
(2015) 05 SHI CK 0041

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal Nos. 46, 72 and 126 of 2012

Azam and Others

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 02-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 395

Citation : (2015) 05 SHI CK 0041

Hon'ble Judges : Rajiv Sharma, J; Tarlok Singh Chauhan, J

Bench : Division Bench

Advocate : Naresh Kumar Tomar, for the Appellant; M.A. Khan, A.A.G, Advocates for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sharma, J.

1. Since common questions of law and facts are involved in these appeals, all these appeals were taken up together for hearing.

2. These appeals are directed against the common judgment dated 23.12.2011/29.12.2011, rendered by the learned Addl. Sessions Judge, Mandi, H.P., in Sessions Trial No. 10 of 2010, whereby the appellants-accused (hereinafter referred to as the "accused", namely, Azam, Shamshudin and Sheharudin), who were charged with and tried for offence punishable under Section 395 IPC, have been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay fine of Rs. 10,000/- each and in default of payment of fine, they were further ordered to undergo simple imprisonment for six months each. Accused Kasim was acquitted by the learned trial Court for offence under Section 395 IPC.

3. The case of the prosecution, in a nut shell, is that PW-1 Shyam Lal is running

shop of Goldsmith at Sundernagar, Bhojpur. He had gone to Shimla on 8.9.2009. His wife Sushma, PW-2 and his servant Raju were present in the shop. Sushma brought boxes of nose pins containing five trays and other ornaments to her home from the shop on 8.9.2009. They were kept by her in the almirah. Shyam Lal and his family members were sleeping in the house on 9.9.2009. Somebody knocked at the door at 1:30 AM. Sushma opened the door. Krishna Devi PW-3, mother of Shyam Lal was standing on the door. 4-5 persons were accompanying her. As soon as Sushma opened the door, one person entered inside the room. He was armed with pistol. He put the pistol on the head of Shyam Lal. Other persons entered inside the room. They were also armed with the pistols. The fourth person was armed with the darat. They searched the almirah. Other family members also arrived in the room. They were made to sit in the room. Tilak Raj, the younger brother of Shyam Lal and his wife also arrived after sometime. They were also threatened. Bag containing various ornaments was taken out of the almirah. The chains of Sushma and Krishna were snatched. Two mobile phones were also taken away. The accused left the room with all the articles. The matter was reported to the police and entry in the daily diary Ext. PW-10/A was recorded. Statement of the complainant Shyam Lal Ext. PW-1/A was recorded and sent to the Police Station. FIR Ext. PW-11/A was registered. Empty wrappers of Shikhar Gutka make Ext. P-4 and P-5, and one bottle of Godfather beer were taken into possession vide seizure memo Ext. PW-1/B. It was found that Gutka was spitted on the mat lying on the floor. Piece of mat was cut and seized vide memo Ext. PW-1/C alongwith the lock and key. These were sealed in separate parcel with seal A. Seal impression was taken on separate piece of cloth. Site plan Ext. PW-27/D was prepared. Shyam Lal produced ledger book, bill and drat, which were seized vide seizure memo Ext. PW-1/F. Accused Shehruddin was arrested on 15.11.2009. He made disclosure statement Ext. PW-6/A on 18.11.2009 that he had concealed mobile phone in the house of his sister, which he could get recovered. He got the phone Ext. P-2 recovered from an attache kept inside the room. The mobile phone was sealed with seal "V" and seized vide seizure memo Ext. PW-18/B. Site plan of the place of recovery Ext. PW-27/E was prepared. This mobile was sold by Vijay Kumar to Shyam Lal vide bill No. PW-26/A. Accused Shehruddin told during interrogation that Raju and Nuru met him and told him to go to Himachal and to return after committing dacoity. He, Raju, Nuru, Afzal, Islam and Azam came to Himachal in Scorpio bearing regn. No. DL-3CY-8786, being driven by Shamsuddin. Raju stayed at Kiratpur. Shehrudin, Nuru, Afzal, Islam and Azam went to the house of Mehfooz. Mehfooz brought two pistols. One pistol was with Nuru. Mehfooz handed over one pistol to Afzal and one to Islam. The vehicle was stopped at Kangu from where Nuru, Afzal, Islam, Azam and Shehrudin went on foot to the house of the complainant. Shamsuddin and Mahfoz waited in the vehicle. All of them went to Delhi after committing theft. The articles stolen during theft were distributed in Delhi. The mobile phone fell in the share of Shehrudin, which was sold by him to Kasam. Kasam returned the phone because money transaction could not be completed. Nuru, Azam and Islam had sold jewellery to Mittal Jewelers. The police seized Scorpio bearing

