

Allahabad High Court

Arvind Parmar @ Bunty Raja And 2 ... vs State Of U.P. on 1 October, 2019

Bench: Ram Krishna Gautam

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Judgement Reserved on 18.09.2019

Judgement Delivered on 01.10.2019

Case :- CRIMINAL APPEAL No. - 5242 of 2018

Appellant :- Arvind Parmar @ Bunty Raja And 2 Others

Respondent :- State Of U.P.

Counsel for Appellant :- Ram Datt Dauholia, Nanhe Lal Tripathi

Counsel for Respondent :- G.A.

Hon'ble Ram Krishna Gautam, J.

1. This Appeal, under Section 374 (2) of Code of Criminal Procedure, 1973 (In short hereinafter referred to as "Cr.P.C."), has been filed by the convict-appellants, Arvind Parmar @ Bunty Raja, Rajan @ Rajendra, and Raheem Khan, against the judgment of conviction, dated 30.07.2018 and sentences awarded therein, by the Court of Additional Sessions Judge/Special Judge (U.P. Dacoity Affected Area), Lalitpur, in Sessions Trial No. 53 of 2013 (State vs. Arvind Parmar @ Bunty Raja and others), arising out of Case Crime No. 1612 of 2012, under Sections 457, 380, 411, 413 of Indian Penal Code (Hereinafter in short referred to as "IPC"), Police Station- Kotwali Lalitpur, District Lalitpur, whereby convict-appellants, Arvind Parmar @ Bunty Raja, Rajan @ Rajendra and Raheem Khan, have been sentenced with seven years' rigorous imprisonment and fine of Rs.10,000/-, each, under Section 380 IPC, twelve years' rigorous imprisonment, with fine of Rs.20,000/-, each, under Section 457 IPC, and rigorous imprisonment of three years, with fine of Rs.5,000/-, each, under Section 411 of IPC. In case of default of deposit of fine of Rs.20,000/-, they will have to serve one year's additional simple imprisonment, in case of default of deposit of fine of Rs.10,000/-, they will have to serve six months' additional simple imprisonment and in case of default of deposit of fine of

Rs.5,000/-, they will have to undergo three months additional simple imprisonment, with a further direction for concurrent running of sentences and adjustment of previous incarceration, if any, in this very case crime number, with this contention that the Trial court failed to appreciate facts and law placed before it and the judgment of conviction and sentence, awarded, therein, is illegal, perverse and against the weight of evidence on record. It was passed on the basis of surmises and conjectures.

2. The occurrence of theft had been said to have taken place in the night of 10.08.2012 and a first information report was lodged on 12.8.2012, as Case Crime No.1612 of 2012, under Sections 457 and 380 IPC, Police Station- Kotwali, Lalitpur, District Lalitpur. Subsequently, arrest of Arvind Parmar @ Bunty Raja, appellant no.1, Jeetu Parihar, Rajan, appellant no.2, and Naval Ahirwar, was shown to have been made by the Police on 14.8.2012, whereas Shivam Tiwari, Arvind Pal and Raheem Khan, appellant no.3, said to have fled from the spot. Recovery of golden ornaments and cash, was said to have been made from joint possession of arrested accused persons. Though the occurrence was said to have occurred on 10.08.2012, but first information report was lodged on 12.8.2012. PW-2, S.I. Man Singh, had stated that the arrest of appellant nos. 1 and 2 was made on 14.8.2012 and alleged recovery was said to have been made from them, while appellant no.3 was said to be absconded, whereas, it was a false recovery and false implication. Hence, this Criminal Appeal with above prayer.

3. Heard Sri Nanhe Lal Tripathi, learned counsel for the appellant and learned AGA, appearing for the State and gone through the impugned judgement as well as record of the Trial court.

4. From very perusal of the record, it is apparent that the First Information Report, Exhibit Ka-1, dated 12.08.2012, was got lodged by the informant, Kalyan, at Police Station-Kotwali Lalitpur, District Lalitpur, with this contention that while, on 10.8.2012, he was away from his home, in connection with some urgent work, keeping his house lock, in the night, occurrence of theft, by unknown thieves, took place, by breaking lock and anklet of silver, weight 500 gm, Kardhna of silver (an ornament of waist for woman), weight 500 gm, and Rs.5,000/-, in cash, were stolen, and other household goods were scattered here and there.

