

(2008) 10 GUJ CK 0020

In the Gujarat High Court

Case No : Criminal Appeal No's. 71, 263, 327, 419, 948 and 1266 of 2004 and 642 of 2005 with Miscellaneous Cri. Appli. No. 10384 of 2008 in Criminal Appeal No. 327 of 2004

Sarvansing Omkarsing Rathod

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 20-10-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 377, 391

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 395, 397

Citation : (2009) 1 GLR 245

Hon'ble Judges : J.R. Vora, J; J.C. Upadhyaya, J

Bench : Division Bench

Advocate : K.B. Anandjiwala, for the Appellant; M.R. Mengdey, Assistant Public Prosecutor, for the Respondent

Judgement

J.C. Upadhyaya, J.—The appellants in Criminal Appeal Nos. 71, 263, 327, 948 and 1266 of 2004 and the appellant of Criminal Appeal No. 642 of 2005 were original-accused persons in Sessions Case No. 45 of 2002, who came to be convicted by learned Additional Sessions Judge, Fast Track Court No. 4, Panchmahals at Godhra on dated 9-1-2004 for the offences punishable under Sections 395 and 397 of the Indian Penal Code (T.P.C, for short) and each of them was sentenced to undergo rigorous imprisonment ("R.I.", for short) for 10 years and fine of Rs. 500/-, in default of payment of fine simple imprisonment for one month for the offence punishable u/s 395 of I.P.C. and R.I. for 7 years and fine of Rs. 500/-, in default of payment of fine simple imprisonment for one month for the offence punishable u/s 397 of I.P.C. The appellant-accused preferred these appeals, challenging the legality and validity of the impugned judgment delivered by the learned trial Judge.

2. Criminal Appeal No. 419 of 2004 has been preferred by the State of Gujarat u/s 377 of the Code of Criminal Procedure ("Code", for short), requesting that the

sentence awarded by the learned trial Judge is too lenient, and therefore, it should be enhanced.

3. Misc. Criminal Application No. 10384 of 2008 in Criminal Appeal No. 327 of 2004 has been filed by the applicant-appellant Karansingh @ Lallasingh Rameshsingh Sardarji u/s 391 of the Code, requesting that since the date of birth of the applicant-appellant is 1st June, 1986, and therefore, on the date of alleged offence i.e. on dated 21-3-2001, he was juvenile, and should not have been tried in the Sessions Case by the learned trial Judge along with other co-accused and his case should have been dealt with by Juvenile Court.

4. Since, all the above-referred Criminal Appeals and the Misc. Criminal Application No. 10384 of 2008 arise out of the impugned judgment and order delivered by the learned trial Judge in Sessions Case No. 45 of 2002, with the consent of learned Advocates for the parties, all these matters were heard collectively and they shall stand disposed of by virtue of the common judgment.

5. The prosecution case in nutshell is as under:

5.1. One Gopalsinh Jagatsinh Barad (P.W. 5) was serving as Circle Police Inspector (C.P.I.), Lunawada, District Panchmahals from July 1988 to 13-3-2001 and he was transferred from Lunawada to Ahmedabad and on the date of incident. i.e. on date 21-3-2001, he was enjoying leave and was at Lunawada. As per the prosecution case, Gopalsinh Barad was residing with his wife Hansaben Gopalsinh (P.W. 4) at Lunawada in Anand Park Society. As Gopalsinh was enjoying leave, he returned home from Ahmedabad at about 10-45 p.m. on 20-3-2001. After taking meals with his wife Hansaben, both retired to bed. Meanwhile, at about 10 p.m. two Gram Rakshak Dal (G.R.D.) members named - Parvatsinh Kesrisinh (P.W. 6) and Takhatsinh Ramsinh (P.W. 7), who were posted as watchmen, came on their duty on night round in Anand Park Society. It is the prosecution case that at about 4-45 a.m. on 21-3-2001, some 8 to 10 unknown persons broke open the main door of the house and entered into the house. They were armed with sticks, swords, tamanchas etc. Due to this both Gopalsinh and his wife Hansaben woke up. Persons, in all about 8 to 10 in number entered into their bedroom and they were using abusive language and threatening words too. Gopalsinh was assaulted by one of those persons by pipe on head and 2 to 3 other persons also assaulted on him and he was not allowed to stand up. The key of the locker was demanded from his wife Hansaben. However, she did not give the same, and therefore, the locker was broken up. One of the persons snatched the mangalsutra, weighing about 3 tolas from Hansaben. Hansaben was also assaulted by sticks and pipes and by the blunt part of tamancha on her forehead. During the course of this robbery, telephone wire was also cut off with the help of sword. As per the prosecution case, Rs. 32,000/- in cash were looted and the golden ornaments like mangalsutra and chain, as well as certain silver vessels worth Rs. 33,000/- were also looted. That thus in all, together with cash amount, the property worth Rs. 65,000/- was looted. Thereafter, while leaving the house those robbers, who were 8 to 10 in number, dragged inside the house