regn. No. DL-3CY-8786 on 23.11.2009 from Ganda Nala Hajuri Khas. Visiting cards were found inside the vehicle, which were seized vide seizure memo Ext. PW-8/C. Accused Azam, Shamsuddin and Islam were arrested on 26.11.2009. Mohammad Azam made a statement on 8.12.2009 under Section 27 of the Indian Evidence Act that he could get gold recovered from Shamli Bazaar. Azam showed shop of Mittal Jewellers in Bara Bazaar, Shamli. Memo Ext. PW-24/B was prepared. Shamsudin made a statement under Section 27 of the Indian Evidence Act that he could get the gold recovered from his house, which was kept by him outside his house in a tarpaulin. Memo Ext. PW-5/B was prepared in this behalf. He led the police to his house from where one polythene bag was recovered which was opened and it was found to be containing gold nose pins. Nose pins were taken to shop No. 224 and Madan Lal owner of the shop separated artificial gold and real gold. It weighed 20.760 grams. Artificial gold and gems weighed 5.150 grams. These were seized vide seizure memo Ext. PW-24/D. The site plan was also prepared. Dr. Sanjay Pathak collected saliva samples. He also conducted their medical examination and issued MLCs Ext. PW-14/B to Ext. PW-14/E. Salvia sample and piece of mat picked up from the spot were sent to FSL, Junga for analysis vide letter Ext. PW-22/A. An application Ext. PW-15/A was moved for taking blood Sample. Dr. Babita Chaurasia, PW-15 supervised taking samples. The blood samples were handed over to the police. These were sent to FSL for analysis. Report Ext. PW-20/A was issued by the FSL. Gold was also recovered from PW-23 Manoj Kumar who was running shop at Bara Bazaar, Shamli. The statements of the witnesses were recorded. The investigation was completed and the challan was put up after completing all the codal formalities.

4. The prosecution, in order to prove its case, has examined as many as 29 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case. According to them, they were falsely implicated. The learned trial Court convicted accused Azam, Shehrudin and Shamsudin, as noticed hereinabove. Accused Kasim was acquitted. Hence, these appeals on behalf of the accused persons.

5. M/S. N.K. Thakur, Sr. Advocate with Mr. Inder Sharma, Ajay Sharma and Naresh Kumar Tomar, Advocates, appearing on behalf of the respective accused, have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A. Khan, learned Addl. AG, for the State has supported the judgment of the learned trial Court dated 23/29.12.2011.

6. We have heard learned counsel for both the sides and gone through the records of the case carefully.

7. PW-1 Shyam Lal, testified that he was running a shop of goldsmith at Sundernagar. His wife use to work with him in the shop. He had gone to Shimla on 8.9.2009. His wife and his servant Raju were present in the shop. He returned from Shimla in the evening. He and his wife slept in their room. Children slept in their room. There was a knock on his door at about 1:00 AM. He heard the muffled voice of his mother. His wife switched on the light and opened the door.

