. Hence non finding of blood stains on the T shirt of Aniket and also on the Pant of Aniket, cannot be said to be mere coincident. It cannot ignored that out of these four clothes seized at the instance of accused Jawed, only on his T shirt which was on his person at the time of incident, the blood stains having blood group 'AB' of Mansi were

noticed by the Chemical Analyzer. This fact categorically proves the presence of accused Jawed at the house of Mansi on the date of incident. So far as this recovery is concerned, certainly the cross examination of P.I. Shri Borse was conducted by Advocate Shri Mote, on behalf of accused No.1. But only suggestions denying the said recovery of clothes at the instance of accused Jawed were given to him and except said denial, nothing has been brought on record so as to disbelieve the evidence of P.I.Shri Borse.

97/- So, under such circumstance, even though the panchas on these recoveries have not supported the prosecution on some material particulars, still the evidence of I.O. Shri Borse is sufficient enough to hold the said recovery of clothes at the instance of accused Javed to be genuine one. In this regard, again ratio in the case of **“Mohd.Aslam Vs. State of Maharashtra, reported in (2001) 9 SCC, 362 (S.C)”** says that merely because the panch witnesses turned hostile, evidence of the witness who effected recovery would not be vitiated. Even otherwise the testimony of I.O.Shri Borse is truthful and reliable and hence in the light of the ratio in the case of **“Gurjinder Singh v. State of Punjab”**, said recovery of clothes at the

instance of accused Jawed can be considered and it cannot be said that the panchas turned hostile and therefore, said recovery cannot be considered.

98/- Now coming to the fourth set of evidence adduced by the prosecution, it consists the important evidence of Dr.Mugdalmath, Dr. Hena Khan, C.A reports and DNA reports produced on record by the prosecution.

99/- The evidence of Dr. Heena Khan as well as the evidence of I.O. Shri Borse discloses that accused was sent for medical examination by I.O. Shri Borse and at that time, the Medical Officer was requested to collect blood sample and semen sample of accused for chemical analysis and for DNA test. The evidence of Dr.Heena Khan and the certificate on record also disclose that she examined accused Jawed clinically and after his examination she noticed that accused Jawed was capable of performing sexual intercourse. It also seems that after collecting the blood and semen sample of the accused along with his pubic hair and nail clippings etc, letters were written by her to the Chemical Analyzer Aurangabad and also to the Chemical Analyzer, Forensic Science Laboratory Mumbai at Exh-84 & 85 and the samples were sent for analysis and also for DNA test. Regarding collection of

samples of accused Jawed, for the purpose of chemical analysis and DNA test, nothing was suggested in cross examination of Dr. Heena Khan nor the said fact was denied on behalf of accused.

100/- The evidence of I.O coupled with the evidence of Dr. Mugdalimath also shows that as per the request of the Investigating Officer, Dr. Mugdalimath had collected blood of the deceased for grouping, her pubic hair, nail, vaginal swab and smear swab from left breast, matted vaginal hair, aspirated vaginal fluid etc for chemical analysis and for D.N.A.Test. His evidence also discloses that said blood, her nails, vaginal swab, aspirated vaginal fluid etc were sent by him to the Forensic Science Laboratory, Aurangabad and Mumbai for analysis. He has specifically testified that matted vaginal pubic hair and aspirated vaginal fluid of the victim were sent by him to DNA profile at Forensic Science Laboratory Mumbai and at the same time, he sent pluck hair of the victim for controlled DNA test to Forensic Science Laboratory Mumbai.

101/- After receipt of said blood and semen samples of the accused and said samples of the victim, the Chemical Analyzer analyzed those samples sent to him

for DNA test.

102/- Accordingly the C.A.Report at Exh-115 produced on record categorically discloses that the blood group of accused Jawed is “A”. The C.A.Report at Exh-111 pertains to the blood of Mansi i.e. victim and it shows that her blood group was “AB”. It appears that the Chadder, Bed-sheet, scarf, T shirt, bracier, M.C.Pad, scissor and screw drivers found on the spot were also sent for chemical analysis at F.S.L. Aurangabad. Its C.A.Report is produced at Exh-116 and it discloses that on the chadder, bed-sheet, T shirt & scissor, “AB” blood group of Mansi was noticed. Hence it is clear that to commit murder of Mansi scissor was used.