5. On 14.8.2012, while SOG Incharge, Sumit Kumar Singh, alongwith his Police Team, was on surveillance duty, informer gave information about presence of thieves, who have committed various thefts in the city, with stolen articles, near Cremation Ghat, Chandi Mata Temple. This was immediately communicated to Inspector, Incharge, Kotwali Lalitpur, District Lalitpur, Sri Uday Bhan Singh and was called to Varni Four-way Junction. A Police Team led by him, with the Inspector, proceeded for Chandi Mata Temple. On being pointed by the informer towards few persons, sitting thereat, Police Team apprehended four persons at 15.15 PM. On being asked to disclose identity, first one told his name Arvind Parmar @ Bunty Raja, Resident of Nai Basti, Police Station Kotwali, Behind Little Flower School, Lalitpur, from whose personal search, one Mangalsutra of yellow metal, appearing to be gold, with cash of Rs.10,000/-, was recovered, other one disclosed his identity as Rajan, Son of Govind Singh Bundela, Resident of Cremation Ghat, Nai Basti, Police Station Lalitpur, from whom golden chain of yellow metal, with cash of Rs.12,000/- was recovered, third one disclosed his name as Jitu Parihar, Son of Parmanand, Resident of Railway

Crossing, Gandhinagar, Police Station Kotwali, Lalitpur, from whom, ear ring of gold of yellow metal was recovered, and fourth one disclosed his identity as Naval Ahirvar, Son of Har Naryan, Resident of Nehru Nagar, Infront of Masjid, Police Station Kotwali, District Lalitpur, from whom, three rings of gold, Rs.32,000/-, in cash, and one Pendent of yellow metal was recovered whereas Shivam Tiwari, Arvind Pal, Banti Dhobi and Raheem managed to escape from the spot. Smt. Prem Lata Jain, Pramod Kumar, Akhilesh Kumar Sharma, Smt. Gita, Satendra Singh Parmar, Balram Pachauri, Niraj Nayak, Sanjay Tiwari and many others reached on the spot, who identified those apprehended persons to be residents of above locality. Upon being investigated, those apprehended persons confessed offence of theft committed by them and also confessed that Mangalsutra and one golden ring was stolen from the house of Smt. Prem Lata Jain, whereas one golden chain and Rs.2,000/-, in cash, were stolen from the house of Balram Pachauri, two golden rings, with cash of Rs.20,000/-, was stolen from the house of Akhilesh Sharma, two ear rings were stolen from the house of Sanjay Tiwari, Pendent of Mangalsutra was stolen from the house of Niraj Nayak, Rs.5,000/-, in cash, was stolen from the house of Bharat Patel, Rs.2,000/- was stolen from the house of Gita and Rs.5,000/-, in cash, was stolen from house of Pramod. Remaining stolen articles were taken away by Shubham Tiwari, Arvind Pal, Bunti Dhobi and Raheem. Alleged recovered stolen articles were identified by those public men, who were informants in various cases of theft, lodged by them, being Case Crime Nos.1150/2012, 1210/2012, 2420/2012, 1492/2012, 701/2012, 778/2012, 1613/2012, 1617/2012 and 1612/2012, under Sections 457, 380, 411 and 413 IPC. Apprehended persons were made known about commissions of offence by them under above Sections of IPC. It was presumed that those accused persons were habitual offenders of theft, hence they were taken into custody and recovery memo was got prepared on the basis of which this implication, under Sections 457, 380, 411 and 413 was made.

6. On the basis of investigation, chargesheet was filed and after hearing learned Public Prosecutor as well as learned counsel for defence. Charges for offence, punishable under Section 380, 457, 411 and 413 IPC were framed. Charges were readover and explained to the accused persons, who pleaded not guilty and requested for trial.

