

(2018) 10 BOM CK 0040
In the Bombay High Court
Case No : Criminal Appeal No.301 Of 2017

Vithhal Shreeram Pawar

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 16-10-2018

Acts Referred:

Indian Penal Code, 1860 — Section 120B, 395, 396, 397, 452, 447
Maharashtra Control of Organised Crime Act, 1999 — Section 3(1)(i), 3(1)(ii), 3(4)
Code of Criminal Procedure, 1973 — Section 437A

Citation : (2018) 10 BOM CK 0040

Hon'ble Judges : S.S. Shinde, J; Mridula Bhatkar, J

Bench : Division Bench

Advocate : Uday P. Warunjikar, H.J. Dedhia,

Final Decision : Allowed

Judgement

S.S. SHINDE, J

1. Both these Appeals are directed against the Judgment and Order dated 15th July, 2015, passed by the Special Judge (under MCOC Act), Nashik in

Special Case (MCOC) No.1/2008 thereby convicting accused No.4 â?" Suresh Vyankati Chavan and accused No.8 â?" Vithhal Shreeram Pawar for

the offence punishable under Section 395 of the Indian Penal Code [for short 'IPC'] and sentencing them to suffer imprisonment for life and to pay a

fine of Rs.3,000/Â each, and in default of payment of fine to suffer rigorous imprisonment for a period of six months. The trial Court also convicted

accused No.4 and accused No.8 for the offence punishable under Section 396 of the IPC and they are sentenced to suffer imprisonment for life and

to pay a fine of Rs.3,000/Â each, in default of payment of fine to suffer imprisonment for a period of six months. The trial Court also convicted

accused No.4 and accused No.8 for the offence punishable under Section 397 of the IPC and they are sentenced to suffer rigorous imprisonment for

seven years. The trial Court also convicted accused No.4 and accused No.8 for the offence punishable under Section 447 of the IPC and sentenced

them to suffer rigorous imprisonment for three months. All the sentences were directed to be run concurrently.Â

2. Both these Criminal Appeals are arising out of one and the same Judgment and Order passed by the trial Court, hence the same are being decided

by this common Judgment.Â

3. Before the Trial Court there were in all nine accused. However as original accused No.1 â?"Baliram Pundalik Chavan, accused No.2 â?" Sudhakar

Pundalik Chavan, accused No.3 â?" Bhika Piraji Chavan, accused No.5Â Narayan Sitaram Pawar, accused No.6Â Kashiram @ Bapya Vayaskar

Pawar, accused No.7Â Mangal Vyankati Chavan and accused No.9Â Babu Sitaram Pawar were absconding during the course of trial, the Trial

Court has separated and proceeded the case against accused No.4 â?" Suresh Vyankati Chavan and accused No.8 â?" Vithhal Shreeram Pawar only,

and convicted and sentenced them as stated herein above.Â Hence Criminal Appeal No.1211 of 2018 is filed by original accused No.4 â?" Suresh

Vyankati Chavan and Criminal Appeal No.301 of 2017 is filed by original accused No.8â?" Vithhal Shreeram Pawar. Criminal Application No.1235 of

2017 is filed by original accused No.8â?" Vithhal Shreeram Pawar for releasing him on bail during the pendency of the Appeal.Â Â Â Â Â Â

4. The prosecution case, in brief, is as under:Â

[A] An informant Â Uttam Laxman Pawar resides near Railway Cabin situates within local limits of village Nagapur. On 23rd March, 2007, the

informant watched T.V. up to 10 p.m. and thereafter, he went to bed. On 24th March, 2007 at about 1.00 a.m., as somebody was awaking, he woke

up and came out of his house. At that time, Ravindra Nathe was telling that thieves had come within local limits of village. When the informant was

standing in front of house, he heard shouts of his cousin Sharad Kacharu Pawar. Thereafter, the informant and Ravindra Nathe rushed at the house of

his uncle Kacharu Pawar. At the relevant time, they saw doors of house were in open condition and articles in the house were in scattered condition.

At that time, Sharad was found sitting at the door of his house with swelling

injuries on his hand and leg. They found Prabhavati sitting in front of T.V. showcase having head injury and swelling on her face. They also found that Didi, niece of informant, was sitting near Prabhavati and she has sustained head injury. Then they found Kacharu Pawar lying on the cot with head injury to him. As wife of Sharad, namely, Manisha was not found, they took search and went backside of house of Sharad near to bandh, where Manisha was found lying with head injury. Manisha and Kacharu were found dead. He made inquiry with Sharad who told that suddenly three persons entered into house and started to assault them and told the entire incident. The informant lodged report with Police Station, Manmad city.

(B) On the basis of report crime No.46 of 2007 came to be registered. Investigation was carried out. Investigating Officer Shreenivas Patil prepared inquest panchanama of dead body of deceased Kacharu and Manisha (ExhibitÂ76 and 77 respectively) and sent the dead bodies for postmortem. He prepared spot panchanama (ExhibitÂ94) and seized articles lying on the spot of incident. Blood was found over the skin of tree. He seized the said portion of skin of tree under the panchanama ExhibitÂ88. He then recorded the statements of witnesses. During investigation, he collected postÂmortem notes of both deceased. He collected injury certificates of the injured. Thereafter further investigation was entrusted to Crime Branch, Nashik.

(C) Police Inspector Ashok Kashinath Belwate attached to Rural Crime Branch, Nashik carried out further investigation. He obtained custody of six accused by obtaining their transfer warrant from Shegaon Court and arrested them. On 23rd April, 2007, during police custody accused Baliram Pundalik Chavan gave memorandum statement (ExhibitÂ178) and at his instance, it came to be revealed that accused hatched conspiracy. Thereafter, on 24th April, 2007 during police custody accused Baliram Pundalik Chavan gave memorandum statement (ExhibitÂ144) and at his instance, wooden log (Article HÂ2) having blood stains came to be seized under panchanama (ExhibitÂ145). On 25th April, 2007, during police custody accused Bhika Piraji Chavan gave memorandum statement (ExhibitÂ147) and at his instance, one purse (Article 1), ornaments black marriage string (mangalsutra), one gold bids and `dorale' (Article HÂ4 and HÂ5) came to be seized under seizure panchanama (ExhibitÂ148). On 26th April, 2007, during police custody accused Sudhakar Pundalik Chavan gave memorandum statement

(Exhibit 139) and accordingly wooden log (Article H 3) came to be seized under seizure panchanama (Exhibit 140). On 7th May, 2007, during police custody accused Sudhakar Pundalik Chavan again gave memorandum statement (Exhibit 180) and accordingly at his instance, saffron colour clothes which includes one shirt (Article 15) and lungi (Article 16) came to be seized under panchanama (Exhibit 181). On 25th April, 2007, during police custody accused Suresh Chavan gave memorandum statement (Exhibit 134) and at his instance axe (Article H 3) came to be seized under panchanama (Exhibit 135). On 25th April, 2007, during police custody accused Bhopya Pawar gave memorandum statement (Exhibit 136) and at his instance wooden log (Article H 1) came to be seized under seizure panchanama (Exhibit 137).

Then Police Inspector Binwate forwarded the report (Exhibit 182) for adding section 396 of the IPC and further investigation was carried out by Dy.

S.P., Manmad.

(D) During the course of investigation, it was revealed that prior to the commission of crime accused hatched conspiracy and carried out recce of village, pretending that they were 'Sadhus' and committed dacoity. The accused committed dacoity at the house of witness Sharad by forcibly entering into his house, armed with deadly weapons, sickle etc. and assaulted the witnesses by means of the weapons and forcibly took away the cash amount of Rs.50,000/- from the cupboard in the house and also snatched away the golden ornaments from the person of deceased Manisha and injured witness Prabhavati worth Rs.10,000/- and in the said assault, they committed murders of deceased Kacharu Pawar and Manisha Pawar and ran away from the spot.

(E) Moreover, according to the prosecution during the course of investigation, it was further revealed that accused are involved in continuing unlawful activities by individually, singly or jointly, either as a member of organized crime syndicate or on behalf of self syndicate by use of violence or threat or intimidation or coercion or by other unlawful means with the object of gaining pecuniary benefit or gaining undue economic or other advantage for himself or any other persons against whom more than one charge sheets have been filed before the Competent Court preceding ten years and that Court has taken cognizance of the said offence for which punishment of

imprisonment for three years, is prescribed and after collecting necessary information and sanction under the provisions of Maharashtra Control of Organized Crime Act, 1999 (For short, "the MCOC Act"), the provisions of MCOC Act came to be applied. Thereafter, the investigation of the matter was entrusted to S.D.P. Sunil Kadasne. He then recorded statements of witnesses, collected the documents regarding pending offences against the accused. He referred the pending cases against the present accused in different Court and mentioned the same in the charge sheet. Accordingly, he filed the certified documents at Exhibit 188 to 191. He collected C.A. reports Exhibit 192 to 196. On 11th October, 2007, he forwarded the papers for getting sanction to the office of Additional DG vide letter Exhibit 154. On 13th June, 2008, after getting sanction of DG, he forwarded charge sheet on 14th July, 2008.