As soon as she opened the door somebody pushed her. There were 2-3 persons on the door. One of the persons put the pistol on the head of his wife. She was taken to a side. He was behind her. Another person slapped him and put the pistol on his head and took him to a side. His mother was caught by two persons. A pistol was put on her head. She was also brought inside the room. They were made to sit inside the room with pistol pointing towards their heads. The children also came inside the room on hearing noise. They were also made to sit alongwith them. There were four persons who came inside their room. One was standing on the door. The wife of his younger brother Mamta also came to their room on hearing the noise. One of the person snatched her chain and brought her inside the room. She was also made to sit with them. His younger brother Tilak Raj came after her. He was also dragged inside the room. He was slapped twice-thrice. One of the persons was armed with darat. Two of the persons covered them and two went to the Almirah. One hit the lock of almirah with darat and broke it. The other started searching the almirah and the room. There were two bags inside the almirah. One was bigger and the other was smaller. The small bag was having cash and bigger was having gold. He put the smaller bag in the bigger bag. They had kept two mobiles on the TV set. They picked up the mobile phones, took away the bags and all of them came out of the room. They bolted the door from outside. He caught the door and tried to open it. It opened after some time. They went out and started shouting. They could not find out as to where those persons went. The people came after some time because their houses were at some distance. He telephoned the police. The police came and inspected the spot. His statement Ext. PW-1/A was recorded. The police also took the photographs. The police cut the piece of the mat where they had spitted. It was sealed in a parcel. The lock of the Almirah was also seized by the police vide memo Ext. PW-1/C. The police also seized the accounts book Ext. PW-1/D, bill Ext. PW-1/E and one darat vide seizure memo Ext. PW-1/F. Vijay and Mohan Lal had put their signatures on this memo. He identified darat Ext. P-1. The identification of the accused was got conducted in the month of December in Sub Jail, Mandi. He identified three persons. The police took him to Shamli. The gold was melted and converted into a piece. The police also recovered 20 grams of nose pins. This was identified by Vijay Kumar and memo Ext. PW-1/G was prepared. It was seized vide memo Ext. PW-1/H. In his cross-examination, he deposed that he told the police that he had heard muffled voice. His mother was caught from arms by two persons. 2-3 slaps were given to his brother. One person hit the lock with the blunt side of darat. He had kept two mobiles on TV set and had pulled the door and it opened. (Confronted with Ext. PW-1/A where it is not so recorded).

8. PW-2 Sushma Devi also supported the version of PW-1 Shyam Lal. According to her, all the accused went outside the room and bolted from outside. Her husband pulled the door from inside. The door opened after sometime but the accused had left by that time.

9. PW-3 Krishna Devi, mother of PW-1 Shyam Lal also deposed the manner in

which the accused entered the house. According to her, she was going to toilet at mid night. One person was standing on the door. She thought her younger son was standing. She caught him by the arm and inquired Bablu where you were going. He put his hand on her mouth and pointed a pistol on her head. He threatened to kill her in case she would shout. Two persons caught her arms. They told her that they were police officials. They made inquiry about the person who runs a shop at Sundernagar. She replied that he is her son and he was sleeping in the room. They took her inside the room. She was not allowed to make any noise. Her daughter-in-law, Sushma opened the door. They pushed her inside the room. They pointed pistol at her head and also on the head of her daughter-in-law. The person with darat and empty handed started searching the room. The lock was broken with the blunt side of the darat. The accused went away with the bag and the mobiles. They bolted the door from outside the room. Shyam Lal pulled at the door and the door opened after some time.

10. PW-4 Vijay Kumar proved cashbook Ext. PW-1/D, bill Ext. PW-1/E. According to him, one darat Ext. P-1 was seized by the police vide memo Ext. PW-1/F on 10.9.2009. One nugget of gold was produced by Manoj alias Bobby owner of Mittal Jewellers. He examined it. It weighed 250 gms. He had issued certificate Ext. PW-1/G. In his cross-examination, he deposed that he did not know Manoj Kumar. The police had taken them to the shop of Manoj Kumar. The police told them that they knew about the shop of Manoj Kumar and they had to accompany the police to his shop. The police had telephoned them and told them to come to the shop of Manoj Kumar. In the cross-examination by the Advocate, appearing on behalf of accused Azam, he deposed that the shop of Manoj Kumar was open and Manoj Kumar made the statement in his presence.

