

(2012) 02 BOM CK 0226
In the Bombay High Court
Case No : Criminal Appeal No. 496 of 2007

Ganesh Bhau Sonawane

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 01-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 397

Citation : (2012) BomCR(Cri) 70 : (2012) 114 BOMLR 871

Hon'ble Judges : Hari P. Davare, J; A.P. Lavande, J

Bench : Division Bench

Advocate : Abhaykumar Apte, for the Appellant; M.M. Deshmukh, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—By this Appeal the appellant ("the accused" for short) takes exception to judgment and order dated 13th February, 2007 passed by Sessions Court at Sewree in Sessions Case No. 222/2006 by which the accused has been convicted for the offence punishable u/s 302 and Section 397 of IPC and sentenced to suffer imprisonment for life and to pay fine of Rs. 1000/-in default to suffer imprisonment for one month and to suffer R.I. For seven years and to pay fine of Rs. 1000/-in default to suffer one month simple imprisonment, respectively. The accused has been convicted for causing murder of his aunt Laxmibai B. Narayankar on 17th December, 2005.

2. Briefly, the prosecution case is as under:

Deceased Laxmibai Narayankar was residing alone at Bungalow named as "Sai Krupa", at Model Town, Mulund West. Her daughter PW1 Meena Ramesh Darvesh was residing at Koparkhairane, New Mumbai. Baburam - the husband of Laxmibai expired in 2001 and thereafter Laxmibai started residing alone in the said bungalow. Devidas -the son of deceased was residing at Sion, Chembur with his family members. Meena used to visit her mother two or three times in a month

and Devidas used to meet her once in a month. Therefore, one key of the bungalow of her mother was with Meena and another key was with Devidas. On 17/12/05 Shubharta - the daughter of Meena made phone call to Laxmibai at about 6.30 hours and she had talk with Laxmibai. At about 7.00 p.m. Meena gave a call to her mother but there was no response from Laxmibai. Thereafter, she tried to contact her mother on mobile but there was no response. Therefore, she made phone call to her brother to enquire whether Laxmibai had come to his house but he replied in the negative. On the same day at about 11.00 p.m. Meena alongwith her son Sagar, nephew Sachin proceeded in Indica car and reached at the bungalow of her mother at about 11.30 p.m. They noticed that the entrance gate was locked and there was no light in the bungalow. Since she had not taken the key of the bungalow, she went to her brother's house. She took the key of the bungalow from her brother and came alongwith her brother back to the Bungalow of her mother at about 1.00 a.m. on 18/12/05. Devidas opened the lock and all of them entered the house and after switching on the light, they could not find Laxmibai. Meena noticed that bathroom was closed from outside. She opened the latch of the bathroom and saw her mother Laxmibai lying in injured condition with injuries on her neck and chin caused by sharp weapon. She raised shout whereupon her brother, son and nephew came near the bathroom and saw Laxmibai. They informed Tony Agarwal who made phone call to the police who came on the spot. She also noticed that her mother did not have gold chain and four bangles which Laxmibai was normally wearing. She lodged report at Mulund police station which was registered under Sections 302 and 397 of IPC against an unknown person. The investigation was carried out and spot punchnama Exhibit 17 and seizure panchanama (Exhibit 18) of the clothes of the deceased were conducted. It is further the case of the prosecution that the accused was suspected to be involved in the commission of the crime and as such he was arrested on 22nd December, 2005 under arrest punchanama Exhibit 13. On 23rd December, 2005 the accused while in police custody made a disclosure statement to show the shop of the Marwadi whom he had sold ornaments of deceased Laxmibai. Accordingly, Memorandum Exhibit 32 was recorded and the accused led the police and panchas to Vikhroli to the shop of Mr. Jain named "Mahavir Jewellers" where Dharamchand Jain disclosed that the accused had sold four bangles and one gold chain and the same were produced. They were seized under recovery panchnama Exhibit 33. The gold ornaments seized were shown to PW1 Meena who identified the same under Panchnama Exhibit 34. Thereafter, the accused also showed his willingness to show the place where he had thrown iron Khanjeer used in the commission of the offence and clothes worn by him. Accordingly, Memorandum Exhibit 22 was recorded and consequent to disclosure statement the Khanjir was recovered near the heap of garbage. The accused also took out one plastic bag from inside the two cement roof sheet in which there was one yellow colour full shirt and one ash colour full pant. In the backside of pant pocket one iron key was found. The same were seized under Recovery Panchnama Exhibit 23. On 24th December, 2005 identification parade was held by PW8 Jagannath Mule - Special Executive Officer