(F) While forwarding charge sheet in this crime, accused Vithhal Shreeram Pawar was absconding. He was arrested on 3rd March, 2012 by Police

Inspector, Manmad in crime No.47 of 2007. Police Inspector, Manmad informed the said fact to Samadhan Bhikaji Pawar, SDPO Manmad.

Accordingly, SDPO Manmad obtained transfer warrant and arrested him. He applied for permission of the Court for holding identification parade of

accused Vithhal Shreeram Pawar vide letter (Exhibit 171). He then informed Tahsildar Nandgaon for holding identification parade vide letter

(Exhibit 111). Accordingly, Tahsildar held the identification parade and forwarded report (Exhibit 112). He recorded statements of witnesses and

then forwarded the report (Exhibit 172) for submitting the charge sheet against the accused to Additional DG. They received consent (Exhibit

193). Accordingly, on 21st May, 2012, he submitted supplementary charge sheet against the accused Vithhal Shreeram Pawar.

(G) A charge (Exhibit 54) for the abovementioned offences, was framed against original accused Nos.1 to 6 and 8 on 8th April, 2013, and the same

was explained to them in vernacular. The accused persons pleaded not guilty and claimed to be tried, with the defence of total denial and false

involvement in this case.

5. During the arguments before the Trial Court, original accused Nos.1 to 3, 5 and 6 absconded. Their sureties have deposited surety amount. Since

long accused No.8 " Vithhal Shreeram Pawar was in jail and therefore, the trial

Court separated and proceeded the case against accused Nos.4 and 8.

6. After recording the evidence and conducting full-fledged trial, the trial Court convicted original accused Nos.4 and 8 for the offences afore-

stated.

7. Since these are the appeals against conviction, we would like to re-appreciate the entire evidence placed on record, so as to reach to the proper

conclusion as to whether the reasons and findings recorded by the trial Court are based upon improper appreciation of evidence on record and calls

for any interference in exercise of appellate jurisdiction or otherwise. Heard learned counsel appearing for the Appellants and learned APP appearing

for the State, at length. With their able assistance, we have carefully perused the entire notes of evidence.

8. In order to prove the case, the prosecution examined in all 27 witnesses. The accused did not examine any witness in defence. As observed earlier,

before the Trial Court, there were as many as nine accused, however, during the arguments before the Trial Court accused Nos.1 to 3, 5 and 6

absconded and therefore, the Trial Court has separated the case of accused Nos.4 and 8 and proceeded to decide the matter. Therefore, we will

consider the evidence which is adduced by the prosecution to prove the case as against accused Nos.4 and 8.

9. We have perused the entire evidence placed on record by the prosecution. Looking to the evidence which has come on record and the submissions

advanced by the learned counsel appearing for the parties, there does not appear to be dispute regarding the fact that in the night of 23rd March, 2007,

dacoity took place at the house of Sharad Kachru Pawar. The prosecution has proved on record the inquest panchnamas of Kachru and Manisha who

died, as well as their postmortem reports have been brought on record and there is no dispute that Kachru and Manisha died due to the attack by the

dacoits at the time of incident and they suffered culpable homicide amounting to murder. Similarly the prosecution has proved that prosecution

witnesses PW-12 Sharad Kachru Pawar, PW-17 Prabhavati Kacharu Pawar and one Didi, daughter of Sharad, sustained injuries during the

process of dacoity. The prosecution has examined PW-10 Dr. Kavita Madhav Sanap, who conducted autopsy over the dead bodies of Kacharu

Dattu Pawar as well as Manisha Sharad Pawar. She has stated about the multiple injuries noticed by her on the dead bodies of Kacharu and Manisha,

including the head injuries. Through the evidence of PW¹⁰ Dr. Kavita, the prosecution has brought on record, the cause of death of Manisha and

Kacharu, as "due to Neuregenic shock due to head injury". The prosecution has also brought on record that Prabhavati Kacharu Pawar (PW¹⁷)

and Sharad Kacharu Pawar (PW¹²) and Didi Sharad Pawar received injuries, including head injuries and fracture injuries, during the process of

dacoity.

Thus the prosecution has proved that during the process of dacoity, the culprits have attacked on the family members of Sharad Kacharu Pawar,

committed murder of Manisha and Kacharu and also caused injuries to Prabhavati Kacharu Pawar, Sharad Kacharu Pawar and Didi Sharad Pawar.

It is pertinent to note that the Trial Court has also observed in para No.16 of the Judgment that the dacoity at the place of incident was not seriously

challenged by the defence in the cross-examination and what challenged was the participation of accused Nos.4 and 8 along with absconding

accused. Thus, from the perusal of entire evidence brought on record by the prosecution, it appears that the occurrence of dacoity and in the said

process, murders of Manisha and Kacharu and further injuries sustained by the prosecution witnesses is not seriously disputed by the defence. The

defence has disputed the participation of the accused persons in said dacoity.

10. The prosecution examined PW³ "Uttam Laxman Pawar. He deposed that the incident took place on 23rd March, 2007 at midnight hours. On

that day about 1.00 a.m., he heard the shouts from the house of Ravindra Nathe situated at a distance of 50 ft. from his house. At the relevant time,

Ravidra shouted and told that thieves had come to their field. He therefore rushed at outer side and at the relevant time heard the shouts of Sharad

that thieves had come. Therefore, he along with others rushed at the house of Sharad. He noticed that Sharad was sitting at the door of his house and

fracture injuries were found on his hand and leg. He further deposed that they found Kacharu lying on the cot with head injury to him. Near the said

spot, Prabhavati the wife of Kacharu found lying with injury and swelling on her face. Another family member Didi also found lying with head injury at

backside parietal region. When they entered into the house, they noticed the

household articles in a scattered condition. He further deposed that at the backside of house of Sharad near to bandh Manisha, wife of Sharad was found lying with head injury. He further deposed that at the relevant time Manisha and Kacharu found dead.

11. PW³ Uttam further deposed that, Sharad told them that three persons entered in his house, they worn half pants and had covered their faces and were armed with axe, wooden logs and other weapons. PW³ Uttam further deposed that Sharad told him that on entering his house those three persons assaulted them, Manisha escaped from the backside door of the house, however at the backside below the Bor tree other persons were present and they assaulted her on head. PW³ Uttam further deposed that, Sharad told him that those persons took away ornaments and cash about Rs.60,000/-, which was the amount of sale proceeds of onions. He further deposed that then Police came at his locality and he narrated entire incident to the Police, which they reduced into writing.

12. PW³ Uttam further deposed that at the relevant time prior to incident, two Pingals (Sadhu) used to come at their village early in the morning, they used to ask for clothes, tea etc. He further deposed that it revealed to them that the said Sadhu intend to carry out recce of their house and locality. He further deposed that they came for about 5-6 occasions at his house during aforesaid period.

13. PW³ Uttam further deposed that he was then called at Nandgaon for identification parade at Tahsil office and he can identify the persons who used to come at his house as Pingals (Sadhu) (PW³ identified accused Kashinath @ Bappya Yavaskar Pawar, Baliram Pundlik Chavan, Narayan Sitaram Pawar, Sudhakar Pundlik Chavan and Bhika Piraji Chavan).

14. During the course of cross-examination, PW³ Uttam stated that on the day of incident, he had not seen the culprits who came at the house of Sharad and assaulted him and his family members. He was unable to state as to why the Police have not recorded in the report that he has informed the same to the Police at the time of incident. He further stated that while lodging the report he has not stated that some persons were present outside the house of Sharad. While lodging the report, he has stated to Police that prior to incident on 5-6 occasions, some persons had come at his house early in the morning and asked for clothes and tea and it appears that they were

making recce of his house and locality. He was unable to assign any reason as to why it is not recorded in his report. He further stated that prior to going at Nandgaon, he came at Nashik on one occasion for identification parade. At Nandgaon, Police Station and Tahsil office are in the same campus. He further admits that one main Gate is there to the said campus and after entering into from the said gate, at one side the Police Station is there and at other side Tahsil office is there. At the relevant time about 10 villagers were called for identification parade. They went at the Tahsil office at about 12.00 noon. Police brought the accused one by one. He was unable to recollect whether he had stated clothes worn by each accused at the time of identification parade. He further stated that he was unable to recollect whether prior to identification parade at Nandgaon, the accused were shown to him at Nashik.