those two G.R.D. watchmen and while leaving the house, the main door was locked from outside and those robbers who had entered into the house, made their escape good. Thereafter, Hansaben raised alarming shouts, called the neighbours, who came and opened the door. Both the injured Gopalsinh and Hansaben were taken to hospital for treatment. In connection with this offence, Hansaben lodged the First Information Report ("F.I.R.", for short), which was registered by the police. The Investigating Police Officer conducted police investigation and recorded statements of witnesses. In presence of panchas, panchnama of the scene of offence was drawn, medical certificates of injured witnesses were obtained. One tempo bearing No. GJ-16U-6210 was recovered. After the completion of investigation, charge-sheet was filed in the Court of learned Judicial Magistrate, First Class, Lunawada. As the offence was exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions Judge, Panchmahals at Godhra, which was numbered as Sessions Case No. 45 of 2002.

5.2. The learned Additional Sessions Judge framed charge against the appellant-accused persons in connection with offence punishable under Sections 395 and 397 of the I.P.C. Since, the accused persons did not plead guilty and claimed to be tried, the prosecution adduced its oral and documentary evidence. After the conclusion of the evidence, the learned Judge recorded the further statements of the accused persons u/s 313 of the Code and the accused generally denied all the allegations levelled against them. The learned Additional Sessions Judge, after considering the evidence on record and after considering the arguments advanced on behalf of both the parties, delivered the impugned judgment on dated 9-1-2004 and came to the conclusion that the prosecution successfully proved the offences charged against the accused, beyond any reasonable doubt and all the six accused persons came to be convicted for the commission of offences punishable u/s 395 and Section 397 of the I.P.C. and awarded sentence to each of the accused persons, as stated above.

6. In connection with the Criminal Appeals filed by the appellant-accused persons, learned Advocate Mr. K. B. Anandjiwala and learned Advocate Mr. M. M. Tirmizi challenged the legality and validity of the impugned judgment delivered by the learned trial Judge on various grounds. It was submitted that the learned trial Judge committed serious illegalities in convicting the accused persons. That considering the nature of the offence, it is apparent that the entire case depends upon the question of identification of the accused persons. That in the present case, there is no dispute that all the accused persons were totally unknown to the witnesses Gopalsinh and his wife Hansaben and two watchmen Parvatsinh and Takhatsinh. Therefore, in the F.I.R., it is very natural, the first informant Hansaben did not refer any accused by his name. However, in the F.I.R., no description of any of the accused persons is given. In the F.I.R., only general statement is made by the first informant that the accused persons belong to age group between 22 to 25 years of age and they had worn pants and shirts and they were speaking Gujarati language. No specific description of any of the

accused persons is given in the F.I.R. Even in this connection, considering the depositions of above-referred four witnesses, no specific description of any of the accused persons is stated. On the contrary, it has come in evidence that at the time of robbery, the accused persons had muffled their faces. That admittedly the incidence occurred during night hours. In the F.I.R., the first informant stated that after entering into the house, those unknown persons switched on the lights of the house, whereas, witnesses Hansaben and Gopalsinh during the course of their evidence stated that lights of the house were already on, even before unknown persons entered into the house. That this creates reasonable doubt about the possibility of the witnesses, to see the faces of those unknown persons. It is further submitted that as per the prosecution case and especially considering the deposition of Investigating Police Officer, P.I. Balvantsinh Rana (P.W. 14), while he was investigating some other case, one accused Mayasingh, who was involved in that other case provided information to the Investigating Police Officer Mr. Rana that these six accused persons along with other persons had committed robbery in the house of first informant -Hansaben. Thereupon, by transfer warrants, the Investigating Police Officer Mr. Rana arrested these six accused persons on 6/10-9-2001. That thus, the accused persons came to be arrested after about six months from the date of the incident. That no regular Test Identification Parade ("T.I.P.", for short) was arranged before Mamlatdar, but, as admitted by Gopalsinh and his wife Hansaben, after the accused persons were arrested, they were called in Local Crime Branch (L.C.B.) police station by the Investigating Police Officer, who stated to them that the police has arrested those accused persons and the witnesses should come to the L.C.B. police station for the identification of the accused persons. That thus, the so-called identification was nothing, but a farce as no regular T.I.P. was arranged. The Investigating Police Officer showed to these witnesses only the six accused persons stating that he arrested those six persons in connection with this crime. Therefore, it is submitted that no reliance can be placed upon the evidence adduced by the prosecution regarding so-called identification of the accused.