in which PW7 Ramlal Kahar who was working in the Shaswat bungalow which was just opposite to the bungalow of deceased Laxmibai. Ramlal who claimed to have seen the accused near the gate of the bungalow on 17th December, 2005, at about 12 o'clock noon, identified the accused. The muddemal articles were sent for analysis to FSL, Mumbai. The Investigating Officer also collected the receipt book of Mahavir Jewellers Exhibit 25. After completion of the investigation chargesheet was filed against the accused in the Court of Metropolitan Magistrate under Sections 302 and 397 of IPC. Since the case was exclusively triable by the Court of Sessions, the case was committed to the Sessions Court, Sewree. In Sessions Case No. 222/2006 the charge under Sections 302 and 397 was framed against the accused. The accused pleaded not guilty to the charge and claimed to be tried.

3. To prove the case against accused the prosecution examined 12 witnesses and also produced documentary evidence. The accused did not lead any evidence in defence. The defence of the accused was of total denial. The learned Session Judge upon appreciation of the evidence led by the prosecution held the accused guilty under both Sections and sentenced him as above. Insofar as the disposal of the property is concerned, the learned Judge ordered that same be preserved till the appeal was disposed of.

4. Mr. Apte, learned Counsel appearing for the accused submitted that the said circumstantial evidence led by the prosecution is not sufficient to convict the accused for the offence for which he has been convicted. According to learned Counsel PW7 Ramlal Kahar who claimed to have seen the accused alongwith deceased in "Sai Krupa" bungalow at about 12 noon could not have done so since there is a six feet compound wall around Shaswat bungalow in which he was working. Learned Counsel further submitted that no reliance can be placed on the recovery of weapon inasmuch as the same is from open place and after a period of about 11 days. Insofar as recovery of clothes is concerned, learned Counsel submitted that there is a variation between the colour of clothes seized and the colour of the clothes as deposed by the witness to the seizure panchnama. Learned Counsel further submitted that no reliance can be placed on the bill dated 18/12/2005 Exhibit 25 produced by PW5 Dharamchand Jain inasmuch as the same does not bear the signature of the accused. Learned Counsel further submitted that perusal of the bill book discloses that in respect of other bills the signature of the seller was obtained and, therefore, it is evident that the bill book has been fabricated by the prosecution to falsely implicate the accused. Insofar as identification parade held by PW8 is concerned, learned Counsel submitted that no reliance can be placed since all the dummies were of different age and complexion and further there is a variation as to the number of dummies present at the parade as per the versions of PW7 and PW8. Learned Counsel further submitted that identification of the ornaments by PW1 Meena under panchnama conducted by police is clearly inadmissible and, therefore, the identification of the said ornaments by PW1 Meena for the first time in the Court does not carry much weight. Learned Counsel further submitted that the version

of PW5 that initially the accused have sold two bangles and on the same day the accused approached him with two bangles in evening and collected Rs. 10,000/- is absolutely unbelievable and in any case not supported by any documentary evidence. According to learned Counsel the theory of last seen together is not applicable inasmuch as PW7 Ramlal Kahar claims to have seen deceased Laxmibai with accused at 12 o'clock whereas the death of Laxmibai admittedly occurred after 6.30 p.m. and in the absence of any cogent evidence having been led by the prosecution that the accused was seen in the bungalow after 6.30 p.m., the theory of last seen together has absolutely no relevance besides being improbable. According to learned Counsel the key which was alleged to have been found in the pant recovered at the instance of the accused was not tried on the lock of the bungalow and as such an adverse inference has to be drawn against the prosecution. Mr. Apte further submitted that the evidence led by the prosecution does not conclusively establish the guilt of the accused beyond reasonable doubt and as such the accused is entitled to be acquitted of both the offences for which he has been convicted by the trial Court. Mr. Apte placed reliance upon the judgment of the Apex Court in the case of Prabhu Vs. State of U.P., .