15. Thus, it is crystal clear from the evidence of PW³ Uttam that he had not seen the culprits who came at the spot of incident and assaulted Sharad and his family members. Neither he was present on the spot at the time of incident nor he has actually seen the assailants. His evidence reveals that prior to the incident two persons pretending themselves to be Sadhus, used to visit his house and locality with an intention to carry out recce, during the relevant period. During the identification parade, he was asked to identify those two alleged Sadhus. Though he has deposed that two Sadhus used to visit his locality, in the identification parade, he has identified as many as five accused. Further, from his entire evidence it is not clear whether the procedure and guidelines for the identification parade were scrupulously followed or not. Thus it is clear that if the evidence of this witness is accepted as it is, he has not witnessed the actual incident of dacoity and assault and further he has not seen the assailants. This witness has specifically deposed that Sharad told him that three persons entered his house[^] by covering their faces. Thus, when the faces of those persons were covered, the question of identifying them does not arise at all. It is clear that PW³ Uttam has not supported the prosecution case, still he was not declared as hostile by the prosecution. Be that as it may, during the identification parade, this witness has not identified the original accused Nos.4 and 8, who are the Appellants in the present Appeals, and all the persons alleged to have been identified by this witness are the accused persons who were

absconding during the trial before the Trial Court, whose case was separated from the case of the present Appellants. Further he has identified those

persons to be Sadhus who used to come in the village, and not as culprits. Thus, evidence of PW-3 is not helpful to the prosecution case.

16. The prosecution has examined PW-4 Rajendra Sayaji Pawar. He deposed that the incident took place on 24th March, 2007 at the house of

Kachru Dattu Pawar. On that day at about 1.00 a.m. he received a phone call from his friend Ashok Pawar informing that dacoity took place at the

house of Kachru Dattu Pawar. Therefore, he himself and others rushed at the house of Kachru. He noticed dead body of Kachru Dattu Pawar on the

cot, having head injury. Below the Bor tree, the dead body of Manisha Sharad Pawar found lying with head injury. Sharad Pawar and his mother

Prabhavati found lying in injured condition. The dacoits took away cash of Rs.60,000, ornaments and other articles from the house. The household

articles were found in a scattered condition. He further deposed that in his presence, police prepared inquest panchnama of dead bodies of Kachru

Dattu and Manisha (Exhibit 76 and 77).

17. PW-4 Rajendra further deposed that few days prior to the incident, persons pretending to be Sadhus, used to come to their village and their

behaviour appeared to be suspicious. Those persons were in the age group of 35 to 40 and fair in colour and he personally met them on 2-3

occasions. He further deposed that he was called at Nandgaon for identification parade. He identified the accused at the relevant time. He further

deposed that he can identify with certainty those persons if shown to him. (The witness (PW-4) identified accused Sudhakar Pundlik Chavan, Bhika

Piraji Chavan, Baliram Pundlik Chavan, Narayan Sitaram Pawar, Kashinath @ Bappya Yavawskar Pawar.

18. During the course of cross-examination, PW-4 Rajendra stated that on the day of incident, he had not seen the culprits who came at the house

of Sharad and assaulted Sharad and his family members. Police recorded his statement. While recording his statement, he told the police that at the

relevant time he had seen two Sadhus in the village about 15-20 days prior to the incident. He had not stated about the identification marks found

over those Sadhus to the police. He admits that he has stated about Sadhus on account of suspicion only. He further stated that at the time of

identification parade accused were in casual dress however he was unable to state the exact colour of their dress. He further stated that Tahsil office and police station, Nandgaon are in the same campus. He further stated that at the time of identification parade, 10-12 persons were standing in a row. He himself was the only witness for identification and Tahsildar was also present.

Prior to his reaching in the room of identification, accused were already there and were standing.

19. Thus, it is clear from the evidence of PW-4 Rajendra that on the day of incident he had not seen the culprits who came at the house of Sharad and assaulted Sharad and his family members. Even during the identification parade, he has identified the accused who used to come to his village pretending to be as Sadhus, and not as the persons who had participated in the dacoity and assault. Further, during the identification parade neither he was shown nor he has identified original accused Nos.4 and 8 who are appellants in the present appeals. Though PW-4 stated that only two persons pretending themselves to be Sadhus used to come in his village, in the Court he identified as many as five accused. Thus, evidence of PW-4 is not at all reliable and trustworthy and the same is not at all helpful to the prosecution case.

20. Admittedly, as per the prosecution case, the culprits who participated in dacoity and assault were unknown to the prosecution witnesses.

Therefore, in such a situation the identification parade becomes necessary so as to reveal the identity of the real culprits. The prosecution has

examined PW-8 Mandar Anilrao Kulkarni, who conducted test identification parade. He deposed that since 2005 to 2009 he was serving as

Residential Naib Tahsildar at Nandgaon. On 30th April, 2007 Police Inspector, Crime Branch Nashik delivered a letter to him for holding identification

parade. He then decided to hold identification parade on 3rd May, 2007 and accordingly issued a letter to Senior P.I., L.C.B. so as to secure presence

of accused and witnesses.

21. PW-8 Mandar further deposed that on 3rd May, 2007 Police Inspector, Manmad produced six accused for identification parade. Nine

witnesses had also come for identifying the accused. He then called two panchas for identification parade. He then conducted identification parade in

his office before panchas according to provisions as per Manual and submitted the reports (Exhibit 104 to 109) of the said identification parade.

During first identification parade vide Exhibit 104, eight witnesses identified accused Baliram Pundlik Chavan. So also in identification parade vide

Exhibit 105, eight witnesses identified accused Sudhakar Pundlik Chavan. So also in identification parade vide Exhibit 106, seven witnesses

identified accused Narayan Sitaram Pawar. Then identification parade vide Exhibit 107, three witnesses identified accused Suresh Vyankati Chavan.

In identification parade vide Exhibit 108, two witnesses identified accused Bhikaji Piraji Chavan. So far as identification parade vide Exhibit 109 is

concerned, eight witnesses identified accused Kashiram @ Bhopya Vayaskar Pawar. He further deposed that the accused who were present in the

identification parade were present before the Court and he identified them.

22. During the course of cross examination, PW 8 Mandar stated that Nandgaon Police Station and Tahsil office is in the same campus. On the

relevant day at about 10.30 a.m. accused were produced by the Police Inspector. The witnesses also came at the same time. He was not aware as to

whether accused belongs to Pardhi community. He was unable to state whether dummies who were called, belonged to Pardhi community. He admits

that in panchnamas Exhibit 104 to 109 he has not referred ages, description and addresses of the dummies. He admits that he has not obtained the

signatures of dummies over panchanamas. He further admits that he has not referred in said panchanamas that he has selected dummies having

similar personalities with accused. He has not obtained the signatures of panchas over said panchanamas. He has not referred the description of

clothes and their colours worn by accused and dummies, in the said panchanama.

23. Thus upon perusal of the evidence of Naib Tahsildar (PW 8 Mandar), it is clear that in panchanamas Exhibit 104 to 109 he has not referred

ages, description and addresses of the dummies, he has not obtained the signatures of dummies and also of the panchas on panchanamas, he has not

referred in said panchanamas that he has selected dummies having similar personalities with accused. Thus it appears that while carrying out the

identification parade, PW 8 has not followed the proper procedure. It is pertinent to note that the incident took place on 24th March, 2007 at about

1.00 a.m. and about the said incident, identification parade of the accused was

conducted on 3rd May, 2007 and that too by not following the proper procedure and guidelines, and therefore explicit reliance cannot be placed upon such faulty identification parade, as the same does not conclusively proves that the accused were the persons who had participated in dacoity and assault.Â Â

24. The prosecution has examined PWÂ9 Sanjay Nimba Shinde, Naib Tahsildar, Nandgaon, Dist. Nashik, who conducted the identification parade in respect of accused No.8 â?" Vithhal Shreeram Pawar. He deposed that the SDO Manmad has directed him to conduct identification parade of accused in C.R. No.46/2007 arising out of Special Case No.1/2008, vide letter dated 17th March, 2012. He then informed to SDPO that he was holding the identification parade on 23rd March, 2012. He has also directed the SDPO to produce the witnesses on the said date in Central Prison, Nashik.

25. PWÂ9 â?" Sanjay further deposed that on 23rd March, 2012, he went at Central Prison, Nashik. He then directed Superintendent of Jail to make arrangement for holding identification parade. He also directed the Jail Superintendent to produce six dummy accused having similarity with the accused. On his direction, one witness out of two had also come so as to identify the accused. He then conducted identification parade according to provisions as per Manual. At the time of identification parade, witness Sharad Kacharu Pawar has identified accused â?" Vithhal Shreeram Pawar before the panch witness. He further deposed that accordingly he prepared the memorandum of identification parade (Article 112). At the relevant time he recorded statements of panch present regarding their consent to act as panch. He prepared the map showing the position of the premises used for holding identification parade. He then forwarded the memorandum report of the identification parade to the Court.