7. Prosecution examined PW-1, Constable 99 Sushil Kumar, PW-2, S.I. Man Singh Pal, PW-3, S.I. Sunit Kumar Singh, PW-4, Kalyan and PW-5, S.H.O., Retired, Uday Bhan Singh.

8. Statement of accused persons were got recorded, under Section 313 Cr.P.C. in which prosecution version was denied and false investigation, with no confession, was said. No evidence in defence was led and after hearing arguments of learned Public Prosecutor and the counsel for defence, impugned judgment of conviction for offence, punishable under Sections 380, 457 and 411 IPC and judgment of acquittal, under Section 413 IPC was passed.

9. After hearing over quantum of sentence, impugned sentence was passed.

10. No appeal, by the State, against judgement of acquittal for offence, under Section 413 IPC, is there.

11. PW-1 is Constable 99 Susheel Kumar, who, in his testimony, has formally proved registration of first information report, received by Post, which was in respect of lodging of report for occurrence of theft, on the basis of which, he got a first information report, being Chik No. 284/12, Case Crime No.1612/2, under Sections 457 and 380 of IPC, against unknown thieves, registered, which was Exhibit No. Ka-1, in his handwriting and under his signature.

Since first information report was against unknown accused persons, cross-examination was not done.

12. PW-2 is S.I. Man Singh Pal, who, in his testimony, has stated that some unknown persons on 10.08.2012, having broken the lock of the house of Kalyan s/o Gorelal, r/o 464 Civil Lines, Laltipur, committed theft of cash, jewellery, ornaments etc. An FIR in this connection was lodged at the police station on 12.08.2012, the investigation of which was done by him. On 14.08.2012, SOG In-charge Suneet Kumar and his police team arrested the accused persons Arvinda Parmar @ Bunty Raja, Rajan S/o Govind Singh, Jeetu Parihar s/o Parmanand, Nawal s/o Har Narain, R/o Lalitpur from whom the articles related to crime in the case crime nos. 1150/2012, 1210/2012, 1420/2012, 1492/2012, 701/2012, 778/2012, 1613/2012, 1617/2012, 1612/2012 u/s 457, 380 IPC were recovered, and upon interrogation name of other accused persons came into the light. On 27.08.2012, SO Udaibhan Singh, accompanied by the present witness, Subhash Chandra Yadav, SI Varun Pratap Singh and constable Bahadur Singh, on reaching, Nehru Nagar, while on surveillance duty for locating the whereabouts of wanted, got an information that the accused person Shivam Tiwari, wanted in the aforesaid case, is standing at the Bal Sudhar Grih Road. On the aforesaid information, the police personnel reached there where the accused person after seeing the police personnel tried to flee from the spot, but Police managed to apprehend the accused person Shivam Tiwari at 9:30 hours. While he was being searched, Rs. 5000/-, related to occurrence of theft, committed in the house of informant, a gold ring weighing around 1.5 gm, related to the case crime no. 1492/2012, and a silver silver box (Dibiya), in connection with case crime no. 1420/2012, were recovered. The accused person, on being investigated, confessed that he and his accomplices, Arvinda Parmar @ Bunty s/o Devendra Singh, Rajan s/o Govind Singh Bundel, Jeetu Parihar s/o Parmanand, Nawal Ahirwar s/o Harnarain, Arvinda Pal s/o Ram Sewak, Bunty Dhobi, Rahim s/o Sagir, had committed theft in the house of Kalyan, s/o Gorelal, in the night of 10.08.2012. From the aforesaid theft, he had got Rs. 5000/- as his share, which was recovered from him.

On getting the information of arrest and recovery of related articles, present complainant of the case Kalyan s/o Gorelal, Niraj Nayak s/o Shaligram Nayak and Sanjay Tiwari s/o Sukhdev Tiwari reached on the spot, who stated about the thefts committed in their houses, and identified jewellery and said that that the recovered items had been stolen from their houses. Recovery memo was got scribed on the spot by S.I. Varun Pratap Singh on the dictation of the S.O. Recovered items were separately sealed casewise. Sample seal was prepared on which this witness as well as complainant put their signatures. Accused also signed the memo. A copy of memo was given to the accused. Recovery memo, so prepared, was Exhibit Ka-3 (Paper nos. 8ka/1 to 8ka/2).