6.1. It is further submitted that in connection with the incident, panchnama of the scene of offence was drawn by the Investigating Police Officer on the same day when the incidence occurred i.e. on date 21-3-2001. Despite this, after the arrest of the accused persons in the month of September, 2001, as per the prosecution case, the accused persons "discovered" the place of offence in presence of panchas, and on date 6-9-2001 and 11-9-2001, two more panchnamas of the scene of the offence were drawn in presence of panchas, which are outright inadmissible in evidence, as those panchnamas being "demonstration panchnamas" and not falling within purview of Section 27 of the Evidence Act. While convicting the accused persons, the learned trial Judge relied upon such "demonstration panchnamas". It is further submitted that admittedly, the accused No. 1 Sarvansingh Omkarsingh was suffering from polio and he was physically invalid and admittedly even during the course of evidence the four witnesses namely Gopalsinh, Hansaben, Parvatsinh and Takhatsinh categorically

stated that said accused Sarvansingh had never entered the house of the first informant Hansaben at the time of offence, yet, the said accused No. 1 Sarvansingh was wrongly implicated in connection with this offence. As per the prosecution case, investigation was made to find out ornaments, which were looted from the house of the first informant. That admittedly those ornaments could not be recovered by the police. But, a false story was concocted that the accused No. 1 Sarvansingh, though did not enter into the house of first informant, but, while the other accused persons went inside the house, the accused No. 1 Sarvansingh was standing near the tempo, in which all the accused had come to Lunawada for the purpose of robbery. Said tempo was recovered by the police during the course of investigation and the prosecution examined owner of the tempo - Ratilal (P.W. 12) as a witness, but no cogent and convincing evidence, is adduced by the prosecution, not only about the identification of the accused No. 1, Sarvansingh, but, even about the fact that the tempo which was used by all the accused persons, in connection with this offence.

6.2. It is further submitted on behalf of the appellants that far from the house of the first informant Hansaben, one slipper was found and in presence of panch - Ganibhai (P.W. 9) when the police directed only the appellant-accused Karansingh to wear it, said slipper matched to the size of the right foot of accused Karansingh @ Lallasingh. That as per the prosecution case, one footprint was found away from the house of the first informant and imprint of the footprint was sent to F.S.L. along with foot imprints of the accused persons and that the F.S.L. reported that more or less the footprint resembles the specimen footprint of accused Karansingh @ Lallasingh Rameshsingh. That even in the report, the Scientific Officer who conducted the test was not certain and in the report itself, it is stated that more or less both the imprints resemble. That on the basis of weak evidence, the learned trial Judge came to the conclusion that the prosecution proved its case beyond reasonable doubt.

6.3. It is submitted that as per the prosecution case, though the ornaments in its original form could not be recovered, but, at the instance of the disabled accused No. 1 Sarvansingh, shop of goldsmith Harishkumar Vadilal Soni (P.W. 3) was searched in presence of panchas and two small ingots, one golden and another silver were recovered on the assumption that said accused No. 1 Sarvansingh sold the golden and silver ornaments to this goldsmith - Harishkumar and said goldsmith converted those ornaments in two ingots. However, goldsmith Harishkumar (P.W. 3) not at all supported the case of the prosecution in his deposition before the trial Court and deposed that because of the threat by the police, he presented those ingots to the police. That while convicting the accused persons, the trial Court also relied upon such weak evidence and though goldsmith-Harishkumar did not support the case of the prosecution, yet relied upon his deposition.