26. During the course of cross examination, PWÂ9 Sanjay stated that he himself called the panchas on the relevant day. He admits that panchas and witness Sharad Kacharu Pawar are covillagers. The Jail Superintendent arranged dummies as per his direction. He admits that on the relevant day, amongst dummies, the dummies in the age group of 25 were not available. He admits that there is no attestation below the thumb impression of dummy. On the relevant day, he reached in the jail for identification parade at

about 11 a.m., identification parade started at about 11.30 a.m. and completed at 12.45 p.m. He admits that in report (Exhibit 112), there is no reference as to when the identification parade started. He was not aware as to whether accused belongs to Pardhi community. He was not aware as to which community, the dummies belonged. He has not referred nature and colour of clothes worn by dummies and accused. He admits that in his report he has not referred the accused by any particular number. He has not obtained in writing that accused stated about his unwillingness to change the clothes.

27. Thus evidence of PW 9 Sanjay, shows that panchas and witness Sharad Kacharu Pawar are from the same village. His cross examination reveals that on the day of identification parade, the dummies in the age group of 25 were not available. It is pertinent to note that at the relevant time, accused Vithhal Shreeram Pawar was of the age of about 25 years, regarding whom identification parade was carried out. PW 9 admits that in his report he has not referred the accused by any particular number. It is significant to note that the incident took place on 24th March, 2007 and about the said incident, identification parade of accused No.8 was conducted on 23rd March, 2012, after the gap of about five years, and that too by not following the proper procedure and guidelines, and therefore explicit reliance cannot be placed upon such faulty identification parade, as the same does not conclusively proves that the accused was the person who had participated in dacoity and assault, which took place in the year 2007.

28. The prosecution examined PW 12 Sharad Kacharu Pawar. He deposed that in the year 2007 he along with his family consisting of parents, wife Manisha, daughter Pragati alias Didi were residing at their field situated in Nagapur Shivar. On 23rd March, 2007 at about 11.30 p.m. he was watching T.V., the other members of the family were sleeping. At that time, three persons entered into their house and they assaulted him by stick and axe. Those three persons worn blue, black and green banyans, respectively. All of them worn a full Pant. At the time of recording his statement, he has stated about descriptions of those persons in detail. They were having height about 5 to 5.5 feet and they were in the age group of 30 to 35 years. The witness identified three accused before the Court, who have stated their names as Baliram Pundlik Chavan, Narayan Sitaram Pawar and

Bhika Piraji Chavan. He further deposed that they have possessed wooden logs measuring about 3 feet. He further deposed that he can identify those wooden logs and axe if shown. The wooden logs at Article H, H¹ and H² respectively when shown to him, he identified the same. He also identified axe, Article H³.

29. PW¹² Sharad further deposed that at the relevant time those persons further assaulted by the weapons over the head of his father (Kachru).

Therefore, his father died at the spot. He further deposed that then those persons assaulted over the face and chin of his father. He then raised the

shouts. Those persons then assaulted over his head, leg and hand by the weapons with them. His leg and hand therefore fractured and rod was

inserted. His wife then woke up and those persons asked her to deliver the keys of the cupboard. His wife (Manisha) then delivered key to them and

tried to escape from the backside door. At the relevant time, she reached up to a tree behind their house, where associates of those persons were

present and they have assaulted his wife and killed her. They then opened the cupboard and took away cash of Rs.50,000/ from the same. Those

persons also snatched the ornaments on the person of his wife and mother. He further deposed that he can identify those ornaments if shown to him.

The ornaments H⁴ and H⁵ when shown to him, he identified the same to be of his mother. He further deposed that those person then assaulted to

his daughter Didi. He further deposed that he can identify one person, who was standing at the outer side of the house. [The witness identified one of

the accused and the accused stated his name as Suresh Vyankati Chavan(Appellant herein)]. He further deposed that he can also identify one more

accused and identified accused who stated his name as Vithal Shreeram Pawar[Appellant herein]. He further deposed that then on hearing his

calls, the neighbour rushed at his house. He told them about the incident. The neighbours then shifted him, his mother and his daughter Didi in hospital

at Manmad. He was then shifted at Suyash Hospital at Nashik. He was hospitalized for about one and half months. Therein Police came and asked

him whether he can identify the culprits. Then he has been called at Nandgaon Tahsil office for identification parade of accused. He identified the

accused persons in said parade. Then again Police called for identification of accused in Central Prison, Nashik road and he identified the accused. He

further deposed that 8 to 10 days prior to the incident, some persons used to come at their village and they were having the dress like Sadhu.

30. During the course of cross-examination, PW-12 Sharad stated that while stating descriptions of the accused he has not stated before the Police

identification marks like mole etc. He has not stated the detail description of the wooden logs and axe before the Police while recording his statement.

He has stated before the Police while recording his statement that those persons asked for keys to his wife and she had delivered the same to them.

He was unable to state why the same is not so recorded in his statement. He has stated before the Police that while his wife escaped at the backside

of the home, the associates of the accused were there, who assaulted her and killed her. He was unable to state as to why it was not so recorded. He

has not delivered the purchase receipts of the ornaments to the Police during investigation. It was not happened that the Police mixed the ornaments

identified by him with other ornaments and then asked him to identify the ornaments. He came at Central Jail Nashik for one occasion only. During

hospitalization period of one and half months, he had not gone anywhere. After the said period of one and half months, he never had been at Nashik

Gramin Police Station or at Manmad Police Station. Police came in the hospital on 2-3 occasions. He had been to Nandgaon on one occasion only.

He was unable to recollect exact time of reaching Tahsil office on that day. He was unable to state as to who had brought the accused at Tahsil

office on that day. When they reached there, accused were already brought there at the inner side. At the relevant time, in the Tahsil office 5-6

villagers were also there. He has not stated before the Police while recording his statement that eight days prior to the incident, persons wearing dress

of Sadhu came in the village. In his statement, he has stated that three culprits were there. He has not stated before the Police about the presence of

associates of culprits at the outer side of the house.

31. Thus, it is clear that the defence has brought on record several contradictions, omissions and improvements in the evidence of PW-12 Sharad.

Though he deposed before the Court that when his wife reached up to a tree behind their house where associates of those persons were present and

they have assaulted over his wife and killed her, during the course of cross-examination, he has specifically admitted that he has not stated before

the Police while recording his statement about the presence of associates of culprits at the outer side of the house. He further admitted that he has not

stated before the Police while recording his statement that eight days prior to the incident, persons wearing dress of Sadhu came in the village. Though

it is the prosecution case that there were nine assailants, who participated in dacoity, this witness stated that only three persons entered in his house

and assaulted him. So also, before the Court this witness has identified only three accused namely Baliram Pundlik Chavan, Narayan Sitaram Pawar

and Bhika Piraji Chavan. It is pertinent to note that another prosecution witness PW-3 Uttam has specifically stated in his evidence that at the

relevant time Sharad told them that three persons entered in his house, who worn half pants and had covered their faces. However, PW-12 Sharad in

his deposition specifically stated that all the assailants had worn full pants. Thus there is variance in the evidence of PW-3 Uttam and PW-12

Sharad on the material particulars about the clothes of the assailants. Even for the sake of arguments, the prosecution evidence is read as it is, this

witness Sharad has stated that the accused Suresh Vyankati Chavan was standing outside the house when dacoity took place. Thus even as per the

prosecution case accused Suresh has not participated in the actual process of dacoity. Even the trial Court has also held that appellant/accused

has not participated in the actual process of dacoity.

32. The prosecution examined PW-13 Sanjay Vasant Ghuge. He deposed that on 25th April, 2007 at about 11.00 a.m. Manmad Police called him at

Manmad Police Station and accordingly he went there. One Udikar and Gavali were also called by the Police at the Police Station. Suresh Chavan

was in the custody of the Police, who gave confession to the Police. The Police has reduced the same into writing. He further deposed that the

panchas have gone through the same and put their signatures thereon. He deposed that memorandum (Exhibit-134) is the same and it bears his

signature.

33. PW-13 Sanjay further deposed that thereafter in the Police Jeep he along with panchas, accused Suresh Chavan and Police staff went about one

and half K.M. from Manmad near temple of Goddess Godavari. Then from the nearby bushes therein, accused Suresh Chavan discovered an axe to

the Police. The length of said axe is about two and half feet and its edge is about

7 inch. He further deposed that he could identify the said axe if shown to him. When axe (Article HÂ3) was shown to him, he identified the same. He further deposed that the Police then seized the said axe, prepared its panchanama. He further deposed that the seizure panchanama (ExhibitÂ?135) is the same, which bears his signature. Accused also put his thumb impression over the same. He further deposed that on the day of recording his evidence, he was unable to identify accused Suresh Chavan due to lapse of many years.Â

34. PWÂ13 Sanjay further deposed that on the same day, in the evening at about 4.30 p.m. Manmad Police again called him at Police Station. At the relevant time, Gavali and Sanjay Wadane were also present as panchas. One Bhopya Pawar was in the custody of Police, who confessed to discover wooden log. Accordingly, confession was recorded by the Police. He further deposed that Memorandum (ExhibitÂ136) is the same, which bears his signature. He further deposed that then in the Police Jeep, he along with other panchas, Police staff, accused Bhopya Pawar went near the temple of Goddess Godavari. Accused Bhopya then discovered the wooden log from the nearby bushes. When the wooden log (Art. HÂ1) was shown to him, he identified the same. He further deposed that the Police seized the said wooden log and prepared the seizure panchanama (ExhibitÂ137).Â He further deposed that on the day of recording his evidence, he was unable to identify Bhopya due to lapse of so many years.