5. Per contra, Mr. Deshmukh, learned APP for the respondent submitted that the circumstantial evidence led by the prosecution is sufficient to convict the accused since the chain is complete. Learned APP submitted that the evidence led by the prosecution is cogent and no fault can be found with the same and the findings recorded by the learned trial Judge to convict the accused cannot be faulted. Mrs. Deshmukh further submitted that even if the identification of the gold ornaments by PW1 Meena before the police is not taken into consideration being inadmissible, the identification of said ornaments by PW1 Meena in the Court deserves to be accepted even in the absence of prior test identification parade. Learned Counsel further submitted that the prosecution has been able to establish the following circumstances which conclusively prove the guilt of the accused.

(i) Homicidal death of Laxmibai.

(ii) The accused and the deceased were last seen together in the bungalow of deceased at 12 noon on 17/12/05.

(iii) Discovery of four gold bangles and chain (broken) sold by the accused to PW5 Dharamchand Jain.

(iv) Recovery of weapon i.e. dagger (khanjeer) the clothes of the accused at the instance of the accused.

(v) Presence of blood on the dagger and on the clothes of the accused.

6. In support of her submissions, Mrs. Deshmukh relied upon the following judgments:

Earabhadrapa Vs. State of Karnataka, , Ramesh Vs. State of Rajasthan, ,

7. We have carefully considered the rival submissions, perused the record and the judgments relied upon.

8. The question which arises for consideration in the present appeal is whether the circumstantial evidence led by the prosecution proves beyond reasonable doubt that it was the accused who had committed murder of deceased Laxmibai after committing robbery of the gold ornaments on 17/12/2005.

9. As stated above, the prosecution has relied upon the following circumstantial evidence to prove the offences against the accused.

(i) Homicidal death of Laxmibai.

(ii) The accused and the deceased were last seen together in the bungalow of deceased at 12 noon on 17/12/05.

(iii) Discovery of four gold bangles and chain (broken) sold by the accused to PW5 Dharamchand Jain.

(iv) Recovery of weapon i.e. Dagger (khanjeer) the clothes of the accused at the instance of the accused.

(v) Presence of blood on the dagger and on the clothes of the accused.

10. In order to prove the homicidal death of Laxmibai, the prosecution has examined PW9 Dr. Sunil Jawle. PW9 Dr. Sunil Jawle deposed that at the instance of Mulund police station, he conducted postmortem on dead body of Laxmibai Narayankar between 9.00 p.m. and 10.00p.m. on 18/12/2005 and he found following external injuries on her person.

(1) CLW right parietal, 4cm above right pinna, 4 X 2 X Bone deep oblique radish.

(2) CLW just above injury no. 1 2 1/2 X 1/2 radish.

(3) Incised wound over right frontal, 4 cm above eyebrow, 2 X 1/2 X bone deep, 2 X 1/2 X bone deep vertical radish.

(4) Punctured wound above right eyebrow laterally 1/4 X 1/4 radish.

(5) Incised wound right parietal, posterior 2 X 1/2 X bone deep radish.

(6) Incised would left parietal 4 cm above pinna 2 X 1/2 X bone deep - radish.

(7) Punctured wound right pinna upper part, penetrates and caused punctured wound to temporal region at corresponding area 1/2 X 1/2 X bone deep-radish.

(8) Incised wound left cheek 2 X 1/2 X 1/2, sharp edges-radish.

(9) Chop wound left chin to right angle of mandible 13 X 3 X bone deep, cut ends of mandible pieces seen oblique.

(10) Another cop wound starts at left end of injury no. 9 oblique upwards, end at

center of lower lip 6 X 2 X 2 -radish.

(11) left periorbital contusion 6 X 6 radish.