11. PW-5 Const. Mohan Lal, deposed that the police recovered mat over which the assailants had spitted in his presence on 9.9.2009 vide seizure memo Ext. PW-1/C. The police also recovered one piece of broken lock and one key vide the same memo. These were sealed in separate parcels with seal "A". Accused Azam made a disclosure statement in his presence and in the presence of Bhinder and Sanjeev Kumar that he could show the shop and could get recover the ornaments sold by him, Islam and Noordin. Memo Ext. PW-5/A was prepared. The memo was signed by him, Binder and Sanjeev Kumar as witnesses and also by the accused. Accused Shamsudin made a disclosure statement on the same day in his presence and in the presence of Bhinder and Sanjeev Kumar that he could get recovered some ornaments concealed by him outside his house in a tarpaulin. Memo Ext. PW-5/B was prepared and it was signed by him alongwith Bhinder and Mohan Lal. In his cross-examination, he deposed that he did not remember the time when the disclosure statement was made in the Police Station Sundernagar. However, it was day time.

12. PW-6 Puran Chand deposed that the accused Sheharudin made a statement that he had concealed a black coloured mobile with his sister. He could get it recovered. Memo Ext. PW-6/A was prepared.

13. PW-7 Binder Kumar deposed that on 8.12.2009, ASI Vijay Kumar and other police officials were present in the Police Station. Accused Azam was present in the Police Station. He made a statement that he could get the ornaments recovered from Shamli in Uttar Pradesh. Memo Ext. PW-5/A was prepared and signed by him, Sanjeev and Mohan Lal alongwith the accused. Thereafter, accused Samshudeen made the statement that he could get recovered the ornaments from a tarpaulin outside his house. Memo Ext. PW-5/B was prepared and signed by him, Sanjeev and Mohan Lal alongwith the accused. In his cross-examination, he deposed that he went to the Police Station in connection with the personal work. He did not remember the time when he visited the Police Station. He did not remember the time of making the statements or the time at which the investigation was completed. He did not remember the time at which he left the Police Station. He reached at home at 6:00 PM. He did not go to Delhi.

14. PW-8 Sant Ram, deposed that accused Sheharudin made disclosure statement that he has kept mobile in his rented accommodation at Nehru Vihar and he could get it recovered. Statement Ext. PW-8/A was recorded and signed by him, HC Chaman Lal and thumb mark by the accused was also put. They took accused Sheharudin to his rented accommodation from where he got mobile recovered which was kept by him in an attache. Memo Ext. PW-8/B was prepared and signed by him, HC Chaman Lal and thumb mark by the accused was also put. He had gone with the police party to search for the accused in Delhi, Mustafabad and Hazuirkhas. One black coloured Scorpio bearing regn. No. DL-3CY-8786 was parked near ganda nalla. It was the same vehicle wanted by the police. The key of the vehicle was attached to the lock of the front door. The door was opened. Visiting cards were found inside the vehicle and were seized by the police. The vehicle was seized by the police vide seizure memo Ext. PW-8/C. Ashwani Kumar, produced one agreement mark-B which was seized vide memo Ext. PW-8/D. In his cross-examination, he submitted that they left the Police Station on 19.11.2009 in a hired Scorpio. He alongwith Vijay Kumar and HC Chaman Lal were in that vehicle. They reached Delhi on the same day. He did not remember the time. He did not know who had hired the Scorpio vehicle. He did not remember its colour. They had stopped many times on the way to Delhi. He did not inquire the name of the driver. They went to the house of sister of accused Sharudin where his statement Ext. PW-8/A was recorded. He did not remember who were present in the house of sister of accused. The statement was recorded by ASI Vijay Kumar. Thereafter, they went to Nehru Vihar. He admitted that no person of Delhi police or resident of Delhi was associated during investigation. He did not remember the colour of the vehicle in which they went to Delhi on 22.11.2009.