35. During the course of crossÂexamination, PWÂ13 Sanjay stated that he cannot remember the number of the Police Jeep in which they went to the aforesaid spot. He admits that the spot from where the axe and wooden log were discovered can be seen from the temple and accessible to the public. He was unable to recollect whether in memorandum panchanama it has been mentioned that the accused is going to discover the axe and wooden log. He further stated that the axe and wooden log are having no seal bearing his signatures. The Police brought the photocopy of the panchanama and delivered the same to the accused near the temple. He stated that he is dealing in transport business in Manmad.Â

36. Upon careful perusal of the evidence of this witness, it is clear that axe was recovered at the instance of accused Suresh Chavan. It is pertinent to note that the said axe was recovered from the bushes near temple of Goddess

Godavari. During the course of cross-examination, this witness has specifically admitted that the spot from where the axe and wooden log were discovered, can be seen from the temple and accessible to the public. In the case of Sujit Gulab Sohatre & others vs. the State of Maharashtra, the Division Bench of the Bombay High Court held that recoveries from the places which are accessible to all and sundry are not incriminating evidence. In the present case also, the recoveries of axe and wooden log at the instance of the accused are from the place accessible to all and therefore the evidence of PW-13 Sanjay is not useful to the prosecution case. Further PW-13 Sanjay was unable to identify accused Suresh Chavan due to lapse of many years.

37. The prosecution examined PW-14 Dhananjay Pralhad Avsare, who is panch to the seizure of wooden log at the instance of accused Sudhakar Pundlik Chavan. He deposed that accused Sudhakar took Police and the panchas at the nearby spot of bridge and cremation and discovered wooden log to the Police. However, during the course of his cross-examination, this witness specifically admitted that the spot from where the wooden log was discovered was having public access. Therefore, the evidence of this witness is also not useful to the prosecution case. It is significant to note that accused Sudhakar Chavan is absconding accused.

38. The prosecution examined PW-15 Santosh Gangaram Mazde, who is panch to the seizure of wooden log at the instance of accused Baliram Chhabu Chavan. He deposed that accused Baliram took Police and the panchas near the temple of Goddess Godavari and from the nearby bushes therein he discovered wooden log. However, during the course of his cross-examination, this witness also specifically admitted that the spot from where the wooden log discovered was having public access. Therefore, the evidence of this witness is also not useful to the prosecution case. It is significant to note that accused Baliram Chavan is absconding accused.

39. PW-16 Ganesh Thakaji Gavali is a panch to the seizure of ornaments at the instance of accused Bhika Piraji Chavan. Accused Bhika Piraji Chavan is absconding accused, who is not appellant before this Court.

40. The prosecution examined PW-17 Prabhavati Kacharu Pawar, wife of deceased Kacharu. She deposed that in the year 2007, they were residing at their field situate at Nagapur Shivar near railway track. Her family was

consisting her husband, her son Sharad, daughter Manisha and granddaughter Pragati @ Didi. On the date of incident, at about 8.30 p.m they were sleeping. At the relevant time, something hit on her head and hence she woke up. She saw three assailants while assaulting over the head of her husband. Those persons possessed sticks, wooden logs and axe. They were in the age group of 30 to 35 years, having blackish colour. They worn banyan and full pant.

41. PW17 Prabhavati further deposed that her daughter Manisha tried to escape at the outside of house, but she was also assaulted on her head and killed. The assailants snatched ornaments from the person of Manisha. She further deposed that the said persons have also snatched her

ornaments, which includes golden marriage string. She can identify the said ornaments. When the ornaments (H4 and H5) were shown to her, she

identified the same. She further deposed that those persons also assaulted her son on his head, hands and legs and they opened the cupboard and took

away cash of Rs.50,000. She further deposed that she can identify the wooden log and axe, if shown. Those are at Article H, H1 to H3. She

further deposed that the assailants also assaulted over her granddaughter on her head and hand. Three assailants entered into their house and six

persons were at the outer side. She further deposed that she can identify them, accused before the Court are the same. She herself and her son were

shifted at Hospital at Manmad. She was then shifted at Nashik and was operated there towards injuries on her hand and neck. She was in the hospital

for about two months. Police recorded her statement when she was in position to talk.

42. During the course of cross-examination, PW17 Prabhavati stated that while recording her statement she has not stated about the identification

mark over the person of the assailants. She admits that wooden logs and axe are usually available with the farmers. She has stated before the Police

the colour of pants and banyans worn by the assailants at the time of incident, however, she was unable to state why it is not so recorded by the

Police. She has stated before the Police that three assailants entered into house and six were standing at the outer side. She was unable to assign any

reason as to why it is not mentioned in her Police statement that six persons were standing at the outer side. She has specifically stated that she had

not been in the office of Tahsildar at Nandgaon. She has stated to the Police that assailants assaulted over the head of Manisha, but she was unable to

assign any reason as to why it is not so recorded in her Police statement.Â Â

43. The evidence of PWÂ17 Prabhavati reveals that she has stated that three assailants entered into her house and six persons were at the outer side.

So far as the number of accused persons is concerned, her version is totally different than the version of PWÂ12 Sharad. She has specifically

admitted that she never visited to the office of Tahsildar at Nandgaon. Thus it is clear that she has not identified the accused during the identification

parade and for the first time in the Court, she has identified the accused. This witness has stated that the accused were wearing full pants and thus

her version is contrary to the version of PWÂ3 â?" Uttam, who stated that at the relevant time, the accused had worn half pants. Further the

prosecution has brought on record various contradictions, omissions and improvements in the evidence of PWÂ17. Thus, the evidence of this witness

is not at all trustworthy and reliable.Â

44. PWÂ18 Raosaheb Kashinath Tribhuvan, Police Head Constable is the carrier who carried out muddemal articles to the office of Chemical

Analyzer for chemical analysis. PWÂ19 Sanjiv Dayal was the Director General of Police, Maharashtra State, who accorded the sanction to prosecute

the accused under MCOC Act. It is significant to note that the Trial Court has acquitted accused Nos.4 and 8 of the offences punishable under the

provisions of the MCOC Act.

Â 45. PWÂ20 Shrinivas Julal Patil, Police Inspector is the Investigating Officer, who carried out initial investigation. He deposed about the manner in

which he has carried out the investigation. He deposed that on 24th March, 2007 Head Constable on Station Diary duty informed him on phone that at

Nagapur Shivar dacoits had come and killed a woman. He deposed that he himself along with the staff went at the spot. On reaching there, he learnt

that the culprits with the help of axe and wooden logs with them, killed Manisha Pawar and Kacharu Pawar, and also injured Sharad, Prabhavati and

Didi Pawar. He also learnt that injured were shifted in the Hospital. He then informed about the incident to the control room as well as superior

officers. He then recorded FIR (ExhibitÂ87) from Uttam Laxman Pawar. He then sent FIR to the Police Station through ASI Shaikh. He noticed that

household articles in the said house were in a scattered condition. He then prepared the inquest panchanama of the dead bodies of deceased Kacharu and Manisha. Head injuries were found to both of them, along with other injuries. He then sent dead bodies for autopsy and thereafter prepared spot panchanama. He seized soil sample mixed with blood of Kacharu and Manisha as well as simple soil, bed sheet. He also seized soil sample mixed with blood of injured Prabhavati as well as simple soil and quilt. The pieces of bangles having white and rose colours were also seized. He then seized all the articles and prepared the panchanama (Exhibit 94). As blood was found over the skin cover of the tree, therefore he seized the said portion of skin cover of the tree and prepared panchanama (Exhibit 88). He then recorded statements of witnesses. He deposited the property in Muddemal Section of the Police Station. He collected Postmortem notes of both the deceased and injury certificates of the injured. Thereupon, further investigation was entrusted to Crime Branch Nashik.

46. During the course of cross-examination, PW 20 Shrinivas admitted that while lodging the FIR, informant Uttam had not stated in detail description of the culprits. He specifically admitted that he has not recorded in the panchanama that on the relevant day he had applied seal of wax on the muddemal seized from the spot and obtained the signature of panchas over the said seal. He further admits that he has not referred in the panchanama that they have sealed the bottles of blood samples of deceased with wax seal and obtained the signatures of panchas over the said seal.