6.4. Therefore, in sum and substance, it is submitted that the prosecution has

miserably failed to prove its case against any of the accused persons beyond reasonable doubt. Therefore, it is submitted that the appeals preferred by the appellant-accused persons be allowed and they be acquitted.

6.5. It is further submitted that as the prosecution has miserably failed to prove its case beyond any reasonable doubt against any of the accused persons, and therefore, the Criminal Appeal No. 419 of 2004 preferred by the State of Gujarat u/s 377 of the Code, requesting enhancement of sentence, deserves to be dismissed.

6.6. So far as Misc. Criminal Application No. 10384 of 2008 in Criminal Appeal No. 327 of 2004 is concerned, learned Advocate Mr. M. M. Tirmizi for the applicant Karansingh @ Lallasingh Rameshsingh submitted that as per the School Leaving Certificate produced in Misc. Criminal Application No. 10384 of 2008, the date of birth of the applicant-appellant is 1-6-1986, and therefore, on the date of alleged incident i.e. 21-3-2001, he was below 18 years of age, and was juvenile, and therefore, the learned trial Judge erred in conducting regular trial against him and ultimately convicting and sentencing the applicant-appellant in connection with this offence.

7. On behalf of the State of Gujarat, learned A.P.P. Mr. M.R. Mengdey supporting the impugned judgment delivered by the learned trial Judge submitted that the learned trial Judge rightly came to the conclusion that the prosecution proved its case beyond reasonable doubt against all the accused persons and did not commit any illegality or irregularity in convicting them for the offences charged against them. That as a matter of fact, the four eye-witnesses to the occurrence, namely-Gopalsinh, first informant Hansaben, Parvatsinh and Takhatsinh, not only identified the accused persons in L.C.B. police station, but even during the course of their deposition before the trial Court, they identified all these accused persons. That the learned trial Judge did not commit any illegality in accepting the evidence of these four eye-witnesses, regarding the identification of the accused persons, in the open Court. That it has come in evidence that at the time of incident, light in the house was on and the witnesses were assaulted by the accused persons with dangerous weapons, therefore, witnesses had adequate opportunity to see the faces of the accused persons. Considering the nature of the incidence, it could not have been over within a spur of moment. Therefore, there was sufficient opportunity to the witnesses to see the faces of the accused persons, and there is nothing wrong with them, identifying the accused persons during the course of their depositions in open Court. That it has come in evidence that only one or two accused persons had muffled their faces. That there is nothing in evidence that all had muffled their faces. That though goldsmith Harishkumar turned hostile during the course of deposition, but considering the deposition of panch witness Nilesh Purani (P.W. 8) and the panchnama, Exh. 30, the prosecution successfully proved that accused No. 1 Sarvansingh voluntarily stated before panchas and police that he has sold the ornaments looted from the house of the first informant to goldsmith -

Harishkumar, and at the instance of this accused the golden and silver ingots were recovered from the shop of goldsmith Harishkumar. That therefore, the learned trial Judge rightly accepted such deposition of panch witness Nilesh Purani and the panchnama, Exh. 30, to connect the accused No. 1 Sarvansingh with the crime. That the learned trial Judge rightly accepted the scientific evidence adduced by the prosecution that the footprint, which was found nearby the house of the first informant was that of the accused Karansingh @ Lallasingh and thus the involvement of this accused is proved beyond any reasonable doubt. That even the slipper foundout near the house of the first informant, fitted in the right foot of accused Karansingh. Therefore, it is submitted that the appeals preferred by the appellant-accused are meritless and deserve dismissal.

8. In connection with the appeal preferred by the State of Gujarat bearing Criminal Appeal No. 419 of 2004, the learned A.P.P. Mr. Mengdey submitted that considering the seriousness of the crime and the fact that all the accused persons are habitual offenders and involved in such similar crimes and considering the fact that the property looted by them from the house of the first informant was worth about Rs. 65,000/-, the learned trial Judge should have awarded maximum sentence prescribed u/s 395 and Section 397 of the I.P.C. Therefore, it is submitted that the State appeal bearing Criminal Appeal No. 419 of 2004 deserves to be allowed, as prayed.