15. PW-9 Subhash Bashin, JMIC-II, Amb, has recorded the statements of the accused regarding their willingness for identification vide Ext. PW-9/B to PW-9/E.

16. PW-14 Dr. Sanjay Pathak, has examined the accused and issued MLCs Ext. PW-14/B to Ext. PW-14/E.

17. PW-17 HC Krishan Chand, made the statement that the case property was deposited with him and he deposited the same in the malkhana by making appropriate entry.

18. PW-21 Ashwani Kumar deposed that he was owner of vehicle bearing regn. number DL-3CY-8786. He had purchased the vehicle from Rajender Yogi. He issued certificate Ext. PW-21/A. He proved agreement Ext. PW-21/B.

19. PW-22 Dr. Aparna Sharma, has proved report Ext. PW-20/A. According to her, Ext. 2, 3, 4 and 5 yielded degraded DNA and STR amplification through PCR was not successful despite repeated attempts. The I.O. was again asked to send fresh samples to generate the DNA profile of the accused. According to her, on the basis of analysis performed on the exhibits, it was concluded that DNA profile obtained from exhibit 1 (piece of mat having spitting of gutka) matched fully with DNA profile from exhibit 6-d (blood sample of Islam).

20. PW-23 Manoj Kumar deposed that in the month of September, 2009, 4-5 boys, one lady and children came to his shop. They asked for exchanging the gold. The accused Azam and Shehruddin were accompanying those boys. One Neeru and Islam showed the identity cards. They handed over 200 grams of gold in the form of broken ornaments in the form of nose rings, rings, karas, chains and ear rings. He deducted 15% as per the conditions/quality of the ornaments. The gold was 200 grams after melting it. He handed over the ornaments, namely, 8 karas, two chains, 3-4 pair of ear rings, nose pins and Rs. 1,50,000/- as per the market price. In his cross-examination, he admitted that Mittal Jewelers is not a registered jeweler. He had maintained a copy regarding the transaction. It was a rough copy because it is not to be shown to any person. He had made entry in the rough copy regarding the transaction. They maintained the rough copy for about 1-2 months and thereafter, they dispose of the same. They did not obtain the signatures of the person delivering the articles. Signatures of the persons who came to him were not obtained by him. He has not taken any receipt of Rs. 1,50,000/- paid to the accused. He did not pay sale tax and income tax. They were only charging labour charges.

21. PW-24 HC Chaman Lal deposed that accused Shehruddin made a statement Ext. PW-8/A that earlier statement made by him was false to mislead the police and he had kept the stolen mobile in Nehru Vihar in his tenanted house which could be got recovered from him. Memo was prepared which bears his signatures and signatures of Sant Ram. Recovery memo Ext. PW-8/B was prepared which bears his signatures and signatures of Sant Ram as witnesses. Azam, Islam and Shamsuddin were taken to Shamli on 9.12.2009. Azam pointed out one shop Mittal Jewelers and told that the gold was sold in this shop. It was verified by Islam. The gold was sold in this shop. Memo is Ext. PW-24/B which bears his signatures and Azam put his signatures and Islam put his thumb impression. The shop was closed. Inquiry was made from Shamsuddin. He told that he could get the ornaments recovered from his house. The accused showed the place from where gold ornaments namely nose pins and nose rings were got recovered by

him. The weight of gold was found to be 20.760 grams and weight of stones was found to be 5.150 grams. These were kept in piece of paper and were wrapped in a piece of cloth. These were seized vide memo Ext. PW-24/D. In his cross-examination, he could not narrate the number of days when he remained with the police during the course of investigation. He did not remember the registration number or colour of the vehicle. They had gone in Scorpio vehicle. He did not remember the registration number and colour of the same. No person accompanied them from the complainant party. He could not tell as to who had hired the jeep. He could not tell the name of the driver. They had not associated any local police official. The local police was not associated at Shamli.