On 13.8.2012, investigation of the offences related to crime no 1612/12 was started by this witness, under sections 457, 380 IPC. On 2.9.2012, S.O Udaibhan Singh, alongwith present witness, Man

Singh Pal, S.I. Subhash Chandra Yadav and Constable Bahadur Singh left police station in search of some lead and while taking round via Nai Basti, Railway Station, came to Sadan Sah four-way Junction, on the information of the informer, arrested, accused Raheem Khan (appellant no.3) from Gate No. 2 of District Hospital at 15.00 hours, on whose personal search, one ring of yellow metal of gold, weight about one gram and one pair anklet of silver, weight about 150 gram, was recovered from his possession. On being investigated, accused person confessed to have committed theft in the house of Balram Pachauri in the night of 14.6.2012 and this ring was given to him as his share, likewise, in the night of 31.7.2012, he confessed to have committed theft in the house of Niraj Nayak and got anklet as his share, which has been recovered from him. Arvind, Naval, Jeetu, Batti and Arvind Pal were also with him in commission of theft, recovery of which has been made from him. They committed various other thefts in the city. Upon hearing information regarding recovery, complainants had come to the spot, who after seeing the recovered items, identified them to be theirs, which had been stolen. Recovered items were sealed in separate clothes. Sample seal was prepared. The recovery memo was got scribed by him on dictation of the S.O. Police personnel and other witnesses put their signature on the recovery memo after reading the contents. A copy of memo was given to accused on the spot and his signature was obtained.

In cross-examination, this witness has said none of the complainants have mentioned any mark of identification of stolen articles nor receipt in respect thereof was given. He also did not get it verified from any jeweller whether this article is pure metal or duplicate. Though arrest of Raheem Khan was made from the gate of District Hospital, which was a crowded place, but no independent public witness was made because none was ready to become a witness of arrest or recovery, so made. He also did not note name and address of the witnesses and, therefore, was not able to even tell the name of witness. On the spot, though he stayed for about one and an half hour and prepared recovery memo, but was not able to tell the boundary of the spot. Though a copy of the recovery memo was given to the accused persons, after getting it signed by the accused, but at the time of police custody, recovery memo was not with the accused, though it was not thrown before him. Neither there was any specific mark of identification of the stolen articles was mentioned in the report nor any mark of identification of accused person was there. Though at the time of recovery of articles, informant did identify recovered articles, but there was no mention of this fact in the statement recorded in the case diary. No receipt of recovered articles was with the informant nor was there any paper pertaining to his claim over recovered articles. Such articles are usually used in each house.

Meaning thereby, testimony of this witness is full of variance and is having material contradiction, which is not trustworthy at all and prosecution miserably failed to prove its case.

13. PW-3, Sub Inspector, Sunit Kumar Singh, is witness of arrest of accused and recovery of stolen articles. He, in his testimony has stated that while he, alongwith his Police Team, was on surveillance duty, informer gave information about presence of thieves, who have committed various thefts in the city, with stolen articles, near Cremation Ghat, Chandi Mata Temple. This was immediately communicated to Inspector, Incharge, Kotwali Lalitpur, District Lalitpur, Sri Uday Bhan Singh and was called to Varni Four-way Junction. A Police Team led by him, with the Inspector, proceeded for Chandi Mata Temple. On being pointed by the informer towards few