103/- The evidence of the Investigating Officer as well as C.A. Reports on record show that the semen was detected on the bed-sheet of Mansi and said bed-sheet (Exh-2) was sent for analysis. Its C.A. Report (Exh-115) categorically discloses that the semen detected on Exh-2 is of blood group “A” which is that of accused Javed. So, this C.A. Report is also one of the incriminating circumstances against accused Jawed which also discloses his presence on the date of incident at

the house of Mansi.

104/- As stated earlier, the C.A. Report at Exh-117 is pertaining to two Jeans Pants and two T shirts which were recovered at the instance of accused Jawed by P.I.Shri Borse. It appears that out of those four clothes, on T- shirt (Exh-2), which was that of accused Javed and which was on his person at the time of incident, the Chemical Analyzer had noticed the blood having blood group “AB” which was that of Mansi. Certainly it is an incriminating circumstance against Javed of which there is no explanation offered by him.

105/- In the light of aforesaid C.A.Reports, now the DNA test reports at Exh-107, 119 and 120 are required to be considered. It appears that, Chemical Analyzer Mumbai had taken out the DNA from aspirated vaginal fluid of deceased Mansi and the controlled blood sample of accused Jawed was also sent by Dr. Heena Khan to Forensic Science Laboratory Mumbai. The DNA test was conducted accordingly and the Chemical Analyzer had opined about said DNA test as follows.

“For all the 17 genetic systems analyzed with PCR using male specific **Y STR** system the male haplotypes obtained in Aspirated vaginal fluid of deceased Mansi (FSL ML

Case No.DNA 288/09 – Exh-2) exactly matched with male haplotypes in control blood sample of accused Javedkhan. (FSL ML Case No.DNA 317/09 – Exh-2).”

106/- So, the aforesaid DNA test report apparently discloses that aspirated vaginal fluid of deceased Mansi was containing male haplotypes of accused Jawedkhan. Hence unless and until accused Jawedkhan had committed rape on Mansi, there was no reason to find his male haplotypes in the aspirated vaginal fluid of deceased Mansi. Hence this is also an incriminating circumstance against accused Jawed which categorically proves his presence in the house of deceased Mansi on the date of incident. It cannot be ignored that no satisfactory explanation is offered by accused Jawed Khan in respect of said DNA test report. If the ratio in the case of **“Nazar Mohammad v State of Maharashtra reported in 2002(2) B.Cr.C 881”** is applied here, then certainly it is an incriminating circumstance against Javed.

107/- Prosecution has also produced DNA test report at Exh-119. It appears that controlled blood sample of accused Jawed Khan was analyzed vide FSL ML Case No.DNA 117/09 (Exh-2). It also appears that from the spot, Police had seized one bed-sheet on which the semen stains were noticed. The C.A.Report at Exh-119

shows that the DNA was extracted from semen stains detected on the bed-sheet (FSL ML Case No. DNA-356/09). The C.A. Report at Exh-119 discloses following opinion.

“For all the 17 genetic systems analyzed with PCR using male specific **Y STR** system the male haplotypes obtained in semen stains detected on bed-sheet (FSL ML Case No. DNA 356/09 - Exh-1) **exactly matched** with male haplotypes in control blood sample of accused Javedkhan. (FSL ML Case No.DNA 317/09 – Exh-2).”

108/- Therefore, said DNA test report at Exh-119 also categorically discloses that in the DNA extracted from the semen stains on the bed sheet in the house of Mansi, the male haplotypes in control blood sample of accused Jawed Khan were noticed. Therefore, this C.A. Report also categorically discloses the presence of accused Jawed Khan at the house of victim and that also discloses that unless and until accused have had sexual intercourse with the deceased, there was no reason of finding of semen stains on the bet sheet on which the body of Mansi was lying on

stomach. Regarding said incriminating circumstance no explanation is offered by accused Jawed.

109/- Again the prosecution has produced DNA report at Exh-120. From this report it appears that the Chemical Analyzer had extracted the DNA from blood stains detected on the bed sheet (Exh-1) which was sent for analysis. Regarding said DNA and regarding blood stains detected on the T shirt of accused, the DNA test was performed. Accordingly the Chemical Analyzer interpreted about the said test which is as follows.