22. PW-25 Krishan Lal, has proved receipt No. 086885 vide Ext. PW-25/A. According to him, the vehicle Scorpio 8786 crossed the barrier on 8.9.2009 towards Himachal. He admitted in his cross-examination that receipt Ext. PW-25/A was not in his handwriting but in the hand writing of his employee. He could not tell the State to which vehicle bearing regn. No. 8786 belonged. The receipt was for the small vehicle. He could not narrate the description of any other vehicle mentioned in the counterfoil. He could not narrate as to how he remembered the description of Scorpio.

23. PW-27 ASI Vijay Kumar, deposed that a telephonic information was received in the police post Slapper on 9.9.2009 that a dacoity had been committed in the house of Shyam Lal. The statement of Shyam Lal was recorded. Photographs were taken. The statements of the witnesses were also recorded. Disclosure statements made by the accused under Section 27 of the Indian Evidence Act were also recorded. Recoveries were effected of the gold and telephone. In his cross-examination, he admitted that he has not associated the local police. Volunteered that local beat Constable was present but he was not cooperating them. He had not made any complaint regarding this fact because he was short of time. He also admitted that the recovery was got effected by Shamsuddin from open place underneath the tarpaulin. No local witness was associated because it was similar community inhabited by people of one community. He further deposed in his cross examination by Sh. Vikash Sharma, Advocate that Azam made a disclosure statement on 8.12.2009 in the presence of Binder Kumar and Sanjeev Kumar. They had visited the Police Station by chance in connection with their work. He could not tell the details of the work. In his further cross-examination, he admitted that there was no identification mark on the recovered gold to connect it with the stolen gold. Four revolvers could not be recovered in this case.

24. PW-28 Madan Lal, was declared hostile. He denied the suggestion by the learned Public Prosecutor that the police came to him on 9.12.2009.

25. PW-29 Shashikant Verma proved letter Ext. PW-18/A, call details Ext. PW-18/B, customers identification form Ext. PW-19/C and identity proof (election card) Ext. PW-18/D.

26. The case of the prosecution, precisely, is that the accused entered the house of PW-1 Shyam Lal, complainant when PW-3 Krishna Devi came out to use the toilet. According to PW-1 Shyam Lal, he heard the muffled noise of his mother. His wife opened the door after switching on the light. The accused were armed with pistols. They pointed the pistols on their heads and entire family was made to sit together. One of the accused opened the almirah by using darat. Jewelry and cash was removed and the accused fled away after bolting the door from outside.

27. PW-1 Shyam Lal, deposed that the door was opened after some time. Similar statement is made by PW-2 Sushma Devi and PW-3 Krishna Devi. It cannot be believed that the door could be opened from inside when it was bolted from outside. In case, the door was to be opened, even hypothetically, by pushing it, latch would have broken. The police has not recovered any broken latch or the door.

28. The manner in which the prosecution has narrated the entry of the accused to the house is also doubtful. According to PW-3, Krishna Devi, she went out to use the toilet and accused entered their house. It is not believable that 4-5 persons, fully armed were waiting for her to come out to use the toilet in order to enter the house and that too at 1:30 AM.