persons, sitting thereat, Police Team apprehended four persons at 15.15 PM. On being asked to disclose identity, first one told his name Arvind Parmar @ Bunty Raja, Resident of Nai Basti, Police Station Kotwali, Behind Little Flower School, Lalitpur, from whose personal search, one Mangalsutra of yellow metal, appearing to be gold, with cash of Rs.10,000/-, was recovered, other one disclosed his identity as Rajan, Son of Govind Singh Bundela, Resident of Cremation Ghat, Nai Basti, Police Station Lalitpur, from whom golden chain of yellow metal, with cash of Rs.12,000/- was recovered, third one disclosed his name as Jitu Parihar, Son of Parmanand, Resident of Railway Crossing, Gandhinagar, Police Station Kotwali, Lalitpur, from whom, ear ring of gold of yellow metal was recovered, and fourth one disclosed his identity as Naval Ahirvar, Son of Har Naryan, Resident of Nehru Nagar, Infront of Masjid, Police Station Kotwali, District Lalitpur, from whom three rings of gold, Rs.32,000/-, in cash, and one Pendent of yellow metal was recovered whereas Shivam Tiwari, Arvind Pal, Banti Dhobi and Raheem managed to escape from the spot. Smt. Prem Lata Jain, Pramod Kumar, Akhilesh Kumar Sharma, Smt. Gita, Satendra Singh Parmar, Balram Pachauri, Niraj Nayak, Sanjay Tiwari and many others reached on the spot, who identified those apprehended persons to be residents of above locality. Upon being investigated, those apprehended persons confessed offence of theft committed by them and also confessed that Mangalsutra and one golden ring was stolen from the house of Smt. Prem Lata Jain, whereas one golden chain and Rs.2,000/-, in cash, were stolen from the house of Balram Pachauri, two golden rings, with cash of Rs.20,000/-, was stolen from the house of Akhilesh Sharma, two ear rings were stolen from the house of Sanjay Tiwari, Pendent of Mangalsutra was stolen from the house of Niraj Nayak, Rs.5,000/-, in cash, was stolen from the house of Bharat Patel, Rs.2,000/- was stolen from the house of Gita and Rs.5,000/-, in cash, was stolen from house of Pramod. Remaining stolen articles were taken away by Shubham Tiwari, Arvind Pal, Bunti Dhobi and Raheem. Alleged recovered stolen articles were identified by those public men, who were informants in various cases of theft, lodged by them, being Case Crime Nos.1150/2012, 1210/2012, 2420/2012, 1492/2012, 701/2012, 778/2012, 1613/2012, 1617/2012 and 1612/2012, under Sections 457, 380, 411 and 413 IPC. Apprehended persons were made known about commission of offence by them under above Sections of IPC. It was presumed that those accused persons were habitual offenders of theft, hence they were taken into custody and recovery memo was got prepared, which was signed by him, other police personnel as well as by independent witness. It has also been stated by this witness, in his testimony, that on 18.8.2012, being Incharge SOG, while, he was in the search of suspicious persons and criminals, on the information received from informer, called Incharge, Kotwali, Lalitpur, and with the informant of Case Crime No.1612 of 2012, Kalyan, reached Malu Petrol Pump where at four-lane by-pass, informer pointed towards two persons standing thereat, who have been arrested at 11-30 AM. On making personal search, one disclosed his name as Arvind Pal, from whose possession Kardhan of Silver (an ornament of waist of woman), of white metal of 300 gm, was recovered and the second one disclosed his name as Rajendra Soni, from whose possession, anklet of silver of white colour, and Rs.10,000/- in cash was recovered. On being investigated, Arvind, admitted his mistake and said that he was having friendship with Shivam Tiwari and Bunty. They were having a gang and were committing occurrence of theft and stolen articles were being sold to Raju Soni. On that day, they were selling the articles, stolen from the house of the informant to Raju and the articles which were recovered from Raju, were stolen from the house of Balram Pachauri, out of which he got Rs.10,000/- as his share, which he gave to Raju Soni as loan. Informant identified Kardhan of silver and anklet thereat. Recovery memo (Exhibit Ka5) was prepared on the spot, which was signed by this witness as well as

by the informant.