“For all the 15 genetic systems analyzed with PCR, the DNA profile obtained from (1) Blood stains detected on Bed sheet (Exh-1) and (2) Blood stains detected on T shirt of accused (Exh-2) **exactly matched** with DNA profile of Control blood sample of deceased (Exh-4)”

110/- The Chemical Analyzer has formed opinion after performing said test which is as follows.

“(1) Blood stains detected on the Bed sheet, (2) Blood stains detected on T shirt of accused and (3) Control blood stain of deceased are concluded to be of the **same biological individual.**”

111/- Therefore aforesaid C.A. Report categorically discloses that on the Bed sheet, as well as on the seized T shirt of accused Jawed the same blood having blood group “AB” of Mansi was noticed by the Chemical Analyzer. The DNA test reports also categorically prove the presence of accused Jawed at the house of Mansi on the date of incident. Hence if the evidence of all the prosecution witnesses and more specifically if the evidence of PW-1 to 10, that of Medical Officers Dr. Heena Khan and Dr. Mugdalimath, that of Police Constable Shri Bahule and API Shri Patare and that of the evidence of Police Inspector Shri Borse is read along with these C.A.reports and D.N.A.Test reports, then certainly it can be concluded that on the date of incident, accused Javed had entered into the house of Mansi with an intention to commit theft. It also appears and it can be concluded that Mansi might have resisted the accused and therefore, he committed rape on her and then within the help of scissor and screw driver, he committed the murder of Mansi by removing mobile phone, gold ring, clothes of Aniket and cash of Rs.450/- from her house. That is why towards the arrears of bill of hotel Pancham he handed over said mobile phone to accused No.2 Pradeep Chandaliya and hence API Shri Patare had seized

that mobile phone from Pradip Chandaliya by taking its location from mobile tower. It also appears that the gold ring was handed over by accused Jawed to Ram Bodkhe which was hidden by him in electric motor room in Tulsi chamber and it also came to be recovered at the instance of accused Ram Bodkhe. The C.A.reports and DNA test reports categorically disclose the presence of accused in the house of Mansi and unless and until he had raped Mansi on the date of incident, there was no reason of falling his semen on the Bed sheet of Mansi. Similarly, unless and until he had murdered Mansi as testified by Dr. Mugdalimath, there was no reason to fall the blood stains of “AB” blood group of Mansi on his T shirt.

112/- So, in the light of said oral and documentary evidence as well as in the light of all C.A. reports and DNA reports on record, I am of the opinion that the prosecution has proved beyond reasonable doubt that on 11.6.2009 after sunset and 12.6.2009 before sun rise accused Jawed committed lurking house trespass at the house of Mansi with an intention to commit theft and robbery and then he committed rape on her and also committed her murder. The above evidence forms complete chain which indicates towards accused Jawed who did said offence and

nobody else. Therefore, I am of the opinion that the prosecution has succeeded in proving the charges levelled against accused of the offences punishable under Sections 302,392 r/w 397, 376,201,456,457,458 of IPC. Hence points No.1 to 7 are answered accordingly.

As to points No.8 to 12:-

113/- It is also the case of prosecution and it appears from the evidence of witnesses on behalf of prosecution that accused Jawed gave the stolen mobile to accused Pradeep Chandaliya towards the payment of bill and he handed over the gold ring to accused Ram Bodkhe towards the expenses incurred by Ram Bodkhe on accused Javed. It is case of prosecution that accused Nos.2 & 3 concealed accused Javed. Therefore, prosecution has contended that the accused Nos.2 & 3 have committed offences under Sections 411,412,414,109 and 212 of Indian Penal Code. It is also the case of prosecution that accused Nos.2 & 3 had helped accused No.1 and they had hidden accused No.1 in hotel "Pancham" knowingly that he had committed said crime. However, so far as this crime is concerned, no cogent and reliable evidence has been adduced by the prosecution and even on the basis of the evidence adduced by the prosecution, it is rather difficult to hold that accused Nos.2 & 3 had

helped accused No.1 Jawed and they concealed him in the hotel “Pancham” though they were knowing about the act of accused Jawed. Hence I am of the opinion that prosecution has not proved the charge under Section 212 of the Indian Penal Code against accused Nos.2 & 3.

114/- Same is the case of Section 109 of Indian Penal Code. According to prosecution, accused Nos.2 & 3 had abetted the commission of said crime by accused No.1. But again on this point also there is no cogent and reliable evidence so as to come to the conclusion that the accused Nos.2 & 3 had abetted accused No.1 to commit said crime. Hence the offence under Section 109 of IPC is also not proved by prosecution against accused Nos.2 & 3.