29. The case of the prosecution is that accused Azam made the disclosure statement vide Ext. PW-5/A that he could show the shop and could recover the ornaments sold by him. The memo was signed by Binder and Sanjeev Kumar. Accused Shamshudin has also made the disclosure statement Ext. PW-5/B to the effect that he could recover some ornaments concealed by him outside his house in a tarpaulin. PW-5 Const. Mohan Lal, in his cross-examination, has admitted that he did not remember the time when the statement was made. Statements Ext. PW-5/A and PW-5/B were also signed by PW-7 Binder Kumar. His presence in the Police Station is doubtful. According to him, he went to the Police station in connection with some personal work. The Police requested him to sit. He reached the Police Station during day time. He did not remember the time. He did not remember the time at which he left the Police Station or making statements or investigation completed. He did not remember as to when he has taken character certificate. The report was handed over to him by MHC. He did not know whether entry was made by MHC in the daily diary or not. He produced the report in the Tehsil on the next day. He took the character certificate on 9.12.2009. His signatures were obtained by clerk of the Tehsil at the time of delivery of the character certificate. He had not seen the register of the character certificate. The character certificate has not been proved. He was supposed to know the time when he reached the Police Station and left from there.

30. According to PW-8 Const. Sant Ram, mobile phone Ext. P-2 was recovered vide memo Ext. PW-8/B. He had gone with the police party in search of the accused. One black coloured Scorpio bearing regn. No. DL-3CY-8786 was parked near gandanala. The key of the vehicle was attached to the lock of the front door.

In his cross-examination, he deposed that they left for Delhi on 19.11.2009 in a hired Scorpio. They reached Delhi on the same day. However, he did not remember the colour of the vehicle. He also admitted that no person of Delhi or Delhi Police was associated in the investigation. The mobile phone has been recovered from Nehru Vihar. The police has neither informed the local police nor any independent witnesses were associated at the time of seizure of mobile phone vide seizure memo Ext. PW-8/B. Both the witnesses of Ext. PW-8/B are police officials.

31. According to the prosecution, the accused Azam has made disclosure statement on 8.12.2009 that he could get the gold ornaments recovered from Shamli town. This statement was witnessed by PW-7 Binder Kumar, Mohan Lal and Sanjeev Kumar. We have already discussed the statement of PW-7 Binder Kumar. His presence in the Police Station is doubtful. Similarly the statement of Shamshudin was recorded under Section 27 of the Indian Evidence Act that he could recover ornaments concealed by him outside his house in a tarpaulin. It was also witnessed by PW-7 Binder Kumar and Mohan Lal. The shop was got identified by accused Azam vide Ext. PW-24/B. Ext. PW-24/B has been witnessed by the official witnesses. No independent witnesses were associated at the time of preparing Ext. PW-24/B. The police has also not even informed the local police. The gold was recovered vide memo Ext. PW-24/D at the instance of accused Shamshudin. Ext. PW-24/D has also not been signed by any independent witness. It was signed by police officials Const. Chaman Lal and Baldev Singh. The reason assigned by the I.O. for not associating the independent witnesses is that the neighbor also belonged to the same community. The independent witnesses ought to have been associated at the time when Ext. PW-24/B and PW-24/D were prepared. Similarly, we have already noticed that when the mobile phone Ext. P-2 was recovered, no independent witnesses were associated by the police.

32. The case of the prosecution is that the gold was recovered from the shop of PW-23 Manoj Kumar. PW-23 Manoj Kumar in his statement has admitted that Mittal Jewelers is not a registered jeweler. He had maintained a copy regarding the transaction. It is a rough copy because it is not to be shown to any person. He used to make entry in the rough copy regarding the transaction. They maintain the rough copy for about 1-2 months and thereafter, they dispose of the same. They did not obtain the signatures of the person delivering the articles. Signatures of the persons who came to him were not obtained by him. He has not taken any receipt of Rs. 1,50,000/- paid to the accused. Local police has not been associated at Shamli and even the house of the accused was also not got identified by any person.

