IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/CRIMINAL APPEAL NO. 779 of 2011
With
R/CRIMINAL APPEAL NO. 63 of 2011
With
R/CRIMINAL APPEAL NO. 91 of 2011
With
R/CRIMINAL APPEAL NO. 92 of 2011

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE ILESH J. VORA
and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT

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Approved for Reporting	Yes	No

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STATE OF GUJARAT
Versus
VISHNUBHAI @ GABBAR PRAHLADBHAI DANTANI & ORS.

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Appearance:
MS CM SHAH, APP for the Appellant(s) No. 1
MR PS CHAMPANERI(214) for the Opponent(s)/Respondent(s) No. 1
MR RJ GOSWAMI(1102) for the Opponent(s)/Respondent(s) No. 2
MR. YOGENDRA THAKORE(3975) for the Opponent(s)/Respondent(s) No. 3
RULE SERVED for the Opponent(s)/Respondent(s) No. 3

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CORAM:**HONOURABLE MR. JUSTICE ILESH J. VORA**
and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 09/05/2025

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE ILESH J. VORA)

1. Since, the facts of the case and issue involved in captioned appeals are identical and arise out of the same judgment, the appeals are taken up together and are being disposed of by this common judgment.

2. This common judgment shall decide four criminal appeals bearing Criminal Appeal Nos.92, 63, 91 and 779 of 2011, preferred by the appellants as well as State.

3. The aforesaid criminal appeals preferred by the original accused nos.1, 2 and 3 viz. Vishnu Dantani, Sunil Vaghari, and Amirmiya Shaikh, against the judgment of conviction and order of sentence dated 31.12.2010 passed by the Sessions Judge, Gandhinagar in Sessions Case No.48 of 2010 by which the appellants have been convicted under Sections Sections 457, 380, and Section 413 read with Section 114 of the Indian Penal Code and sentenced to undergo imprisonment as tabulated hereinunder:

Accused	**Conviction under Section**	**Punishment**	**Fine**	**In default of fine**
Vishnubhai @Gabbar Prahladbhai Dantani (A-1)	Section 457 of IPC read with 114 of IPC	Rigorous imprisonment for 2 years	Rs.1,000/-	Simple imprisonment for 2 months
Vishnubhai @Gabbar Prahladbhai Dantani (A-1)	Section 380 of IPC read with 114 of IPC	Rigorous imprisonment for 3 years	Rs.2,000/-	Simple imprisonment for 3 months
Sunil @Tino Popatbhai	Section 457 of IPC read	Rigorous imprisonme	Rs.1,000/-	Simple imprison

Knatilal Vaghri (A-2)	with 114 of IPC	nt for 2 years		ment for 2 months
Sunil @Tino Popatbhai Knatilal Vaghri (A-2)	Section 380 of IPC read with 114 of IPC	Rigorous imprisonment for 3 years	Rs.2,000/-	Simple imprisonment for 3 months
Amirmiya Kodarbhai Sekh(A-3)	Section 413 of IPC read with 114 of IPC	Rigorous imprisonment for 3 years	Rs.2,000/-	Simple imprisonment for 3 months

4. The State has preferred the appeal being Criminal Appeal No.779 of 2011, under Section 377 of the Cr.P.C. for inadequacy of the sentence.

5. The facts leading to filing of the aforesaid appeals are as follows:

5.1 The accused were charged of theft allegedly committed in the Jain temple, said to have taken place in the night of 23.12.2009 and FIR by the administrator of the Jain temple came to be filed on the same day i.e. on 23.12.2009 with Mansa Town Police Station. The temple is situated near Swaminarayan Temple at Mansa.

It is the case of the prosecution that in order to commit the offence of theft, the accused nos.1 and 2 by night hours on 23.12.2009, entered into temple by breaking the necessary

doors etc., stolen gold and silver ornaments and cash amount worth Rs.3,98,000/-, and thereafter, the accused sold stolen ornaments to accused No. 3 Amirmiya Shaikh, a goldsmith, doing his business at Vijapur and after receiving the stolen ornaments, he melted it and retained in the form of ignot.