47. Thus, it is clear from the evidence of this witness that muddemal articles were seized from the spot on 24th March, 2007. The evidence of PW 18

Raosaheb discloses that he carried the said muddemal articles to the Laboratory of Chemical Analyzer on 25th May, 2007. Thus, it reveals that

from 24th March, 2007 till 25th May, 2007 the seized material was in the custody of the investigating officer. PW 20 has admitted that he has not

referred in the panchanama that he had applied seal of wax on seized muddemal and that he obtained signatures of panchas over the said seal. He

further admits that he has not referred in the panchanama that he had sealed bottles of blood samples of deceased with wax seal. Thus it is clear that

the prosecution has not brought on record, whether the said articles were properly sealed or otherwise. The Rajasthan High Court in the case of The

State V. Motia and other Accused , in para No. 8 held that:

“8. Learned counsel for Motia accused has raised a number of objections about this evidence against Motia. In the first place, he points out that

there is no evidence to show that after the various articles had been recovered from the possession of Motia, they were kept sealed so that it was not

possible for any one to sprinkle blood stains on them while they were in the custody of the police and before they were, sent for examination by the

Chemical Examiner. We must point out that this lacuna in the prosecution evidence is there. Whenever it is desired by the prosecution that certain

articles, which have been recovered from accused persons are to be identified, or are to be sent to the Chemical Examiner for analysis, it is necessary

that the officer recovering the articles should immediately take steps to seal them and evidence should be produced that the seals were not tampered

with till the identification is over, or till the articles are sent to the Chemical Examiner for analysis. In the absence of such precautions it would always

be open to the accused to say that the police later put human blood on the articles in order to implicate the accused. It is, therefore, necessary for the

prosecution to produce evidence that steps were taken at once to seal the articles, and that from the time the articles came into possession of the

police to the time they were sent for identification before a Magistrate or for examination to the chemical Examiner the seals remained intact. This

evidence is missing in this case. It is, of course, not difficult to sprinkle a few human blood stains on articles recovered if somebody wants to do so.

We do not say that this was done in the present case; but as precautions were not taken, the argument raised on behalf of the accused that this might

have been done remains unrefuted. Under these circumstances, we find that we cannot place the same reliance on the discovery of blood stains on

these various articles as we would have done if necessary precautions had been taken.”

. In the facts of the present case also, it is clear that muddemal articles were in the custody of the investigating officer for about two months and

during the said period possibility of tampering with the muddemal articles cannot be ruled out. Considering the over all evidence and the circumstances

brought on record, explicit reliance cannot be placed upon the Report of Chemical Analysis.

48. The prosecution has examined PW²¹ Samadhan Netajirao Pawar, S.D.P.O. Manmad. He deposed that on 3rd February, 2012, P.I. Manmad informed him that they have arrested accused Vithal Shreeram Pawar involved in C.R. No.47 of 2007. It revealed to him that while forwarding the charge²sheet, the above²named accused was shown as absconding and hence he applied with MCOC Court for getting the warrant. On 4th February, 2012, he has applied with J.M.F.C. Khamgaon for getting the custody of above²named accused. On 22nd February, 2012, they obtained the custody of above²named accused from Central Jail and covered his face. He then obtained the police custody of above²named accused. In due course, the above²named accused remanded in judicial custody and then they applied for permission from the Court for holding his identification parade. He then vide letter Exhibit¹¹¹ informed Tahsildar, Nandgaon for holding identification parade. Accordingly, Tahsildar concerned held the identification parade and forwarded his report (Exhibit¹¹²). He further deposed that he then recorded statements of witnesses who have identified the above²named accused. He then forwarded the detail report for forwarding the charge²sheet to Additional D.G. He further deposed that on 19th May, 2012, they have received consent from Additional D.G. for forwarding the charge²sheet. On 21st May, 2012, he forwarded the supplementary charge²sheet.

49. During the course of cross examination, PW²¹ Samadhan stated that the FIR in the matter was silent regarding name and description of the accused. It reveals from the statements of the accused that the accused were in the age group of 30 to 35 years. On the date of arrest, the accused was in the age group of 25. While recording the statements, the witnesses have not disclosed the identification marks of above²named accused, which is mentioned in the arrest panchanama. He further stated that during investigation, he has not seized the proof connected with immovable property in the name of accused. He further stated that he did not come across with any documents showing that accused is a member of Crimes Syndicate.

50. Thus it appears from the evidence of PW²¹ that he arrested accused Vithal Shreeram Pawar and obtained police custody of the accused, applied for permission from the Court for holding his identification parade and

then informed Tahsildar for holding identification parade.

51. The prosecution examined PW²² Vilas Shivaji Wagh, Police Head Constable. He deposed that accused Baliram Pundlik Chavan given

confession statement and shown the spot where they have conspired. He further deposed that at the instance of accused Baliram one wooden log

having blood stains was recovered from Ghuge Vasti, nearer to bandh of a field. He further deposed that on 7th May, 2007 another accused Sudhakar

Chavan again confessed to discover the clothes used while making reccy before panchas. He further deposed that at the instance of accused

Sudhakar saffron colour clothes were discovered from the bushes near Thakker property, which includes one shirt and lungi.

52. During the course of cross²² examination PW²² stated that the spot from where Baliram discovered wooden log is below the bandh and at the

distance of 25 feet from the said bandh, road was existed. He further stated that one can take the view of the said spot from the road. He admits that

the area from where Sudhakar alleged to have discovered clothes is near the residential area and houses are there. He further stated that he has

reduced into writing statement of Sharad Kacharu Pawar according to his say and as per the direction of P.I. Shendge. He further stated that while

recording the statement Sharad had not stated that the culprits asked for keys and his wife delivered the keys to them. Sharad also not stated

description of axe and wooden log. He further stated that Sharad in his statement stated that at the relevant time three culprits entered into the house.

52. Thus evidence of PW²² Vilas shows that the place from where wooden log was recovered at the instance of accused Baliram was near

the road and was accessible to general public. His evidence further discloses that the area from where Sudhakar alleged to have discovered clothes is

near the residential area, where there are houses. This witness has specifically stated that he has reduced into writing the statement of Sharad

Kacharu Pawar. Through this witness, the defence has brought on record various contradictions, omissions and improvements in the evidence of

PW¹² Sharad Kacharu Pawar.

53. PW²³ Pralhad Kalu Jadhav is the panch to the seizure panchanama of clothes at the instance of accused Sudhakar Pundlik Chavan. He

deposed that Sudhakar Pundlik Chavan took them to the fencing of Thakkar

Bungalow Gangapur road and from nearer to the fencing discovered the clothes, which includes saffron colour shirt having three buttons, Nehru cut as well as same colour towel. During the course of cross examination,

PW 23 stated that adjacent to the Thakkar Bungalow, south north road is there and towards western side of the bungalow residential locality is

there. He further stated that the traffic of the vehicles is always there on the said road and the people also used to pass by said road. He further

stated that the spot from where the clothes were discovered is an open place. 54.

Thus it is clear from the evidence of PW 23 Pralhad that the place from where the clothes were discovered at the instance of accused Sudhakar

was an open space, which was accessible to the general public.

55. The prosecution has examined PW 24 Madhukar Trambak Athare, Head Constable. He deposed that on 25th May, 2007 he was serving at the

office of Rural Crime Branch, Nashik. At the relevant time, one Mr. Belavate was serving as Police Inspector, who carried out investigation in the

matter. He deposed that Mr. Belavate was not alive. He himself assisted Mr. Belavate while carrying out investigation in the present matter.

He further deposed that during the investigation, he has prepared memorandum statement of Suresh Vyankati Chavan on 25th April, 2007 vide Exhibit

134 at the instance of P.I. Belavate. Accordingly accused Suresh then acted as per confession Exhibit 134 and prepared the panchnama of seizure of

weapons at the instance of P.I. Belavate. He further deposed that he can identify the axe discovered by accused Suresh, if shown to him. He further

deposed that axe Article H/3 is the same which was shown to him. He further deposed that on 25th April, 2007 at the instance of accused Kashiram

alias Bhopya Pawar, wooden log was discovered.

56. During the course of cross examination, PW 24 Madhukar stated that at the relevant time he has not mentioned the body marks in the

statement of those holy men or Sant (Sadhu). He further stated that he has not referred the description of weapon while preparing memorandum

statement of accused Suresh Vyankati Chavan. He further stated that he has not referred in the statement of accused Kashiram alias Bhopya that he

shown readiness to discover the wooden log.

57. This witness PW 24 deposed about the discovery of the axe at the instance of accused Suresh Vyankati Chavan. However, as observed earlier,

the discovery of said axe is from the place which was accessible to all. Further it is pertinent to note that as per the version of this witness, the place

from where axe is recovered at the instance of accused Suresh is different than the place from where axe was recovered at the instance of accused

Suresh, as per the version of PW¹³ Sanjay. Thus prosecution is not sure, which weapon was possessed by the accused Suresh.