One bundle was opened before the court from which Rs.12,000/-, in cash, one chain of yellow metal (of gold), was taken out, from second bundle one pair ear ring (Jhala) and from another bundle, one Mangal Sutra was taken out, which, after being seen by the witness, has been said to have been recovered on 14.8.2012 from the joint possession of Arvind Parmar, Govind Singh, Jitu Parihar and Naval Ahirwar, and were verified by the witness. From one other bundle three rings of gold, Rs.32,000/-, in cash, and one golden pendent was recovered. However, in cross-examination, this witness, has stated that the recovered articles were not before him. He was not investigating case Crime No. 1612/12. About informant, he was informed by Incharge, Kotwali, Uday Bhan Singh. Informer gave information before him, but did not tell that stolen articles, pertaining to Case Crime No.1612/12, were with the accused persons. On being asked by Incharge, Kotwali, informant of Case Crime No.1612/12, Kalyan, was called. Though the place, from where accused were arrested, was crowded one, but none from the public was called as witness. Nothing was recovered from accused, Arvind Pal. There was no specific mark of identification on the recovered anklet nor it was enquired from the informant as to on what basis recovered articles were being claimed by him of his article. He did not get signature of informants of various reports, except Prem Lata Jain and Gita. Accused persons were not named in any first information report nor any mark of identification nor age of accused persons were mentioned in the first information report. In between informed place and Cremation Ghat, there were several houses and traffic was also there, but none from public had been asked to accompany the Police. Meaning thereby, testimony of this witness is full of material contradiction and shaky and appears to be concocted and cooked-up story, without any concrete evidence or cogent material to corroborate testimony given by this witness. There was no independent public witness of the arrest and the recovery made from the accused persons, though the place was crowded one, as stated by the witness in his testimony. Therefore, renders testimony doubtful and as such cannot be relied.

14. PW-4, Kalyan, is the informant of the present case crime number, who, in his testimony, has stated that on 10.8.2012, he, alongwith his other family members, was living in the house of Vimlesh Kumar Jain, on rent. On that day, after locking his house, when he went out of station, in connection with some urgent work, and came back on third day, found the locks of his house were broken and upon entering into the house, he has seen that all household articles were scattered here and there and silver anklet of 500 gm and Rs.5,000/-, in cash, kept in a bag, were stolen by unknown thieves. He has lodged a first information report of this occurrence at the Police Station against unknown thieves, Paper no. 5K, having his signature and exhibited as Exhibit K-6. After 10-15 days, he came to know that Police has arrested some thief at Juvenile Jail Road, Nehru Nagar and he reached thereat. One thief caught by the police was sitting there, who disclosed his name Shivam Tiwari from whose possession Rs.5,000/-, in cash, alleged to have been recovered, which was confessed by the accused Shivam Tiwari to have been stolen from his house. Anklet, Kardhani (an ornament of waist of woman) and cash money, stolen from his home, has been handed over to him. While, being cross-examined, this witness has stated that though he produced receipt in respect of stolen articles, but the same were not on record. He was not having bill of stolen articles. Stolen articles were purchased by him from shop. After ten days, Inspector called him. Inspector recorded his statement on the date of lodging of report itself. At the place, where he met with Inspector, 2-4 persons were

standing. Inspector told name of arrested person Shivam Tiwari. He did not recognise Shivam Tiwari. Shivam Tiwari is not appellant in the present case. Meaning thereby, it was all the story cooked-up by the Police. Neither there was any independent public witness of the arrest nor of recovery of stolen cash nor any specific mark of identification of stolen case was there. The testimony of this witness is of no relevance to the prosecution because in the present case Shivam is not under Appeal and present appellants were not apprehended alongwith accused-Shivam Tiwari.

Meaning thereby, informant neither has seen anyone, while committing theft in his house nor was there at the time when locks of her house were broken nor any accused was produced before him for identification. Neither any recovery was made before this witness nor any specific mark of identification/denomination of alleged recovered article/currency notes was there nor any recovery memo was signed by him nor the same were produced before the court during trial nor this witness was previously acquainted with accused persons. Thus, testimony of this witness does not support prosecution case at all and the case set up by the prosecution falls flat, so far as testimony of this witness is concerned.