115/- So far as the offence under Section 412 of IPC is concerned, it speaks about the possession and receiving of the property by committing of dacoity. Here it is not the case of dacoity since it appears that accused No.1 alone had entered in the house of victim. Hence I am of the opinion that Section 412 of IPC is not applicable to the facts of this case.

116/- So far as an offence under Section 411 of IPC against accused No.2

Pradip Chandaliya is concerned, the argument advanced by Advocate Shri Ghanekar shows that, the said mobile phone was seized by Police from accused Pradip. According to Advocate Shri Ghanekar, accused Pradip was not aware that it was stolen property and hence according to him, offences under Sections 411 and 414 of IPC are not made out against accused No.2 by name Pradip. So far as an offence under Section 414 of IPC against accused No.2 Pradip is concerned, nothing has been brought on record that this accused assisted in concealing that property and hence so far as accused No.2 Pradip is concerned, an offence under Section 414 is not proved by the prosecution. So far as Section 411 of IPC is concerned as stated earlier, the argument advanced by Advocate Shri Ghanekar as well as the evidence of Police Constable Bahule and API Shri Patare shows that said mobile was found with accused Pradip.

117/- In this regard, Advocate Shri Ghanekar has relied on the ratio laid down by Hon'ble Supreme Court in the case of “**Trimbak v. State of M.P. Reported in 1954 Cr.L.J.335**” wherein three ingredients to prove the offence under Section 411 are given. (1) The stolen property was found in possession of the accused (2) That

some persons other than the accused had possession of the property before the accused got its possession, and (3) The accused had knowledge that the property was stolen. Advocate Shri Ghanekar has also relied on the ratio in the case of **“Karnalsingh v. State of Maharashtra, reported in 1976 Cr.L.J.842”**. In that case, it has been held that where the explanation which the accused had given was good enough to raise serious doubts about the sustainability of a charge under Section 411, IPC, the accused was held entitled to an acquittal.

118/- Advocate Shri Ghanekar has also relied on the ratio in the case of **“Mohan Lal v. State of Maharashtra, reported in 1979, CRI.L.J.1328”** which also speaks that the accused must be shown to have reason to believe that the property was stolen.

119/- Hence in the light of said ratios, Advocate Shri Ghanekar has argued that the accused by name Pradeep was not having any knowledge that the mobile was stolen property and hence he has prayed to acquit the accused.

120/- But it seems that accused Pradeep Chandaliya kept that mobile with him. He did not ask Jawed from where he brought it. He did not ask for its receipt. It

appears that accused Javed was his regular customer and he must be aware about the activities of Javed. Accused Pradeep must have enquired to accused Javed about said mobile. He must have understood that the person who is not in a position to pay bill, from where & how he had brought such a costly mobile. But Pradip did not take care of all these facts. That impliedly shows that Pradip must be aware about the fact that Javed had obtained it by committing theft and still he kept it with him. So far earlier two ingredients are concerned certainly it is proved that it was of Mansi & then Javed obtained its custody by committing theft. Hence prosecution has established all three ingredients so far as stolen mobile is concerned.

121/- That apart, immediately after the theft i.e after five to six days, said mobile was found with accused Pradip. The presumption under Section 114 of the Evidence Act says that the Court may presume that the man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. In this case, no account for possession of said mobile is given by accused Pradip. So, under such circumstance and in the light of said presumption, I am of the opinion that though

accused Pradip cannot be said to be a thief, still he is supposed to be the receiver of stolen property and hence I am of the opinion that an offence under Section 411 of IPC is proved against accused Pradip. Hence accused cannot take shelter of the ratios in above cases on which his advocate has placed reliance.

122/- So far as accused No.2 Ram Bodkhe is concerned, the evidence of Investigation Officer P.I. Shri Borse speaks that after obtaining Police Custody of accused Ram Bodkhe, on 23.6.2009 he interrogated towards Ram Bodkhe and he showed readiness to produce the gold ring received by him from accused Jawed As stated by accused Ram, they had gone to Tulsi Chamber, behind hotel Puncham. Then after as per the statement (Exh-64) given by Ram Bodkhe, he had taken out said gold ring which was kept by him in the electric motor room of Tulsi chamber. He produced it before P.I.Shri Borse and therefore, it was seized by him under panchnama at Exh-65. It appears that on this ring, the logo RC Bafna as "RC" was carved.