58. The prosecution has examined PW²⁵ Sunil Devidas Kadasne. He deposed that in the year 2007 he was serving as a SDPO at Manmad. On

adding the charges under MCOC Act, the investigation of the matter was entrusted to him. He then recorded statements of the witnesses, collected

the documents regarding pending offences/cases against the accused. They have also separately filed the certified documents connected with

Sessions Case No.250/2007 in C.R. No.47/2007 of Manmad Police Station. He further deposed about the various documents filed regarding various

cases filed in various Courts. He further deposed that on receiving C.A. Reports (Exhibit¹⁹² to 196), he has forwarded the same with the charge¹

sheet. He further deposed that on 11th October, 2007 he forwarded the papers for getting sanction to the office of Additional D.G. On 13th June,

2008 they got consent from D.G.P. to forward the chargesheet vide Exhibit¹⁵⁵. Then on 14th July, 2008 he has forwarded the charge¹sheet. He

further deposed that the accused before the Court are the same.

59. During the course of cross examination, PW²⁵ Sunil admits that the FIR was against three culprits. He further admits that detail descriptions

were not given in the FIR. He further admits that it revealed to him that there were differences in the descriptions stated by the witnesses in their

statements and the descriptions of them in the arrest panchanamas. He further admits that some of the property involved in the present matter is also

shown in C.R. No.47 of 2007. The accused belong to Pardhi community. He further stated that during investigation it was not revealed to him that the

accused by illegal means and committing offences collected immovable properties. The bank balance also not revealed to him in the investigation in

the names of the accused. He further stated that at the relevant time, in the Case Diary received to him, there was no documents regarding purchase

of ornaments by the informant. He has not seized the documents from the accused showing that they have formed Organized Crime Syndicate. He

admits that some of the spots from where recovery is made are open space accessible to all. He further stated that the Railway employees always used to check the railway tracks. He further admits that in some of the cases registered against the accused in different Police Stations and stated by him earlier, the accused are acquitted from the charges.

60. From perusal of the evidence of PW²⁵ Sunil, it is clear that the FIR was against only three culprits and in the said FIR detail description was not given. This witness admitted that there are difference in the descriptions stated by the witnesses in their statements and the description in the arrest panchanama. He further admits that some of the property involved in the present matter was also shown in another crime bearing C.R. No.47 of 2007. His evidence shows that during investigation it was not revealed that accused collected immovable properties by illegal means and that the accused were having handsome bank balance. His evidence further discloses that in the Case Diary there was no document regarding purchase of ornaments by the informant. His evidence further discloses that some of the spots from where recovery is made, are open space accessible to all. As observed earlier, the Trial Court has acquitted both the Appellants from the offence punishable under Sections 120^B and 452 of the IPC. The Trial Court has also acquitted the appellants from the offence punishable under the provisions of the MCOC Act.

61. PW²⁶ Dr.Satyapal Singh was the Police Commissioner, Mumbai at the relevant time, who forwarded the proposal to charge accused Vithhal Shreeram Pawar, under the provisions of the MCOC Act. PW²⁷ Premkrishan Jain was the Additional D.G., Special Operations, Mumbai at the relevant time, who granted approval to apply the provisions of the MCOC Act in C.R. No.46 of 2007 registered at Manmad City Police Station. As observed earlier, the Trial Court has acquitted the appellants from the offence punishable under the provisions of the MCOC Act.

62. It is pertinent to note that the incident took place on 24th March, 2007 during the night hours at about 1.00 a.m. and about the said incident, identification parade of the accused/appellant " Suresh Vyankati Chavan was conducted on 3rd May, 2007, after about 40 days from the date of incident. So far as accused/appellant Vithhal Shreeram Pawar is concerned, his identification parade was carried out on 23rd March, 2012, after

almost five years from the date of incident. The Supreme Court in the case of Musheer Khan @ Badshah Khan and another , in the facts of that

case, wherein identification parade was carried out after three months from the date of incident, held thus:Â?

â??32. In so far as the identification of AÂ5 is concerned that has taken place at a very delayed stage, namely, his identification took place on

24.01.2001 and the incident is of 29.11.2000, even though AÂ5 was arrested on 22.12.2000. There is no explanation why his identification parade was

held on 24.01.2001, which is after a gap of over a month from the date of arrest and after about 3 months from the date of the incident. No reliance

ought to have been placed by the courts below or High Court on such delayed T.I. parade for which there is no explanation by the prosecution.â??

63. As observed earlier, in the facts of the present case also,Â so far as accused/ appellant â?" Suresh Vyankati Chavan is concerned, his

identification parade was conducted after about 40 days from the date of incident. So far as accused/appellant Vithhal Shreeram Pawar is concerned,

his identification parade was carried out after five years from the date of incident. Therefore, the identification parade loses its importance in as

much as there was long time gap and possibility of accused being shown to witnesses cannot be ruled out. Such belated identification parade after long

gap from the date of incident, and conducted in breach of the procedure, deserves no consideration.

64. We have already discussed in detail, the evidence of PWÂ8 Mandar Kulkarni, Residential Naib Tahsildar and PWÂ9 Sanjay Shinde, Naib

Tahsildar, who conducted identification parade of the accused persons. PWÂ8 Manohar Kulkarni admitted that in the panchnamas Exhibit 104 to 109

he has not referred ages, description and addresses of the dummies and that the dummies were having similar personalities with accused. PWÂ9

Sanjay Shinde who carried out identification parade, deposed that witness Sharad Kacharu Pawar has identified accused Vithhal Shreeram Pawar

before the panch witnesses. Admittedly accused Viththal Pawar was of about 25 years of age at the relevant time.

However, during the course of crossÂexamination, PWÂ9 admitted that on the relevant day the dummies in the age group of 25 were not available.

The evidence on record discloses that proper procedure was not followed while conducting the identification parades. It seems that the accused were

exposed to the witnesses before the identification parade. The evidence on record does not show that the faces of the accused were covered before or while bringing them for test identification parade. The evidence on record shows that accused were of younger age while the persons other than accused were of more than 30 to 35 years of age. It appears from the evidence on record that the dummies were not of similar age and appearance to that of the accused persons.

65. Certain guidelines are prescribed for conducting identification parade. At this juncture, it would be apt to reproduce herein below the guidelines laid down i.e. Para 16(2)(a) to (p) from Chapter I of Criminal Manual issued by the High Court of Judicature at Bombay, for the Guidance of the Criminal Courts and Officers Subordinate to it in respect of conduct of test identification parade, which read thus :
:Â?Â Â Â

16(2) (a) The object of an identification parade is to make sure that the ability of the witness to recognise the suspect has been fairly and adequately tested.

(b) It should be fair and seem to be fair and every precaution must be taken to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed specifically to the suspected persons instead of equally to all the persons to be paraded.

(c) The Officer concerned with the case against the suspect, if present, must not take part in conducting the parade.

(d) The parade should be arranged by an officer who is not a police officer.

(e) After the commencement of the identification parade, every thing in respect of it should take place in the presence and hearing of the suspect, including any instruction to the witnesses attending it as to the procedure that is to be adopted.

(f) All unauthorised persons should be strictly excluded from the place of identification parade.

(g) The witnesses should be prevented from seeing the suspect before he is paraded with other persons, and witnesses who have previously seen a photograph or description of the suspect should not be led in identifying the suspect by reason of their recollection of the photograph or description, as for instance by being shown the photograph or description, before the parade.

(h) The suspect should be placed among persons (if practicable eight or more)

who are as far as possible of the same age, height, general appearance (including standard of dress and grooming) and position in life. Two suspects of roughly of similar appearance should be paraded with atleast twelve

other persons. Where, however, the two suspects are not similar in appearance or where there are more than two suspects, separate parades should

be held using different person on each parade.

(i) All members of a group of suspects more than two should not be paraded together. There should be more parades than one, each including not

more than two. Two suspects of obviously dissimilar appearance should not be included in the same parade. Identification numbers should be

concealed.

(j) The suspect should be allowed to select his own position in the line and should be expressly asked if he has any objection to the persons present

with him or the arrangements made. He should be informed that if he so desires, he should have his Advocate (or a friend) present at the identification

parade.

(k) The witnesses should be introduced one by one and, on leaving, should not be allowed to communicate with witnesses waiting to see the persons

paraded; and the suspect should be informed that he is free to change his position after each witness has left.

(l) The witness should be asked whether the person he has come to identify is on the parade. He should be told that if he cannot make a positive

identification, it is open for him to say so.

(m) Generally, a witness should be asked to touch any person whom he purports to identify, but if the witness is nervous at the prospect of having to

do that (in case where the witness is a woman or a child who has been victim of a sexual or violent assault or other frightening experience) and if

prefers not to touch the person, identification by pointing out should be permitted.