(12) A abraded contusion over anterior part of neck 13 X 4 cm oblique, reddish abraded contusion over anterior part of neck size 12 X 4 cm oblique radish on cut session under line neck muscle, vessels and intima of large vessels contusion, radish evidence of fracture of hyoid bone and infiltration staining with fracture of greater cornue of hyoid and hamorrhage in trachel rings, radish.

He further deposed that in the head he found subgaleal contusion at places and he also found corresponding internal injuries mentioned in column 2nd. He further deposed that a cause of death was due to manual compression of neck, associated with chop wounds over neck and other multiple injuries. The blood group of deceased was B+. He identified his handwriting on the postmortem report Exhibit 40 and also on the Certificate Exhibit 41 showing the cause of death. He also produced C.A. Report (Exhibit 42) in respect of blood group of deceased. Upon being shown dagger (Article D) he deposed that injuries found on the dead body of the Laxmibai could have been caused by the dagger. In cross-examination he deposed that it was not necessary that all the injuries were caused by double edged weapon. He further deposed that injuries could have been caused within 20 hours of the beginning of postmortem. He confirmed that the injuries were ante mortem.

11. Thus evidence of PW9 Dr. Sunil Jawle which has not been shaken in cross-examination clearly proves that death of Laxmibai was homicidal. The same also stands corroborated by inquest panchnama Exhibit 17 which has been proved by PW3 Vijay Agla, one of the panchas for inquest panchnama. Thus, the prosecution has been able to establish the first circumstance.

12. Coming to the second circumstance i.e. the deceased and the accused having been seen together at 12 o'clock on 17/12/2005, the prosecution has relied upon the evidence of PW7 Ramlal Kahar and PW8 Jagannath More Special Executive Officer who had conducted test identification parade on 24/12/2005.

PW7 Ramlal deposed that in the year 2005 he was residing at Modral town in the bungalow of Mohan Shetty named as Shaswat and he was doing household and gardening work in the said bungalow. Sai Krupa bungalow was opposite Shaswat bungalow. In the year 2005 Laxmibai was staying alone in Sai Krupa bungalow. On 17/12/05 he was watering the plants in the bungalow at about 12 noon. He saw Laxmibai and one person standing in the balcony of Sai Krupa bungalow, for about 15 minutes. He identified the accused as a person he had seen on 17/12/2005. He further deposed that he was called at Central Prison on the next day and out of 12-13 persons standing in the queue, he had identified the accused. He further deposed that on the next day i.e. on 18/12/05 he came to know about murder of Laxmibai. In cross-examination he stated that normally he used to water the plants in the morning and evening but sometimes he used to do it in the afternoon. On 17/12/2005 guest of Mohan Shetty had come in the

bungalow and, therefore, he gave water at 12 o'clock noon. He further stated that there was no servant in the bungalow of Laxmibai. He further stated that there was a boundary wall around the bungalow of Laxmibai of 5-6 feet and also boundary wall around the bungalow of Mohan Shetty of 5-6 feet height. He further stated that he has seen the accused for the first time on 17/12/05 in the noon and he was wearing shirt with cheques and pant on 17/12/2005. He further candidly admitted that he had not stated to the police that Laxmibai and accused were talking standing in the balcony but he had stated that both of them were talking by the side of the gate i.e at the entrance door. He was not shown any photographs in Mulund Police Station nor identified the accused prior to the identification parade. He denied that he was falsely deposing that he had seen the accused talking with the deceased in her bungalow on 17/12/2005.

13. PW8 Jagannath More-the Special Executive Officer who had conducted test identification parade on 24/12/2005 deposed about the steps taken to conduct the parade. According to witness the Superintendent provided six dummies who were asked to stand in a queue and there were two panchas in the room in which parade was held. He deposed that the witness identified the accused by pointing finger towards him. He was shown identification parade report Exhibit 38 and he confirmed its contents are correct. He also identified the accused present before the Court as the one who was identified in identification parade. In the cross-examination initially he stated that all the dummies were of similar age group but later on he admitted that all the six dummies were of different age, different complexion and different body.