8.1. In connection with Misc. Criminal Application No. 10384 of 2008 in Criminal Appeal No. 327 of 2004, learned A.P.P. Mr. Mengdey submitted that during the course of entire trial, the applicant-accused Karansingh @ Lallasingh Rameshsingh did not utter a single word that at the time of the incident, he was aged below 18 years and" was juvenile. During the course of trial he did not produce the School Leaving Certificate stating his date of birth. That thus, after the conviction and that too after 4 years, during the pendency of Criminal Appeal No. 327 of 2004, now at such belated stage the applicant Karansingh turned-up with such defence, which can never be accepted. Even in the memo of appeal, this plea is not raised by the applicant. Therefore, it is submitted that the application outright deserves to be dismissed.

9. In light of the above submissions made on behalf of both the parties, first of all considering the impugned judgment delivered by the learned trial Judge, there is no dispute that the incident of robbery had taken place in the house of the first informant Hansaben. During the course of the incidence, there is no dispute that first informant Hansaben and her husband Gopalsinh sustained bodily injuries. Considering the deposition of Dr. Brahmbhatt (P.W. 1) and the injury certificates of the injured witnesses produced by him, it becomes clear that both Gopalsinh and first informant Hansaben had sustained bodily injuries, which could be caused by any hard and blunt substance. Considering the deposition of neighbour Pravinbhai Patel (P.W. 2) it also becomes clear that as the first informant Hansaben, who was residing in the adjoining bungalow shouted for help, this witness and other neighbours went to the house of the first

informant and they opened the front door, locked from outside and entered into the house and saw that Gopalsinh and Hansaben had sustained bodily injuries and the household articles were scattered in the house. He is also one of the panchas of the panchnama of the scene of offence (P.W. 40), which was drawn by the police on date 21-3-2001 during 9-05 a.m. to 10 a.m. However, the only question, which is required to be decided is as to whether the prosecution successfully proved involvement of all or any of the accused persons in connection with this crime?

10. The mere fact that in the first information report lodged by first informant Hansaben before police, Exh. 23, no names of the accused persons are given, cannot be said to be a relevant fact, considering the nature of the offence. Admittedly, all the accused persons were unknown to the first informant as well as to the witnesses Gopalsinh, Parvatsinh and Takhatsinh. However, the important aspect is about the subsequent identification of the accused persons connecting them with the crime. For that purpose what is relevant, so far as the F.I.R., Exh. 23 is concerned is the description of all or any of the accused persons given in the First Information Report by the first informant. Considering the F.I.R., Exh. 23, it clearly transpires that a very general description about the accused is mentioned by the first informant in her F.I.R. It is stated that the accused persons were of the age-group between 22 to 25 years of age and that they had worn pants and shirts and they were speaking gujarati language. As per the F.I.R. and evidence adduced by the prosecution, the robbers were 8 to 10 in number.

11. In the aforesaid background about the general description of the accused persons given by the witness in her F.I.R., if the evidence adduced by the prosecution during the course of the trial is considered, the first informant Hansaben (P.W. 4) in her deposition clearly admitted that she has not given any specific description of any of the accused persons in the F.I.R. She categorically stated that she did not mark any special feature of any of the accused persons so that she can identify him or them subsequently. Hansaben in her deposition though denied the suggestion that all the accused persons had muffled their faces, but she stated that one person, who entered her house had muffled his face. Out of the six accused persons, which accused person had masked his face remains unsolved question during her entire deposition. Then in her further deposition, she submitted that out of the robbers, some of them had muffled their faces. Under such circumstances, whether one accused had muffled his face or some of them had muffled their faces, is not clear. During her entire deposition, she did not state the approximate duration, during which the robbery continued in her house. However, in her F.I.R. (Exh. 23) it is specifically mentioned that the offence continued for a period of about 5 minutes. About the availability of the light in the house, in her examination-in-chief, she stated that after entering into her house, the lights of her house were turned on by the robbers. However, in her cross-examination, she stated that the lights of her house were already turned on. Even in F.I.R. it is stated that the lights were

turned on by the robbers.

12. Her husband Gopalsinh (P.W. 5) also admitted that during the course of incidence, he could not specifically mark any special feature of any of the accused persons. Only thing he stated in his deposition is that the accused were young persons, aged about 25 years. No other description of the accused is stated by him in his deposition.

13. Considering the deposition of Parvatsinh (P.W. 6), he stated that at the time of incidence, he himself and witness Takhatsinh (P.W. 7) were on night round in the Society and 8 to 10 unknown persons had come. One person armed with pipe, stood nearby them and the remaining persons went inside the house and he stated that all the persons had muffled their faces. P.W. 7 Takhatsinh in his deposition stated that one or two persons had muffled their faces. However, out of 6 accused persons, who had muffled their faces, still remains in doubt.