15. PW-5 is, SHO, Retd. Uday Bhan Singh. This witness, in his examination-in-chief, has stated that on 27.8.2012, while, being posted as SHO Kotwali, he with his accompanying Police team, Man Singh Pal, S.I Subhash Chand, S.I Varun Pratap Singh, and other constables went to Nehru Nagar, Bachha Jail Road, and arrested accused Shivam Tewari in the matter of a case of theft. On making personal search, Rs. 1000/- cash, a gold ring and a white silver small box (Dibiya) were recovered from him as stolen goods. He, on being enquired, disclosed names of all the accused involved in the theft. Non one from the public, present there, was ready to become a witness. Complainant of the case was called on the spot to identify stolen articles. He verified them. He had mentioned details of the goods in the memo, Ext. Ka3. He further stated that on 17.9.2012, he, along with S.I Man Singh Pal, S.I Shamshad Ahmad and other accompanying constables, during patrolling, when reached Govind Sagar Dam, an informer gave information that an accused of theft was going towards Puliya. On being caught, he disclosed his name Banti @ Vinod Rajak. Articles stolen by him and anklets of silver, weighing 250 gram, were recovered from him. On being investigated, he confessed to have committed theft alongwith co-accused on 21/07/12 in the house of Neeraj Nayak, r/o-Azadpur. Recovery memo was prepared on the spot and it was marked as Ext ka-6. Site plan of place of recovery, prepared by S.I. Man Singh from where recovery from accused Shivam Tiwari was made on 19/09/12. (Ext ka-7) On being cross-examined, this witness has stated that Banti Dhobi was not named in first information report. It was against unknown thieves. There was no eye-witness of this incident. There was no specific mark of identification of the goods stolen nor of thief in first information report. No proceedings for identification of recovered articles nor of accused were conducted. He did not remember whether copy of memo was recovered from accused or not. He also did not remember as to whether entry of recovered goods were made or not. Articles recovered from Shivam were not produced in the court. Rupees 5000/- cash, gold ring and one small box of silver had been recovered from Shivam, but did not remember the denomination of currency notes. Articles, pertaining to three occurrence of theft, have been recovered from Shivam. Rupees 5000/-, in cash, from Kalyan's house, ring from Neeraj Nayak's house and small box of silver from Sanjay Tiwari had been stolen. He had given the statement on the basis of recovery memo. Meaning thereby, though accused Shivam and Bunty @ Vinod Rajak were arrested and recovery was made,

but there was no public witness of arrest and the recovery, so made, which makes testimony of this witness unreliable, having full of variance, with material contradiction and is shaky as such does not support case set up by the prosecution. Moreover, Shivam and Banty @ Vinod Rajak, are not appellants in this Appeal and as such their statement, given to the Police, will have no bearing on the case of the appellants.

16. After careful scrutiny of testimonies of the witnesses produced by the prosecution, it is clear that testimonies of witnesses, produced by the prosecution, is with full of variance with material contradictions. Moreso, even single iota regarding offence, punishable under Section 380 IPC or 457 IPC is there, on record, against present convict appellants, except their alleged confessions, in the absence of any independent public witness or any corroborative evidence, that too, when they were apprehended by the Police, which was not admissible in evidence. If entire prosecution case is admitted for the sake of argument, it may be said that those accused persons were apprehended with possession of those recovered articles, but there is neither any specific mark of identification nor there is any corresponding evidence for connecting with above offence of theft was there on record, which was not there and as such in absence of any such evidence, prosecution miserably failed to prove its case.

Meaning thereby, neither identity of recovered article was established nor produced before the court nor alleged recovered article was connected with above occurrence of theft nor it was put under identification proceeding nor there was any independent public witness or any corroborative evidence. Hence, the very essential requirement of theft, taking of articles in above theft, with dishonest intention, and possession of the same could not be proved by the prosecution beyond doubt. But, learned Trial Judge has passed the judgment of conviction and sentence, as above, literally, when no cogent evidence was there.

17. Section 457 of Indian Penal Code (IPC) provides that "whoever commits lurking house-trespass by night, or house breaking by night, in order to committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine, and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years'.