14. Upon a close scrutiny of evidence of PW7 and PW8, we find it extremely difficult to rely upon the evidence of PW7 Ramrao who claimed that he had seen the accused alongwith deceased on 17/12/05 at 12'o clock in the noon. Firstly, he candidly admitted in cross-examination that he had not told the police that he had seen the accused and deceased in the balcony of the bungalow as deposed by him in the examination-in-chief. He candidly admitted that he had told the police that he had seen both of them talking by the side of the gate. Since there is a marked variation in the testimony of the witness vis-a-vis his police statement as to the place where he had seen the accused having talked with the deceased, we find it difficult to place implicit reliance on his testimony. Moreover, the evidence of PW8 Jagannath More discloses that all the dummies were of different age, different complexion and different body. It is axiomatic that in an identification parade dummies must be similar to the accused in all respects i.e. age, complexion, height etc. Moreover, PW7 Ramlal claimed there were 12-13 persons" dummies in the parade whereas PW8 Jagannath claims that there were 6 dummies. Thus, having regard to the evidence of these two witnesses which is not consistent we find it difficult to place any implicit reliance on their testimonies. In any case since PW7 Ramlal admitted that he had seen the accused for the first time on 17/12/05, it was necessary for the prosecution to establish by leading cogent evidence that test identification parade was properly held in which the accused was identified by PW7. The prosecution having failed

to do so, in our considered opinion no reliance can be placed on the testimonies of PW7 and PW8 to hold that prosecution has been able to establish that PW7 Ramlal had seen accused alongwith deceased on 17/12/05 at about 12 o'clock noon.

15. The next circumstance relied upon by the prosecution is of four gold bangles and chain (broken) sold by the accused to PW5 Dharamchand Jain. In order to establish the circumstance the prosecution has relied upon the evidence of PW5 Dharamchand Jain and PW6 Jahangir Khan.

PW5 Dharamchand Jain deposed that he was running jewellery shop under the name and style "Mahavir Jewellers" situated at Vikhroli. He knew accused since he was working as a peon in Sandesh Vidhyalay situated at Tagore Nagar at Vikhroli. He stated that about two months prior to December 2005 accused came to his shop alongwith his mother and he gave him Rs. 500/-. On 18/12/2005 accused came to his shop alongwith his wife and told him that his mother had to undergo operation. The accused sold two gold bangles and one broken gold chain to him for Rs. 16,600/-. He gave the receipt to the accused. The witness identified the bill book maintained by him in the ordinary course of business. He identified copy of the bill No. 417 dated 18/12/05 having the name of the accused. He confirmed the contents of the bill (Exhibit 25) as true and correct. He further deposed that on 18/12/05 in the evening the accused again came to his shop with two bangles and asked him to keep the said two bangles since he required more money for operation of his mother. The accused demanded Rs. 10,000/- which was paid by PW 5 to the accused. The accused requested him to prepare the receipt and told him that he would sign the receipt later. However, on 23/12/05 the accused came to his shop with police who made enquiry whether accused had sold ornaments whereupon he handed over four gold bangles and one broken gold chain and the receipt to the police. He identified four bangles and one broken gold chain (Articles A and B). In the cross-examination the witness admitted that there were signatures of the seller upon copies of the bills from 10/3/05 to 22/12/05 except Exhibit 25. He further stated that since accused was in a hurry, he did not take the signature of the accused. He stated that he had stated to the police that on the very day of the evening accused had come to his shop and took further amount of Rs. 10,000/- after keeping two bangles. He stated that he could not give any reason for such omission in his police statement. He further stated that on the next date, wife of the accused came to his shop and repaid an amount of Rs. 9000/- out of Rs. 10,000/-. He further stated that he did not make any entry in the cash book dated 18/12/05 regarding payment of Rs. 10,000/- to accused. He denied the suggestion that the bill book was written as per the say of the police.

16. PW6 Jahangir Khan stated that on 23/12/05 he was called as a panch at Mulund police station. In his presence the accused made a disclosure statement which was reduced into writing under a Memorandum Exhibit 32. The accused stated that he had sold the gold bangles and chain to Mahavir Jewellers.