14. In this connection, considering the deposition of Investigating Police Inspector Mr. Parmar (P.W.11), he stated that he had recorded police statement of witness Gopalsinh and this witness had stated before him in his statement that as robbers were unknown persons and the offence took place during night hours, and therefore, he had not properly seen them. Witness Gopalsinh in his deposition stated that as the lights were on in his house, and therefore, except accused No. 1 Sarvansingh, he could identify the remaining 5 accused persons, who are in the Court, but, Investigating Officer Mr. Parmar in his deposition stated that this witness Gopalsinh did not state in his statement before him that at the time of the incident, the lights were on in the house, and therefore, except accused No. 1 Sarvansingh, he had identified the remaining accused persons. Furthermore, considering the deposition of P.I. Parmar, he stated that he had recorded the statement of witness Takhatsinh and according to his statement, 12 persons had come to the house of the first informant. That this witness Takhatsinh further stated in his statement that he could not identify those persons as they had muffled their faces. Witness Parvatsinh (P.W. 6) in his deposition stated that light was on, outside the house, and therefore, he had seen the robbers, but considering the deposition of P.I. Parmar, he stated that he had recorded the statement of this witness Parvatsinh and he never stated in his police statement that the light was on outside the house, and therefore, he had seen the persons.

15. Despite the fact that a doubt is created as to whether the lights in the house was on, even prior to the incidence or that the lights were turned on by the accused, after entering into the house, still however, the moot question is possibility available to this witness to see the face of the accused or atleast to see the special feature of the accused persons so that subsequently the accused can be identified. It is also true that even if any accused is identified for the first time by any witness, during the course of his deposition in open Court, without there being any T.I.P., yet, that part of the evidence is admissible. The only fact which is relevant is the availability or possibility of seeing the face of the accused

by the witness at the time of commission of the offence or atleast any special feature visualised by him, plays an important role. In the present case on hand, as admitted by all the witnesses, they did not see the face of the accused in such a manner that subsequently said accused can be properly identified even before the Court. No special features were marked by them. As per the deposition of first informant Hansaben, some of the robbers had muffled their faces. It is not clear as to out of 6 accused persons, who had muffled their faces. According to the depositions of witnesses Parvatsinh and Takhatsinh, the accused had muffled their faces. When such is the situation, the subsequent identification of the accused persons in the open Court cannot be free from any doubt. The important aspect involved in this case is that as admitted by first informant Hansaben and her husband Gopalsinh, after the accused persons were arrested in the month of September, 2001, they were called at L.C.B. police station to identify the accused persons, and accordingly, they had gone to L.C.B. police station where these accused persons were there and they were told that the Investigating Police Officer had arrested them in connection with these offences, and thereupon, they identified those accused persons. Therefore, before their depositions in the trial Court, the accused were shown to the witnesses. When such is the situation, we are of the considered opinion that the subsequent identification of the accused persons in open Court by these witnesses, cannot be said to be free from doubt, inspiring confidence of the Court in relying upon that part of the evidence.

16. As stated above, the scene of offence panchnama was drawn in presence of panchas on 21-3-2001 i.e. the day on which the incident had happened. The panchnama is at Exh. 23. It is the case of the prosecution that subsequently by virtue of transfer order, all the accused persons came to be arrested in the month of September, 2001 and at the instance of the accused persons, the place of the offence was "discovered" and the panchnama were drawn to that effect, which are produced at Exh. 29 and Exh. 36. Panchnama, Exh. 29 was drawn on dated 6-9-2001 and panchnama, Exh. 36 was drawn on dated 11-9-2001. Prior to that, scene of offence panchnama was already drawn on 21-3-2001. In the impugned judgment, the learned trial Judge relied upon these two panchnamas, Exh. 29 and Exh. 36 as an important piece of evidence connecting all the accused persons with the crime. As per the scheme of Section 27 of the Evidence Act, it is clear that the fact may be said to be discovered when the knowledge of the existence of the fact was for the first time derived from the information furnished by the accused. When the fact has already been known by the police, there cannot be a discovery again of that fact as a result of a statement made by the accused, subsequent to the original discovery. It is a basic principle underlying Section 27 of the Evidence Act that "what is not covered cannot be discovered". Suffice it to say that those panchnamas, Exh. 29 and Exh. 36 are more or less "demonstration panchnamas" and the evidence adduced thereby cannot be said to be admissible u/s 27 of the Evidence Act. Therefore, in the impugned judgment, the learned trial Judge committed serious illegality in considering those "demonstration panchnamas" as an admissible evidence against the

accused.