5.2 The offence being I-C.R.No.150 of 2009 came to be registered with Mansa Police Station, for the offences punishable under Sections 380, 457 and 114 of the IPC against the unknown thieves.

5.3 The Investigating Officer PW:16 PSI, Faridmiya Malek was entrusted the investigation of the case. He took visit the temple and in the presence of independent panchas, drew the panchnama of place of occurrence on same day i.e. on 23.12.2009.

5.4 It is further case of the prosecution that the appellant accused were in the custody of Visnagar for other offences of theft and receiving stolen property. The LCB, Mehsana, came to know that the appellants accused had committed theft in the present case. The appellants were interrogated by the LCB, Mehsana, PW-17 Mr. Solanki, PSI. During the interrogation, the appellants accused confessed their guilt. The LCB, Mehsana, intimated to the Mansa Police Station about the involvement of the accused. The Mansa Police obtained the transfer warrant and arrested the appellants in

the present case of theft. During the investigation, the PI – PW-16, recorded the statement of witnesses, based on voluntary disclosure of the accused, prepared a panchnama in terms of Section 27 as accused pointed out the place of offence and shop of accused no. 3. The IO, thereafter recovered and seized the melted stolen ornaments alleged to have been presented by the son of accused no. 3 PW-18, and after obtaining the purety certificate of the same, filed a chargesheet against the accused for the offences punishable under Section 457, 480 and 114 of the IPC.

6. After due framing of the charge and upon accused pleaded not guilty, the trial commenced before the Sessions Court, Gandhinagar. In order to prove the charges, the prosecution examined in all 19 witnesses and exhibited 8 documents:

Oral evidence

PW 1 – Exh.14	Girdharbhai Vithalbhai Patel, Complainant
PW 2 – Exh.16	Somabhai Channabhai Nai, panch witness
PW 3 – Exh.18	Manishbhai Chabbi Das Shah, panch witness
PW 4 – Exh.20	Babubhai Motibhai Senma, panch witness
PW 5 – Exh.21	Hitendrasinh Dasrathsinh Vihol, panch witness
PW 6 – Exh.23	Jaguji Pratapji Vihol, panch witness
PW 7 – Exh.25	Yakubmiya Husenmiya Sekh, panch witness
PW 8 – Exh.31	Usmangani Makbulhusen Rangrej, panch witness
PW 9 – Exh.32	Anand Alumlek Perumal, panch witness

PW 10 – Exh.33	Vipulsinh Navtarsinh Thakor, panch witness
PW 11 – Exh.35	Pravinji Javanji Thakor, panch witness
PW 12 – Exh.37	Ranjitbhai Ganpatbhai
PW 13 – Exh.38	Sanjay Uttam Yadav
PW 14 – Exh.40	Jayeshbhai Natvarlal Soni
PW 15 – Exh.42	Dilipbhai Bhogilal Shah
PW 16 – Exh.49	Faridmiya Sarfumiya Malek, Investigating Officer
PW 17 – Exh.50	Tejamalsinh Jemalji Solanki, Sub Inspector
PW 18 – Exh.51	Faridmiya Amirmiya Sekh
PW 19 – Exh.55	Vinodkumar Netaram Yadav, Police Inspector

Documentary evidence

Exh.15	FIR Complaint
Exh.17	Panchnama of physical examination of body of accused
Exh.19	Discovery panchnama as per Section 27 of Evidence Act
Exh.22	Panchnama of physical examination of body of accused
Exh.24	Panchnama of Scene of Offence
Exh.30	Panchnama regarding recovering the material
Exh.34	Discovery panchnama as per Section 27 of Evidence Act
Exh.39	Certificate Issued by Harekrishna Jewelers

7. After closure of the prosecution evidence, the appellants were questioned under Section 313 of the Cr.P.C. to which, they stated that they have been falsely implicated by the police in the undetected offence and as such, they have not committed any offence of theft. So far as accused

no.3 is concerned, he stated that his son Faridmiya was pressured to produce the ignot and accordingly, by selling the house, he produced the ignot at the behest of the police.