33. PW-27 ASI Vijay Kumar, the I.O. in the case, in his cross-examination has admitted that the recovery from Shamsuddin was made from open place underneath the tarpaulin. It is not believable that accused would have kept the gold underneath the tarpaulin which was accessible to all. PW-27 ASI Vijay

Kumar in his further cross-examination has deposed that Azam has made disclosure statement. Binder Kumar and Sanjeev Kumar had visited the Police Station by chance in connection with some work. He could not narrate the details of the work. He has also admitted that there was no identification mark on the recovered gold. He has also admitted that four revolvers could not be recovered in this case. The recovery of revolvers/pistols was very important since the case of the prosecution is that the accused have threatened the family of PW-1 Shyam Lal by pointing pistols on their heads. Since the revolvers/pistols have not been recovered, it casts doubt on the entire version of the prosecution as to whether the accused were carrying revolvers/pistols at all.

34. Mr. M.A. Khan, learned Addl. Advocate General for the State has vehemently argued that the vehicle used in the case bearing registration No. DL-3CY-8786, was recovered. He further submitted that the vehicle had entered Himachal. He has also drawn the attention of the Court to Ext. PW-24/A. We have gone through Ext. PW-24/A. In Ext. PW-24/A, vehicle No. 8786 has only been recorded but the registration number allotted to a particular State is also to be pre-fixed before the number. Ext. PW-24/A has not been even signed by PW-25 Krishan Lal. Rather, Ext. PW-25/A does not bear the signatures of any person or verification of any person.

35. Mr. M.A. Khan, learned Addl. Advocate General for the State has further argued that the prosecution has obtained the DNA profile of the accused. PW-22 Dr. Aparna Sharma has proved report Ext. PW-20/A. The following observations have been made in Ext. PW-20/A:

"Observations:

- i). Exhibits P-1, 6a, 6b, 6c and 6d yielded good quality DNA and it was possible to amplify all the fifteen autosomal STR loci and amelogenin (X and Y) using AmpF/STR Identifier PCR Amplification Kit.
- ii). The genotype profile of the source of exhibit 6d (Sh. Islam) matched fully with the genotype profile obtained from exhibit-1 (source: piece of mat having spitting with Gutka) at all the fifteen STR loci.

Conclusion:

On the basis of the above analysis performed on the aforesaid exhibits, it was concluded that the DNA profile obtained from exhibit-1 (piece of mat having spitting of gutka) matched fully with DNA profile from exhibit 6-d (Blood sample of Sh. Islam)."

36. The DNA profile matched fully with DNA profile from blood sample of Islam only. The report qua other accused is not conclusive that the DNA profile matched with their blood samples. The blood samples of the accused have been obtained by PW-15 Dr. Babita Chaurasia. It has come in the statement of PW-22 Dr. Aparna Sharma that the I.O. was asked to provide fresh samples to generate the DNA profile of the accused. PW-15 Dr. Babita Chaurasia has not deposed that

the Medical Officer has kept the samples of blood preserved by the Medical Officer, CH Sundernagar. The Medical Officer, CH Sundernagar, has not been examined to establish that he had preserved the blood samples of the accused. According to the conclusion of Ext. PW-20/A, the DNA profile obtained from exhibit-1 matched fully with DNA profile from exhibit 6-d, the blood sample of Sh. Islam and not of the accused.

37. Mr. M.A. Khan, learned Addl. Advocate General has also drawn the attention of the Court to Ext. PW-24/A to establish that the Medical Officer, CH Sundernagar has preserved the blood samples, however, in the absence of examination of Medical Officer, CH Sundernagar, it cannot be conclusively said that he had preserved the blood samples.

38. PW-1 Shyam Lal is goldsmith and thus the doors of his house are bound to be strong and the same could not be opened by pushing it from inside and that too, when the door was bolted from outside by the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 395 IPC.

39. Accordingly, in view of the analysis and discussion made hereinabove, the appeals are allowed. Judgment of conviction and sentence dated 23/29.12.2011, rendered by the learned Addl. Sessions Judge, Mandi, H.P., in Sessions Trial No. 10 of 2010, is set aside. Accused persons are acquitted of the charges framed against them by giving them benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

40. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.