Thereafter the accused led them to Vikhroli (E) at Tagore Nagar and took them to Mahavir Jewellers. The owner of Mahavir Jewellers stated that accused had sold gold chain and gold bangles and took out the four gold bangles and three pieces of gold chain. The police seized the said ornaments in his presence. He signed the panchnama Exhibit 33. He confirmed its contents as true and correct. He also identified four gold bangles, one gold chain in broken condition Articles A and B respectively. In the cross-examination of this witness nothing tangible has been brought on record to discredit the version of the witness.

The witness was allowed to be re-examined by learned APP. The witness further stated that on 24/12/05 he was again called at Mulund police station and in his presence one lady identified four bangles and broken chain as belonging to her mother. He identified the said ornaments. He identified signature on the punchnama Exhibit 34.

17. Upon close scrutiny of evidence of above two witnesses, we have no hesitation to accept the prosecution version that upon disclosure made by the accused, four bangles and one broken gold chain were recovered from PW5 Dharamchand on 23/12/05. Insofar as identification of the gold ornaments by a lady in the police station in terms of Panchnama Exhibit 34 is concerned, the same is clearly not admissible since such identification is hit by Section 161 of Criminal Procedure Code. The statement made by the lady (PW1 Meena) in respect of the gold ornaments in the presence of police and the panchas is clearly inadmissible in law. However, the evidence of PW1 Meena clearly discloses that in her substantive evidence she identified four bangles and one broken chain which was seized from PW5 Dharamchand Jain, as belonging to her mother. In the case of Earabhadrapa (supra) the Apex Court in Paragraph 12 of the Judgment has observed that it is a matter of common knowledge that ladies have an uncanny sense of identifying their own belongings particularly articles of personal use in the family. No doubt, the gold ornaments were belonging to the deceased - the mother of PW1 Meena but the evidence of PW1 Meena discloses that she was quite familiar with the said ornaments and that the gold chain was given by her to her mother. There is one more factor which goes in favour of prosecution. In the FIR Exhibit 10 lodged by PW1 Meena at 1.20 a.m. on 18/12/05, Meena had clearly mentioned that four gold bangles and one gold chain were missing from the body of her deceased mother. The reference of gold ornaments in the First Information Report which was promptly lodged by PW1 Meena and recovery of the said gold ornaments at the instance of the accused on 23/12/05 clearly proves that it was accused who had committed robbery of the said ornaments. We find it extremely difficult to hold that PW 5 Dharamchand Jain has falsely implicated the accused since it is difficult to believe that Dharamchand would part with four gold bangles and one broken chain of gold to falsely implicate the accused. Insofar as the statement made by Mr. Apte that the recovery of gold ornaments is suspicious on the ground that the signature of the accused is not on copy of bill Exhibit 25 is concerned, we find no merit therein. Firstly the witness has categorically deposed that the accused was in a hurry.

Secondly, perusal of the receipt book clearly discloses that it was kept in ordinary course of business and there are more bills prepared after 18/12/05. Moreover, in the copy of Bill No. 410 there is no signature of the seller. Therefore, we find it extremely difficult to hold that receipt book has been fabricated by the prosecution to falsely implicate the accused. The evidence of PW5 Dharamchand inspires confidence and, therefore, we have no hesitation to accept the identification of the said gold ornaments by PW1 Meena for the first time in Court although the identification of the said gold ornaments before the police is inadmissible, in view of the judgment of the Apex Court in the case of Earabhadrapa (supra). Therefore, in our considered opinion the third circumstance has been clearly proved by the accused.