8. Though opportunity was extended, no evidence was tendered from the side of the appellants accused.

9. After hearing the parties and upon appreciation of the evidence, the Trial Judge convicted the accused nos.1 and 2, for the offences punishable under Sections 457, 480, and Section 413 read with Section 114 of the IPC, whereas accused no.3 was convicted under Section 413 of the IPC and sentenced the accused accordingly, as mentioned in Para-2 of this judgment.

10. Challenging the said conviction and sentence, the appellants have filed the criminal appeal, whereas the State has filed enhancement appeal against the quantum of sentence.

11. We have heard learned counsel Mr.P.S. Champaneri, Mr.Yogendra Thakore, Mr.R.J. Goswami, and Ms.C.M. Shah, learned APP for the respective parties.

12. Learned counsels appearing for the accused made the following submissions:

(A) That the judgment of conviction is unjust, improper and

is not sustainable in eye of law; that there is no evidence either direct or circumstantial to prove the charge against the accused and therefore, the prosecution miserably failed to prove the charges against the accused beyond reasonable doubt.

(B) That it is the case of the prosecution that, the accused by trespassing and breaking the doors of the temple, stolen valuable ornaments and thereafter sold it to accused no. 3, who had converted it into ignot by melting the stolen ornaments. That there is no evidence to show that the accused had committed the offence of theft. That the accused were in the custody of IO, as they had been apprehended in the another offence of theft; thus, based on the confession of the guilt of the accused, they had been again arrested in the present case of theft and except the admission of the accused, no any evidence found during the course of investigation to connect them in the alleged offence; the discovery of place shown by the accused cannot be used against him, because, after the registration of the offence the facts of place of occurrence has already been disclosed and put on paper by way of panchnama; the panchas have declared hostile and did not have supported the case of the prosecution; so far as, purchasing of stolen ornaments by accused no. 3 is concerned, the said fact has not been proved by the prosecution; the accused no.3 and his son accused no. 4, who later on acquitted by the court below, were in custody of Mansa Police; the son of accused

no. 3 Faridmiya was not doing the business with the accused no. 3, as at relevant time he was employed as Security Supervisor at private company at Sanand and under the pressure of the police, he managed to produce the ignot as per the weight of the stolen ornaments; thus, there was no evidence found that the stolen ornaments were purchased by accused no. 3.

13. In such circumstances, learned counsels appearing for the appellants would urge that the prosecution failed to discharge their burden to prove the charges against the accused beyond reasonable doubt and there can be no conviction on the basis of surmises, conjectures and suspicion, howsoever grave it may be and therefore, they prayed that the order of conviction and sentence be set aside and appellants may be acquitted of the charges leveled against them.

14. On the other hand, opposing the contentions, learned APP Ms. C. M. Shah submitted that the accused, during the course of investigation, voluntarily made a statement that they intend to show the place of the offence and thereafter, they also made a statement that they intend to show the shop of goldsmith, owned by accused nos.3 and 4 and the I.O. in his testimony, narrated the contents of the panchnama and merely panchas have not supported the case of the prosecution would not be a ground to discard the evidence of the I.O. on the aspect of panchnama, as referred

above. Thus, she submitted that I.O. seized the melted stolen property and the son of accused no.3 PW:18 Faridmiya produced the ignots and the said ignot would exactly tally with the weighed of the stolen ornaments for which, there is no explanation on the part of the accused. The allegation on the police of adopting pressure tactics would substantiate from the explanation of the witness. It is difficult to digest within day one from the arrest, the witness PW:18 sold his house and produced the ignots to the police. Thus, the accused no.3 found in the possession of the stolen property soon after the incident of theft. In such circumstances, the learned APP submitted that the accused having a past antecedent of like nature and they are involved in the so-many cases of theft and receiving stolen properties and therefore, the Court below has not committed any error either on facts or on law in holding the accused appellants guilty of the offence and therefore, she prayed that there being no merits in the appeals filed by the accused and the same may be dismissed and having regard to the nature of offence, and its impact on the society, the appeal for enhancement of sentence may be allowed as the Court below despite of the evidence that the accused are habitual offender awarded a lesser sentence.