123/- The evidence of informant Aniket Deshpande and his friend by name Damodhar Ghuge shows that Damodhar Ghuge had gifted that ring to Aniket which

was purchased from the shop of RC Bafna and the Manager working with RC Bafna has also identified that ring to be sold from his shop. The evidence of Aniket also shows that said gold ring was stolen from his house and the said gold ring was recovered at the instance of accused Ram Bodkhe. So, it can be considered that from accused Jawed he had received that ring and therefore, without keeping it at his house, he had hidden it in the electric meter room of Tulsi chamber.

124/- Advocate Shri Barlota, on behalf of accused has argued that said recovery is not proved beyond doubt since the panchas did not support the prosecution side. For that purpose, he has relied on the ratio laid down by Hon'ble Supreme Court in the case of “ **Kuldip Singh v. State of Delhi, reported in AIR 2004 Supreme Court, 771**” and also on the ratio laid down by Jammu & Kashmir High Court in the case of “ **Rajkumar Vs. State, reported in 2005 Cri.L.J. 1322**” and submitted that accused Ram Bodkhe be acquitted by giving benefit of doubt.

125/- But regarding said recovery is concerned, again the ratio laid down by Hon'ble Supreme Court in the case of “**Gurujinder Singh v. State of Punjab**”, “**Mohd.Aslam v. State of Maharashtra**”, and also the ratio laid down by Hon'ble

Bombay High Court in the case of “**Nana v. State of Maharashtra**”, are to be considered. The ratio in the case of “**Nana v. State of Maharashtra**” says regarding recovery under Section 27 of the Evidence Act. As per this ratio though the panch witnesses do turn hostile, still it is not a reason to vitiate the recovery effected by Police Officer. Similarly, the ratio in the case of “**Gurujinder Singh v. State of Punjab**” shows that the Police Officer can be a reliable witness if the Court finds him to a truthful person. Similarly, the ratio in the case of “**Mohd.Aslam v. State of Maharashtra**” says that merely because panch witnesses are hostile, evidence of witness who effected recovery would not be vitiated.

126/- Hence, if the aforesaid ratios are considered in a proper perspective and if it is considered that the evidence of API Shri Borse is reliable and truthful one, I am of the opinion that, only on the basis of evidence of P.I.Shri Borse, the recovery at the instance of accused Ram Bodkhe is held to be proved beyond doubt. Hence I am of the opinion that the ratios in the cases on which Advocate Shri Barlota, has placed his reliance cannot be strictly applicable to the facts of this case.

127/- Therefore, the evidence on record categorically discloses that the stolen

ring was given by accused Jawed to accused No.3 Ram Bodkhe. Prior to that its possession was with informant. Accused Jawed took it and gave to ram Bodkhe. Even accused Ram Bodkhe must be aware about the activities of accused Jawed and inspite of this fact, he accepted that ring without making any enquiry to Jawed from where he purchased it. He had hidden said ring in the electric motor room of Tulsi chamber. If really it was his property, then he had not hidden it in the electric motor room. Therefore, it can be said that accused Ram Bodkhe voluntarily assisted accused Jawed in concealing the gold ring in the electric motor room situated at Tulsi chamber by accepting stolen property. Hence, the prosecution has proved beyond reasonable doubt the offences under Sections 411,414 of IPC against accused No.3 Ram Bodkhe.

128/- In the light of aforesaid discussion I am of the opinion that the prosecution has established the offence under Section 411 of IPC against accused Nos.2 & 3 by name Pradip and Ram Bodkhe. Similarly against accused No.3 Ram Bodkhe, prosecution has proved an offence under Section 414 of IPC since he helped accused Jawed in concealing the stolen ring. But accused Pradip Chandaliya did not

hide said muddemal and on the contrary, he produced it before Police. Hence offence under Section 414 of IPC is not proved against accused Pradeep Chandaliya. Hence my answers to point Nos. 8 to 12 are accordingly.

129/- Accused Jawed @ Tingrya is heard on the point of sentence. He has submitted that he is of young age and earlier to this offence, no offence was registered against him under Section 302 of IPC. Hence, accused Jawed has prayed to take lenient view while awarding punishment.