18. The next circumstance relied upon by the prosecution is discovery of weapon i.e. dagger and clothes of the accused at the instance of the accused. In order to prove the circumstance the prosecution examined PW 4 Mahesh Pawani. He deposed that on 28/12/05 he was called by Mulund police station and accused made disclosure statement that he would show the place where he had hidden iron khanjeer, his clothes and key. The police recorded Memorandum statement Exhibit 22. He identified his signature on the same and confirmed its contents as true and correct. Thereafter, the accused led the police and the panchas in a police van to Vikhroli (E) near the garbage box which was near Vikhroli railway crossing gate. The accused got down from the vehicle and a khanjeer from the garbage was seized by the police. Thereafter, accused led them to one room in Vikhroli in a lane which was in a hutment area. The accused entered the room and took out the shirt and pant from the "mala" (the loft). In the pant pocket on the backside there was one key. The police seized the clothes and key under panchnama Exhibit 23. He confirmed its contents as correct and identified signature on the same. He also identified the khanjeer (Article D), clothes (Article E and F) and key (Article C). In the cross-examination he stated that he was running a shop near the police station. He stated that police officer Kokane Saheb had not told him to come to Vikhroli for seizure of clothes and Khanjeer. He further stated that police took out khanjeer from the garbage and made writing thereon. He denied that he was deposing falsely at the instance of the police.

19. The evidence of this witness of PW4 Mahesh Pawani which has been corroborated by panchnamas Exhibit 22 and 23 has not been shaken on material aspects in the cross-examination. Therefore, we have no hesitation to accept the testimony of this witness which proves that at the instance of the accused khanjeer was seized from garbage box near Vikhroli railway crossing gate and that a pant and shirt were also seized at the instance of the accused from his hut. No doubt the witness in his testimony has stated that a T shirt was seized from the hut of the accused but fact remains that he has also identified the T shirt which was produced in the Court. We ourselves have seen the Muddemal articles and Article is not T shirt but is a shirt with full sleeves. Therefore, we find that the so called discrepancy in the evidence is not such as to reject the entire

version of the prosecution that at the instance of the accused the pant and shirt were seized from his hut. In our view, although discovery was made on 28/12/05 and accused was arrested on 18/12/05, this fact by itself would not be sufficient to hold that delay in discovery is fatal to the prosecution case. We, therefore, hold that prosecution has been able to establish the fourth circumstance.

20. The next circumstance relied upon by the prosecution is presence of B group on the weapon i.e. Khanjeer (Article D) and on the pant of the accused which was seized at his instance. The C.A. Report Exhibit 52 relied upon by the prosecution establishes that on the khanjeer and the pant, blood of B group which was the blood group of deceased was found. The accused has not offered any explanation in respect of presence of blood of B group on the weapon as well as on the pant. Hence, this circumstance also stands proved.

21. Thus, upon re appreciation of the entire evidence, we have no hesitation to hold that the prosecution has been able to establish circumstance nos. 1, 3, 4 and 5. Insofar as the gold ornaments belonging to the deceased are concerned, the prosecution has been able to establish that gold ornaments belonging to the deceased were sold by the accused to PW5 on 18/12/05 i.e. within 24 hours of the death of the deceased Laxmibai. The only legitimate inference which can be drawn is that it was the accused who committed robbery of the gold ornaments belonging to deceased Laxmibai and committed her murder. It is well settled by catena of decisions of Apex Court that in a case based on circumstantial evidence, the prosecution has to prove that the circumstances clearly establish the complicity of the accused in the commission of the crime and excludes any hypothesis other than the complicity of the accused in the crime. Applying this test, we are of the considered opinion that above referred circumstances which have been proved by the prosecution, taken cumulatively, establish that it was the accused and the accused alone who had committed the robbery and murder of deceased Laxmibai on 17/12/05 between 6.30 p.m. to 11.00 p.m.

22. Insofar as judgment in the case of Prabhoo (supra) relied upon Mr. Apte is concerned, the same does not advance the case of the appellant-accused. In the said case the Apex Court has held that if the statement made by the accused does not lead to discovery of fact, the same is not admissible in evidence. The ratio of the said judgment obviously does not advance the case of the appellant-accused, considering the facts in the present case.

23. In view of the above discussion, we do not find any merit in the present Appeal. No interference is warranted with the impugned judgment and order of conviction and sentences imposed on the accused. The Appeal is, therefore, liable to be dismissed and is accordingly dismissed.