17. It is the case of the prosecution that in connection with this offences a tempo was used by the accused and that the same was hired from witness Ratilal Patel (P.W. 12). Considering the deposition of Ratilal Patel, he stated that accused Sherusingh and accused Lallasingh had hired his tempo bearing No. GJ-16U-6210 from 9 a.m. on date 20-3-2001 and the same was returned on dated 21-3-2001 and Rs. 3,200/- were paid as rent. In his cross-examination, he admitted that his statement was never recorded by police. He further admitted that whenever his tempo was required by any person on rental basis, his own driver used to drive the tempo. In connection with this tempo, prosecution examined witness Balvantbhai Patel (P.W. 10) and he stated that the tempo was returned by accused Sherusinh along with his driver. Under such circumstances, even according to the deposition of witness Ratilal, his tempo along with his driver was hired by the accused. The important aspect is the movement of the tempo. In other words, whether during night hours, in the tempo the accused had travelled to Lunawada, is relevant question, which deserves to be replied by the prosecution. In light of the depositions of witnesses, Balvantbhai and Ratilal, it is clear that only the driver of the tempo can say about the movement of the tempo. The Investigating Police Officer neither recorded the statement of such important witness, who is driver of the tempo, nor the driver of the tempo is examined by the prosecution in this case. Under such circumstances, it cannot be said that the prosecution proved beyond reasonable doubt that the tempo was used by the accused for the purpose of going to the house of the first informant for the purpose of robbery.

18. In the impugned judgment, the learned trial Judge relied upon the fact of recovery of two ingots, one golden and another silver, from the shop of goldsmith - Harishkumar. The prosecution examined panch witness Nilesh Purani (P.W. 8) in connection with panchnama Exh. 30. That at the insistence of accused No. 1 Sarvansingh, the Investigating Police Officer and panchas were taken to the shop of goldsmith Harishbhai, where the accused No. 1 Sarvansingh had alleged to have sold the golden ornaments looted from the house of the first informant and that the goldsmith Harishkumar produced the aforesaid two ingots. However, in this connection, considering the deposition of goldsmith -Harishkumar (P.W. 3), he did not support the case of the prosecution. He only stated that police had come to his shop and threatened him that he has to deliver some gold and some silver to the police, otherwise he would be booked in connection with some offence, and thereupon, he delivered one golden ingot and one silver ingot to the police. It is admitted that the ornaments looted in connection with this robbery were not recovered by the police in their original form. What were recovered were two ingots. In this connection, considering the depositions of the witnesses Gopalsinh and his wife Hansaben, they did not identify the accused No. 1 Sarvansingh and stated that he did not enter into the house. Considering the deposition of witness Takhatsinh (P.W. 7), he stated that he could identify other accused, during the course of his deposition except "the physically handicapped

accused Sarvansingh". Thus, the fact comes on record that the accused No. 1 Sarvansingh was physically handicapped. Furthermore, considering the relevant papers of the case, nowhere it transpires that at the time of arrest of all the accused persons, including the arrest of accused No. 1 Sarvansingh, any arrest panchnama was drawn by the police. If such panchnama would have been drawn, the physical condition of the accused No. 1 Sarvansingh would have come on record. However, no arrest panchnama was drawn by the Investigating Police Officer, when the accused came to be arrested. Under such circumstances, in the impugned judgment, the learned trial Judge erred in relying upon the evidence regarding recovery of golden and silver ingots and connecting those ingots with the ornaments looted in the robbery.