130/- Advocate Shri Mote on behalf of accused Jawed has also argued on the same lines and further he has submitted that looking towards the age of accused Jawed, there are every chances of improvement in him. Advocate Shri Mote has also submitted that this being the first offence of the accused, capital punishment may not be imposed and therefore, he has also prayed to take lenient view.

131/- Accused Pradip Chandaliya and accused Ram Bodkhe are also heard on the point of sentence. They have submitted to take lenient view and according to them, this is their first offence. Hence both of them have submitted that they may not be sentenced to suffer rigorous imprisonment.

132/- Advocate Shri Ghanekar and Advocate Shri Barlota on behalf of both the accused, have submitted to take lenient view looking towards the first offence of accused Pradip & Ram Bodkhe.

133/- As against this, APP Shri Mugadiya has submitted that accused No.1 Jawed is not entitled for any leniency in the light of the acts committed by him. He has submitted that this can be termed as the rarest of the rare case to impose capital punishment. Hence he has prayed to impose capital punishment to accused Jawed for for an offence under Section 302 IPC. The learned APP Shri Mugadiya has specifically relied on the ratio laid down by Hon'ble Supreme Court in the case of “**Bantu v. The State of U.P., reported in 2008(5) Supreme, 596**”. Learned APP has further relied on the ratio laid down in the case of “**State of Maharashtra v.Shivaji @ Dadyashankar Alhat reported in, 2004(3) B.Cr.C, 519**”. Thus, lastly APP Shri Mugadiya has submitted to impose capital punishment to the accused Jawed for an offence punishable under Section 302 of IPC.

134/- I have considered those submissions. I have also perused the ratios on which learned APP Shri Mugadiya has placed his reliance. Certainly it is clear that

the offences under Sections 302 & 376 and other offence under IPC are proved against accused Jawed. But it cannot be ignored that accused Jawed is of 22 years of age and there are every chances of improvement in him. Therefore, even though I am of the opinion that both the offences under Sections 376 & 302 of IPC are proved against accused Jawed, still looking towards the improvement in accused Jawed and looking towards his age and at the same time looking towards his first offence of such a nature, I am of the opinion that this cannot be termed as the rarest of the rare case so as to impose capital punishment. In the light of these facts and looking towards the possibility of improvement in accused Jawed, I am of the opinion that the ratios in aforesaid cases on which APP Shri Mugadiya has placed his reliance cannot be strictly applicable to the facts of this case. Hence I am of the opinion that for an offence punishable under Section 302 of IPC, instead of imposing capital punishment, imposition of imprisonment for life would be the sufficient punishment which can be imposed to accused Jawed.

135/- So far as accused Nos.2 & 3 are concerned, certainly this seems to be their first offence which has been proved against them. Hence I am of the opinion

that imposition of fine of Rs.1000/- to each of them for the offence committed by them would be sufficient quantum of punishment which can be awarded to them. Hence I am of the opinion that following sentence would meet the ends of justice.

ORDER

- 1) Accused by name Javedkhan @ Tingrya s/o Habidkhan is hereby **convicted** under Section 235 of Cri.P.C of the offences punishable under **Sections 456,457,458,392 r/w 397, 302,376, and 201 of IPC.**
- 2) While accused No.2 by name Pradip Chandalia is hereby convicted under Section 235 of Cri.P.C of the offence punishable under Section 411 of IPC and accused No.3 by name Ram Bodkhe is hereby convicted under Section 235 of Cri.P.C of the offences punishable under **Sections 411 & 414 of IPC.**
- 3) Accused No.1 Javed is hereby convicted of the offence punishable under Section **456** of IPC and sentenced to suffer **rigorous imprisonment for one year and to pay fine of Rs. 300/-**. In **default of payment of fine Rs.300/-** he shall undergo **Simple Imprisonment for 10 days.**
- 4) Accused Javed is further convicted of the offence punishable

under Section **457** of IPC and is sentenced to suffer **rigorous imprisonment for 3 years and to pay fine of Rs.300/-**. In default of payment of fine, accused Jawed shall undergo simple imprisonment for 10 days.