15. Before dealing with the rival contentions of the parties, it would be useful to analyses the evidence of some of the relevant witnesses:

(1) Girdhar Vitthal Patel (PW:1) being a Manager of temple and complainant, has stated that on 23.12.2009, in night hours, someone had illegally entered into the temple and in order to commit the theft of ornaments by housebreaking, they stolen the ornaments worth Rs.3,98,000/-. The witness has no personal knowledge about the incident nor he could identify the seized melted ornaments.

(2) PW:2 and PW:9 – Somabhai Nai and Anand Perumal were witness of arrest panchnama Exh.17 allegedly drawn by the police. The witnesses have not supported the case of the prosecution.

(3) PW:3 Manish Shah and PW:4 Babubhai Motibhai being a witness of disclosure panchnama allegedly drawn by the I.O. have not fully supported the case of the prosecution. The place where they committed the theft. Both the witnesses failed to depose the exact words of the panchnama at Exh.19 that the accused on their own volition made a statement that they would like to point out the place where they committed the theft of ornaments.

(3) PW:5 Hitendrasinh Vihol and PW:6 Jassuji Vihol have been examined to prove the arrest of the original accused nos.3 and 4 against whom, the charge was to the effect that they found in the possession of melted stolen ornaments. However, records show that the witnesses have not support the case of the prosecution.

(4) PW:7 Yakibmiya Shaik and PW:8 Usmanghani Rangrej have been examined to prove the seizure of ignots allegedly produced by the PW:18 Faridmiya Shaikh. However, they have not supported the case of the prosecution and they could not identify the melted ornaments.

(5) PW:10 Vipulsinh Natvarsinh and PW:11 Pravinsinh Javansinh have been examined to prove the factum of panchnama at Exh.34 which is pointing out panchnama of the shop of the goldsmith allegedly shown by the accused. The witnesses declared hostile as they did not support the case of the prosecution.

(6) PW:12 Ranjit Ganpatbhai being a Priest of the temple was examined but facts remain that he has no personal knowledge about the alleged offence.

(7) PW:15 Dilip Shah, a Trustee of the temple was examined to prove the particulars of the ornaments for which he has produced the statement of the ornaments allegedly submitted to the office of the Charity Commissioner.

(8) PW:18 Faridmiya Shaikh was examined to prove the seizure of melted ornaments allegedly retained by the accused no.3 in his shop at Vijapur. The witness – son of accused no.3 against whom the charge of receiving stolen

property being proved by the Court below. The witness PW:18 has not supported the case of the prosecution. The witness in his testimony has stated that he had been called by Mansa police and when he went to the police station, he had been threatened that if he would not produce the ornaments, then he will be framed in the offence like his brother and father. The witness has stated that at the relevant time, he was working with a private company at Sanand and due to threaten administered by the police, he managed the ignot as directed by the police and produced the same by selling his house.

(9) PW:17 Tejmalsinh Solanki was examined to prove the involvement of the accused nos.1 and 2. The witness has stated that on 16.03.2010, when he was on duty as PSI, Local Crime Branch, Mehsana, he had called the accused nos.1 and 2 as suspect and he has a reason to believe that they might have committed the theft of ornaments. The witness has stated that upon interrogation of the accused, they confessed about the alleged theft of ornaments. The witnesses has stated that accused at the relevant time, was under custody of Vishnagar Court and after informing Mansa Police, they had been arrested on the basis of transfer warrant. In the cross examination, the witness has admitted that at the time of interrogation, the accused were not arrested by LCB police.