18. In present case, learned Trial Judge has convicted appellants for this offence with sentence, whereas no evidence of lurking house-trespass by night or house breaking by night is there. Theft stands defined in Section 378 IPC. To complete offence, under Section 457 IPC, the ingredient is that burglar, or house breaker by night, should have an intention to commit theft. Theft or an intention to commit theft does actually carry out his intention to commit theft. Theft or an intention to commit theft is in no way a necessary essential ingredient in either of the offences. It frequently happens that lurking house-trespass or house-breaking by night is followed by theft, but the offence can be committed without theft or any intention to commit it. For conviction, under Section 457 IPC, the accused must be proved to have committed lurking house-trespass or house breaking. A charge, under Section 457 IPC must be substantiated by evidence and cannot be assumed from nothing. If a person is charged of house breaking and theft and the commission of theft is established, it would not follow that commission of other offence of house-breaking has also been

established. When evidence does not justify a finding that the accused, who entered inside the house, had same intention to commit an offence, it is not trespass. So, then Section 457 IPC goes out of the way.

19. Allahabad High Court in 41 Cr.L.J, 623 (Allahabad), Chhadami v. Emperor, has propounded that in order to constitute lurking house-trespass, the offender must take some active means to conceal his presence. Regarding presumption under illustration (a) to Section 114, Evidence Act, may also attract a graver offence, like one, under 457 IPC, where the accused is found in possession of articles stolen and obtained by house-breaking, it cannot be inferred that he has committed an offence of house-breaking and theft. Presumption, under Section 114, Evidence Act, can be drawn only when the accused, when asked, is unable to explain his possession.

20. In present case, no evidence of house breaking by night or lurking house-trespass by appellants was there, except alleged recovery of cash and ornament, but the same was not established by specific mark of identification or by denomination of currency notes recovered, which were alleged to have been stolen from the house of the informant to co-relate with the property alleged to have been stolen from above breaking locks of house or recovery of cash from convict-appellants.

21. Section 411 IPC provides that whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

22. Apex Court in AIR 1954 SC 39, Trimbak vs. State of Madhya Pradesh, has propounded ingredients of offence, under Section 411 IPC, i.e., ingredients, which prosecution has to establish: (1) that the stolen property was in possession of the accused, (2) that some person other than accused had possession of the property before the accused got possession of it and (3) that the accused had knowledge that the property was stolen property.

23. In present case, neither property was duly identified by any specific mark of identification nor it was established before Trial court by way of producing the same nor its identity was established in identification parade nor the same was recovered in presence of informant, who had disputed alleged preparation of recovery memo.

24. Under Section 380 IPC, essential ingredient for offence, punishable under Section 380 IPC, is that accused committed theft, i.e., theft was committed in any building, tent or vessel and that such building, tent or vessel was used as human dwelling or was used for custody of the property. Hence, prosecution has to prove points required for proving of an offence, under Section 379 IPC plus that the moveable property was taken away or moved out of a building, tent or vessel and that such building, tent or vessel was being used for human dwelling or custody of moveable property. Intention to take this dishonestly must be proved.

25. In present case, offence of theft was got registered by informant against unknown thieves. Subsequently, alleged recovery of alleged stolen cash money and ornaments was said to have been

made from convict-appellants. Offence of theft or taking of articles from building, by convict appellants, was not proved by any witness and on the basis of possession and presumption, under Section 114, Evidence Act, offence under Section 380 IPC was deemed to be proved whereas identification of alleged recovered cash, with no specific mark of identification, was neither established, by way of identification parade, or by way of proving it before Trial court.

26. Hence, learned Trial court failed to appreciate facts and law placed before it and thereby passed judgment of conviction and sentences therein, against evidence on record.

27. In view of what has been discussed above, this Criminal Appeal deserves to be allowed.

28. Accordingly, this Criminal Appeal succeeds and is allowed. The impugned judgment and order of conviction dated 30.07.2018, passed by the Trial Court, is hereby set aside and the appellants are acquitted of all the charges. The appellants are in jail. They shall be released forthwith, if not wanted in any other case.

29. Keeping in view the provisions of section 437-A Cr.P.C. appellants are directed to forthwith furnish a personal bond and two reliable sureties, each, in the like amount, to the satisfaction of Trial court before it, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the appellants, on receipt of notice thereof, shall appear before the Hon'ble Supreme Court.

30. Let a copy of this judgment along with lower court's record be sent back to the court concerned for immediate compliance.

01.10.2019 bgs/-