- 5) Accused Jawed is further convicted of the offence punishable under Section **458** of IPC and he is sentenced to suffer **rigorous imprisonment for 3 years and to pay fine of Rs.300/-**. In default of payment of fine, accused Jawed shall undergo simple imprisonment for 10 days.
- 6) Accused Jawed is further convicted of the offence punishable under Section **392 r/w397 of IPC** and he is sentenced to suffer **rigorous imprisonment for 7 years and to pay fine of Rs.300/-**. In default of payment of fine, he shall undergo simple imprisonment for 10 days.
- 7) Accused by name Jawed is further convicted of the offence punishable under Section **302 of IPC** and he is sentenced to **suffer imprisonment for life and to pay fine of Rs.300/-**. In default of payment of fine, accused shall undergo simple imprisonment for 10 days.
- 8) Accused by name Jawed is further **convicted** of the offence

punishable under **Section 376 of IPC** and he is sentenced to suffer **rigorous imprisonment for 10 years and to pay fine of Rs.300/-**. In default of payment of fine, he shall undergo **simple imprisonment for 10 days**.

- 9) Accused Javed is further **convicted** of the offence punishable under **Section 201 of IPC** and he is sentenced to suffer **rigorous imprisonment for 1 year and to pay fine of Rs.300/-**. In default of payment of fine, the accused shall undergo **simple imprisonment for 10 days**.
- 10) Accused No.2 by name Pradeep Chandalia is convicted of the offence punishable under **Section 411 of IPC** and he is sentenced to pay **fine of Rs.1000/-**. In default of payment of fine, he shall undergo **simple imprisonment for 15 days**.
- 11) Accused by name Ram Bodkhe is **convicted** of the offences, punishable under **Sections 411 and 414 of IPC** and he is sentenced to **pay fine of Rs.1000/- for each offence**. In default of payment of fine for each offence, he shall undergo **simple imprisonment for 15 days for each of the offences**.
- 12) All the sentences imposed to accused Javed shall run **concurrently**.

- 13) Accused No.2 by name Pradip Chandalia is hereby acquitted of the offences punishable under Sections 412,414. 109,212 of IPC. Similarly, accused No.3 by name Ram Bodkhe is acquitted of the offences punishable under Sections 412,109,212 of IPC.
- 14) The accused No.1 by name Jawed is acquitted of the offences punishable under Sections 394 and 459 of IPC.
- 15) Out of the seized general muddemal, the muddemal at Article-1 (Bed-sheet), Article No.2 (Chaddar), Article No. 7 (Salwar), Article No.13 (Mobile head phone wire), Article-14 (Scarf), Article -15 (Ash coloured shirt), Article-16 (Bracier), Article-22 (Match box), Article-27 (Jeans Pant),Article-28(green coloured T shirt). Article-29 (Black coloured Jeans Pant), Article-30 (Black coloured T shirt), be destroyed, being worthless, after the period of appeal would be over.
- 16) Out of the general muddemal, the scissor at Article-3 and Screw driver at Article-4, be sold in public auction after the appeal period would be over and the sale-proceeds be deposited in State Treasury.
- 17) The purse at Article-23 be returned to informant Aniket Deshpande after the appeal period would be over.
- 18) Out of valuable mudeemal "Sony Erikson" Company Mobile

at Article-25 having IMEI No.354610029004627 and gold ring at Article-26 having RC logo, cash of Rs.450/- be returned to informant Aniket Deshpande, after appeal period would be over.

- 19) Out of the seized mobiles, mobile Article No.24, (Chocklet coloured mobile be given to accused Pradip Chandalia after the appeal period would be over.
- 20) Rest of the four mobiles at Articles-17 to 20 be returned to concerned persons from whom they are seized, after the appeal period would be over.
- 21) Sim Cards at Article-31 & 37 be destroyed after the appeal period would be over.
- 22) Accused **Javed is in jail as under trial prisoner** and therefore **set off under Section 428 of Cri.P.C** would be admissible to him, if any.
- 23) Copy of the Judgment be delivered to each of the accused free of cost.

Sd/-

Date:-24.01.2012.

(S.N.Pathak)

Additional Sessions Judge-3, Aurangabad.

CERTIFICATE

I affirm that the contents of this P.D.F file judgment are same,
word to word, as per the original Judgment.

Name of Stenographer	: R.S.Misal
Court	: District Judge-3 & Addl. Sessions Judge, Aurangabad.
Date	: 23.01.2012
Judgment signed by the Presiding Officer on	: 09.02.2012.
Judgment uploaded on	: 10.02.2012