(10) PW:16 Investigating Officer Faridmiya Malek has been

examined by the prosecution. The witness in his testimony stated that on 23.12.2009, he was entrusted the investigation of the case, and immediately, he took visit the place of occurrence and drew the panchnama of the place in the presence of two independent witnesses. The witness has further stated that the offence was undetected and thereafter, on 23.03.2010, by way of transfer warrant, he arrested the accused Vishnu and Sunil. The witness has further stated that during the course of investigation, the accused showed the place of offence, and the same being narrated in the panchnama Exh.19. The witness has further stated that it revealed that the stolen ornaments were being sold to the accused no.3 by accused nos.1 and 2 and the accused who had sold the ornaments showed shop of the accused no.3 and the same was narrated in the panchnamas Exh.34. The witness has further stated that the son of accused no.3 PW:18 had produced the melted ornaments and the same had been seized vide panchnama at Exh.30. The witness has further stated that he has recorded the statement of witnesses, obtained purity certificate of the ignot and then, handover the investigation to PW:19 V.N. Yadav. Mr.V.N.Yadav, except filing the chargesheet, did nothing towards the investigation. In the cross examination, both the Investigating Officers could not answer about how the accused arrested and what is the evidence on record against them.

16. We have heard learned advocates for the respective

parties, perused the records and proceedings and findings of conviction.

17. Having regard to the facts and circumstances of present case, the issue arise for our consideration as to whether the Court below was right in convicting the appellants – original accused nos.1 and 2 for the offences punishable under Sections 380, 457 read with Section 114 of the IPC and accused no.3 for the offences punishable under Section 413 of the IPC ?

18. As per the prosecution case, the accused nos.1 and 2 i.e. Vishnu Vaghari and Sunil Vaghari, on 18.11.2009, in night hours, after breaking the temple, committed a theft of golden and silver ornaments situated in the area of Village Mansa and then, sold the stolen ornaments to accused no. 3 Amirmiya, who had retained the ornaments after melting the same in the form of ignot. On the other hand, it was the defence of the accused that they have been implicated on the basis of suspicion and as such there is no iota of evidence to prove that the accused had committed the theft and sold the ornaments to accused no. 3 and accused no. 3 was found in the possession of stolen ornaments.

19. In order to appreciate the evidence as well as rival contentions, it is necessary to refer the statutory provisions of theft, and theft in dwelling house and house trespass by night in order to commit offence of theft.

20. Section 378 defines the term ‘theft’ which says that whoever intending to take dishonestly any movable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft. Section 379 provides the punishment for theft. Section 380 pertains to the theft in a dwelling house which says that whoever commit thefts in any building which building is used as a human dwelling or used for the custody of the property shall be punished. Thus, to sustain conviction under Section 380 the prosecution is to prove that the accused committed a theft; that such theft was committed in any building, etc.; and that such building, etc. was used as a human dwelling. Section 457 pertains to lurking house trespass by night or housebreaking by night in order to committing any offence. The other relevant penal provision required to be referred is dishonestly receiving stolen property, knowing or having reason to believe that the same to be stolen property and if the person is habitual then Section 413 would be applicable because the punishment is life imprisonment.

21. In the case on hand, after careful examination of the evidence oral as well as documentary, It is not in dispute that at the time of commission of the offence, i.e. on 23.12.2009, the incident of theft alleged to have been taken place in the jain temple of Village Mansa and silver and gold ornaments worth Rs.3,98,000/- were being stolen by thieves.

At the time of offence, the CCTV camera had not been installed by the temple. In the FIR, the allegations of theft being made against the unknown theft. The appellants accused admittedly were in judicial custody of Visnagar Court for the offence of theft. In the month of March i.e. on 31.03.2010, the accused by way of transfer warrant arrested by Mansa Police. The accused had confessed their guilt before PW-17, when they had been called for interrogation by the witness. In such circumstances, we are of the considered opinion that, how PW-17 got information and on what basis by suspicion he had called the accused, that is no where explained by the prosecution, nor any evidence to that effect being adduced. The LCB PI, PW-17, did not have register any offence and sent the accused in a judicial custody at Visnagar. The offence was undetected and the police was clue less for about 3 months, who had committed the theft. Therefore, there was no any evidence or justification to arrest the accused on the basis of suspicion merely based upon their guilt alleged to have been confessed before PW-17.