(n) If a witness indicates someone, but is unable to identify him positively, this fact should be carefully noted by the officer conducting the parade and

every other circumstances, (such as whether the suspect or any other person is identified or not), connected with it should be noted.

(o) If any request is made by a witness, for example to see the suspect with his hat on or his hat off or to see he person walk or to hear the person

speaking and there being no objection to the person paraded as asked for, the incident should be recorded.

(p) Where a parade has to be held in prison, a prison officer should be present throughout in charge of the discipline of the prisoners who would take

part. Otherwise, the police officer unconnected with the case, ought to be responsible for the parade. It must be ensured that the parade is conducted

in the same way as a parade outside prison.â??

66. In para 16 of above-mentioned Manual, the procedure is prescribed for conducting the identification parades. Clauses (iv) and (v) of the said

procedure read thus :â??

â??(iv) The parade should then be arranged in a room or a place which is such that the identifying witnesses, as well as the persons connected

with the Police, should not be able to look into it.â??

(v) If there is only one accused person to be identified, there should be at least half a dozen persons placed in the parade. If two accused persons are

to be identified, then there should be about 10 or 12 persons in the parade. Not more than two accused should be placed in any single identification

parade. Normally, the Police themselves will have called up the persons to be put in the parade; but the Executive Magistrate/Honorary Magistrate

should see that they are persons of more or less the same physical appearance, and approximately of the same age, as the person to be identified. It

is desirable that innocent persons to be mixed should be different for each such parade.â??

67. Upon perusal of the clause (iv), while conducting the parade, the parade should be arranged in a room or a place which is such that the identifying

witnesses, as well as the persons connected with the Police, should not be able to look into it. In clause (v), it is stated that, if there is only one accused

person to be identified, at least half a dozen dummy persons should be placed in the parade. If two accused persons are to be identified, then there

should be about 10 or 12 persons in the parade. Not more than two accused should be placed in any single identification parade. Normally, the police

themselves will have called up the persons to be put in the parade, but the Executive Magistrate/Honourary Magistrate should see that they are

persons of more or less same physical appearance, and approximately of the same age, as the person to be identified. It is desirable that dummy

persons to be mixed should be different for such parade.

68. In the present case in hand, the procedure prescribed for identification parade was not at all followed while conducting the identification parade of the Appellants herein. Thus, the prosecution has not conclusively proved that the Appellants and the Appellants are the only persons who participated in the dacoity. Therefore, it is unsafe to base the conviction of the Appellants on the basis of such faulty identification parades.

69. We have discussed in detail the entire evidence brought on record by the prosecution. There is no consistency in the evidence of the prosecution

witnesses and the evidence of the prosecution witnesses is not at all consistent, trustworthy and reliable. PW³ Uttam has stated that Sharad told him

that dacoits were wearing half pants, as against this, evidence of PW¹² Sharad and PW¹⁷ Prabhavati reveals that all the dacoits were wearing

full pants. Though, it has come in the evidence of PW³ Uttam and PW⁴ Rajendra that before the incident of dacoity, some persons pretending

themselves as Sadhus used to come in their village, the prosecution has failed to prove conclusively that said Sadhus were the persons who had

committed dacoity. PW³ Uttam and PW⁴ Rajendra had not seen the dacoits while committing the dacoity and they visited the spot after the

incident was over. Though it has come in the evidence of prosecution witness PW¹³ Sanjay that axe was recovered at the instance of appellant

Suresh Chavan, as observed earlier, he has specifically admitted in the cross examination that the spot from where the axe was discovered was

accessible to the public. The prosecution has failed to brought on record actually how much persons involved in dacoity. PW¹² Sharad has identified

only three accused before the Court. His evidence shows that only three persons entered in the house and some persons were standing outside the

house, but he has not stated in clear terms as to how many persons involved in the process of dacoity. PW¹⁷ Prabhavati stated that three persons

entered into the house and six persons were standing outside the house. However if the evidence of PW²⁵ Sunil, investigating officer is perused, he

has specifically admitted in his cross examination that original FIR was only against three culprits and his evidence further reveals that detail

description was not given in the FIR. If really nine culprits would have involved in the dacoity, then the informant would not have registered FIR

against only three persons. Though, before the trial Court there were in all nine accused, the record before the trial Court reveals that accused No.1

â?" Baliram, accused No.2Â Sudhakar, accused No.3 â?" Bhika, accused No.5 Narayan, accused No.6 Kashiram, accused No.7Mangal and accused

No.9Â Babu absconded during the trial before the Court and therefore their case was separated and case was proceeded only against present

appellants i.e. accused No.4 Â Suresh and accused No.8Â Vitthal.Â The police machinery was unable to apprehend absconding accused persons till

the trial was over. As observed earlier, muddemal articles were in the custody of the investigating officer for about two months. The prosecution has

not brought on record whether those articles wereÂ properly sealed and kept in proper condition for such long period, and therefore during the said

period possibility of tampering with the muddemal articles cannot be ruled out. While conducting identification parade, proper procedure was not

followed. It has come in the evidence that while conducting the identification parade, the dummies in the age group of accused were not

available.Â Â As observed earlier, while conducting the identification parade, guidelines prescribed in that behalf were not followed. Thus prosecution

failed to fix the identity of the assailants and further failed to prove that the appellants were the persons who participated in dacoity and therefore on

such faulty identification, conviction cannot be based against the Appellants.

69. We have carefully perused the impugned Judgment passed by the trial Court and we find that the trial Court has recorded perverse findings. The

trial Court has recorded the specific finding that except producing chargesheets on record, the prosecution has not produced cogent and reliable

evidence on record to prove that the accused have committed the offence of organized crime syndicate and accused Nos. 4 and 8 were involved in

criminal activities continuously and they have committed criminal activities by using force, threat or violence or coercion for gaining pecuniary benefits

for themselves and thereby committed offences punishable under Sections 3(1) (i), 3(1)(ii) and 3(4) of the MCOC Act.Â On the basis of aboveÂsaid

findings, the trial Court has acquitted the appellants from the offence punishable under the provisions of MCOC Act. The trial Court has also acquitted

the Appellants from the offence punishable under the provisions of 120ÂB and 452 of the IPC. Upon appreciation of the evidence brought on record

by the prosecution, the trial Court has held that the Appellants were not party to the criminal conspiracy. The trial Court has further held that the

Appellants have not committed houseÂ?trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully

restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint. However, on the same set of evidence the trial

Court has convicted and sentenced the Appellants for the offence punishable under Sections 395, 396, 397, 447 of IPC.Â The trial Court has not

appreciated entire evidence brought on record in its proper perspective and reached to a wrong conclusion. The findings recorded by the trial Court

are not in consonance with the evidence brought on record.

70. The evidence brought on record by the prosecution is not cogent, sufficient and convincing so as to prove the offence against the AppellantsÂ

beyondÂ reasonable doubt. On the whole there is no cogent, clinching and sufficient evidence showing the involvement of the Appellants. Under

these circumstances, the Appellants are entitled for the benefit of doubt.

Hence we pass the following order:Â Â Â Â Â Â Â Â Â Â Â Â Â Â Â Â

(I) Both Criminal Appeals i.e.Criminal Appeal No.1211/2018 and Criminal Appeal No.301/2017 are allowed.

(II) The Judgment and order dated 15th July, 2015, passed by the Special Judge (Under MCOC Act), Nashik in Special Case (MCOC) No.1 of 2008,

thereby convicting and sentencing the Appellants â?" accused No.4 Â Suresh Vyankati Chavan and accused No.8 â?" Vithhal Shreeram Pawar for

the offence punishable under Sections 395, 396, 397 and 447 of the Indian Penal Code, is quashed and set aside.

(III) Both the Appellants i.e. ÂSuresh Vyankati Chavan and Vithhal Shreeram Pawar, are acquitted of the offence punishable under SectionsÂ 395,

396, 397 and 447 of the Indian Penal Code. Fine amount, if deposited as per the impugned Judgment and order, be refunded to the Appellants.

(IV) The order passed by the trialCourt to the extent of acquitting both the Appellants of the offence punishable under Section 120ÂB and 452 of the

Indian Penal Code and under Sections 3(1)(i), 3(1)(ii) and 3(4) of the Maharashtra Control of Organized Crime Act, 1999, is hereby confirmed.

(V) Both the Appellants are in jail,they be set at liberty forthwith, if not required in any other case.

(VI) Both the Appellants shall furnish Personal Bond of Rs.15,000/Â each and surety in the like amount each, under Section 437ÂA of the Code of Criminal Procedure, before the concerned trial Court at Nashik.

(VII) In view of the order passed in Criminal Appeals, Criminal Application No.1235 of 2017 in Appeal No.301 of 2017 does not survive and the same stands disposed of, accordingly.