19. In the impugned judgment, the learned trial Judge placed much reliance upon the recovery of slipper, which was recovered by Investigating Police Officer at some distance from the house of the first informant and that the slipper was suitable for the right foot of accused Karansingh @ Lallasingh. In this connection, considering the deposition of Investigating Police Officer Mr. Rana (P.W. 14), in Paragraph 25 of his deposition, he admitted that the size of the slipper was No. 10 and it can be of right size for the foot of any person whose size matched with the size No. 10. Again he categorically admitted that except Karansingh, he did not make any attempt to see that whether said slipper was matching to the foot of any other accused persons. At any rate, the evidence regarding the recovery of slipper far from the house of the first informant and that it was the slipper of Karansingh, cannot be said to be such evidence, which can be used safely to connect said accused Karansingh with the crime. Similar is the situation regarding the scientific evidence produced by the prosecution in form of F.S.L. report, Exh. 61 in this case. It is the case of the prosecution that at some distance from the house of the first informant the footprint was visible and the impression of such footprint was lifted. Specimen footprints of accused persons were also collected and the specimen impressions of the footprints of the accused persons along with the impression of footprint lifted from the place, which was at some distance from the house of the first informant, were sent to F.S.L. Considering the F.S.L. report, Exh. 61, it is reported that more or less the imprint of footprint matches with the footprint of accused Karansingh @ Lallasingh. It is not stated in the report that it is exactly matched with the footprint of said accused Karansingh. In this line of discussion, again considering the evidence regarding the slipper and specifically considering the panchnama, Exh. 37 drawn on date 11-9-2001, the slipper, which was found at some distance from the house of the first informant was almost of the size of the right side foot of this accused Karansingh. Said demonstration was made by the police by panchnama (Exh. 37) on date 11-9-2001. Subsequently, the footprint was sent to F.S.L. Under such circumstances, even before obtaining the F.S.L. report regarding the footprint, the police had already arrived at the conclusion that the slipper and the footprint belong to the accused Karansingh and as stated above, even the F.S.L. report is not exact about the footprint. When such is the

situation, the learned trial Judge erred in holding that the evidence regarding the slipper and the footprint is trustworthy and can be used against the accused.

20. Last but not least, the question may arise as to how this accused persons came to be arrested in connection with offence. As stated above, no names or any description of any accused were given by the first informant in her F.I.R. The incident took place on date 21-3-2001 and all the accused persons came to be arrested in the month of September, 2001 i.e. after about 6 months from the date of incident. In this connection, considering the deposition of Police Inspector Mr. Rana (P.W. 14) he stated that he was investigating one offence registered with Kothamba Police Station bearing No. Crime Register No. 10 of 2001 and one accused Mayasingh, who was involved in connection with said offence stated to the Investigating Police Officer Mr. Rana that all the present accused are involved in this robbery committed in the house of the first informant Hansaben, and thereupon, he arrested all the present accused persons. It is important to note that said Mayasingh is not accused in this case. No charge-sheet was filed implicating Mayasingh as one of the co-accused in connection with this offence. When such is the situation, Investigating Police Officer Mr. Rana could have recorded the statement of Mayasingh and the prosecution should have examined said Mayasingh as an important witness in the present case. Nothing whatsoever was done.

21. In light of the entire above discussion, we are of the opinion that the prosecution cannot be said to have proved its case against the appellant-accused persons beyond reasonable doubt. The very substratum of the prosecution case loses its credibility and the learned trial Judge erred in convicting the accused persons relying upon such evidence, which is not free from any doubt. Under such circumstances, the impugned judgment and order rendered by the learned trial Judge convicting the appellant-accused persons for the offences punishable under Sections 395 and 397 of the I.P.C. and awarding sentence thereunder to the appellant-accused persons deserves to be set aside by allowing the appeals preferred by the appellant-accused persons. Needless to say that consequently Criminal Appeal No. 419 of 2004 preferred by the State of Gujarat u/s 377 of the Code for enhancement of sentence and the Misc. Criminal Application No. 10384 of 2008 in Criminal Appeal No. 327 of 2004 require no consideration and both the matters deserve to be dismissed.

22. For the foregoing reasons, the impugned judgment and order rendered by the learned Additional Sessions Judge, Fast Track Court No. 4, Panchmahals at Godhra on dated 9-1-2004 in Sessions Case No. 45 of 2002 convicting the appellant-accused persons for the offences punishable u/s 395 and Section 397 of the I.P.C. and awarding sentence thereunder are set aside and the appellant-accused persons are hereby acquitted. They be set at liberty forthwith from jail, if no longer required in connection with any other case. The Criminal Appeals preferred by the appellant-accused persons are allowed accordingly. The Criminal Appeal No. 419 of 2004 and the Misc. Criminal Application No. 10384 of 2008 in

Criminal Appeal No. 327 of 2004 stand dismissed.