It is settled position of law that, a confession made to a police office is prohibited and cannot be admitted in the evidence (Section 25 of the Evidence Act). Section 26 provides that no confession made by any person whilst he is in police custody of a police office shall be proved against such person unless it is made in the immediate presence of the Magistrate. Therefore, confession of guilt cannot be read against the accused, because at relevant time, they were

under the custody of the police. The prosecution mainly relied on the circumstance that after the arrest, the accused had pointed out the place of offence and thereafter, show the shop of accused no. 3, which is suggestive of the fact that the accused was knowing about the theft. In our opinion, the said incriminating circumstance cannot be used as proved against the accused. The panchas of both the panchnama, either turned hostile or have not stated the exact words spoken by the accused and contents of the panchnama. The Investigating officer in his testimony also fails to prove the factum of panchnama. In such circumstances, when the place of offence, already been discovered, the subsequent showing the place by the accused, cannot be said to be a discovery of facts of place of offence. In such circumstances, the incriminating circumstances of pointing out the place of the offence and shop of the goldsmith – accused no. 3 cannot be read as evidence against the accused. So far as charge of receiving and possessing stolen property by accused no.3 is concerned, the prosecution mainly relied on the testimony of PW-18 Faridbhai, who is son of accused no. 3. The fact remains that, at relevant time, he was not in charge of the shop and on the contrary, he was serving as a securi man with private company and further, he has categorically stated that under the pressure, he purchased the gold from the market and produce in the form of ignot to the police authority, as he was threatened by the police that, if he would not produce, then, they will frame in the offence. If

had it been the case that the witness being an administrator of the shop and in presence of accused and at their instance, the melted ornaments were being produced, then, case would be appreciated on a different footing. Therefore, the recovery of melted ornaments becomes doubtful and prosecution failed to prove that the melted ornaments in the form of ignot were the stolen ornaments purchased by the accused no.3 goldsmith. In such circumstances, we are not agree with the contention raised by learned APP that in absence of any explanation by accused no. 3 about the seizure of ignot from his son, the accused presumed to be thieves in view of Section 114A of the Evidence Act, because, when the recovery is not proved, the question does not arise for application of presumption clause.

22. For the reasons aforementioned, the prosecution miserably failed to prove by adducing cogent, acceptable and reliable evidence that, accused nos.1 and 2, on 18.11.2009, at night hours, after breaking the temple, committed a theft of gold and silver ornaments and same were received or retained by the accused no. 3 knowing it to be a property acquired by the theft.

23. For the reasons aforementioned, the Court below was not right in convicting the accused for the offences, as referred above, as it is the fundamental principles of criminal jurisprudence is that the burden of proof squarely rests on the prosecution and there can be no conviction on the basis

of surmises and conjectures or suspicion howsoever grave it may be. The onus of the prosecution cannot be discharged by referring to very strong suspicion and existence of highly suspicion factors to inculpate the accused. It is no doubt true that the accused have in their credit so many cases of like nature but such past records cannot be by itself overweight as far as legal proof is concerned. **(Digambar Vaishnav Vs. State of Chhatisgarh, 2019 (4) SCC 522)**. Thus, in the facts of the present case, after reanalysis of the evidence, the prosecution failed to prove the charges beyond reasonable doubt against the appellants accused. The judgment of conviction and order of sentence passed against the appellants accused is not sustainable in law and accordingly, deserves to be set aside and are hereby set aside.

24. In the result, the appeals i.e. Criminal Appeal Nos. 90, 88, 62 of 2011 stand **allowed**. The judgment of conviction and order of sentence dated 31.12.2010 passed in Sessions Case No.47 of 2010 is hereby set aside. The appellants accused stand acquitted of the offence under Sections 380, 457, 413, read with Section 114 of the IPC. The accused are on bail. Their bail bond is cancelled and surety is discharged. Fine amount deposited if any, be refunded to them. R and P be sent back to the Trial Court concerned forthwith.

25. In view of the setting aside the conviction and sentence, the enhancement State Appeal i.e. Criminal

Appeal No.781 of 2011 does not survive and accordingly, stands **disposed of**.

(ILESH J. VORA,J)

(SANDEEP N. BHATT,J)

Rakesh

Original copy of this order has been signed by the Hon'ble Judges.
Digitally signed by: RAKESH MAHESHKUMAR KOSHTI(HC00950), Principal Pvt. Secretary, at High Court of Gujarat on 09/05/2025 16:11:43