

Thambi Nasir and Etc. Etc. Vs. State

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Court : Mumbai

Decided On : Sep-28-2001

Reported in : 2003CriLJ493

Judge : P.V. Hardas, J.

Acts : [Evidence Act, 1872](#) - Sections 9; [Indian Penal Code \(IPC\), 1860](#) - Sections 376 and 395

Appeal No. : Cri. A. Nos. 21, 31, 32, 34 and 38 of 2000

Appellant : Thambi Nasir and Etc. Etc.

Respondent : State

Advocate for Def. : A.P. Lawande, Public Prosecutor

Advocate for Pet/Ap. : G. Kanekar, ;Tema Dhime, ;Ratna Parbhu and ;A.A. Agni, Advs. (in Cri. A. Nos. 31, 32, 34 and 38/2000)

Disposition : Appeal dismissed

Judgement :

P.V. Hardas, J.

1. Appellant-Thambi Nasir in Criminal Appeal No. 21 of 2000 (original accused No. 1), appellant-Mehboob Nadaf in Criminal Appeal No. 31 of 2000 (original accused

No. 3), appellant-Babu Shaikh in Criminal Appeal No. 32 of 2000 (original accused No. 4), appellant-Rajesh son of Pandurang Chodankar in Criminal Appeal No. 34 of 2000 (original accused No. 5) and appellant-Pallani son of Kamyaswami in Criminal Appeal No. 38 of 2000 (original accused No. 2) stand convicted by the Sessions Judge, North Goa, Panaji, in Sessions Case No. 4 of 1997 by judgment dated 7th January, 2000, for offences punishable under Sections 395 and 376 of the Indian Penal Code and each of them was sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs. 2,000/-, in default to undergo simple imprisonment for 3 months and rigorous imprisonment for 10 years and to pay fine of Rs. 5,000/-, in default to undergo simple imprisonment for 6 months respectively. The appellants in these appeals have assailed their conviction. All the appeals are being decided by this common judgment.

2. Three Swedish Nationals, holidaying in Goa and looking forward to mirth, merriment and frolic, had their sojourn in Goa cut short by a very traumatic incident which occurred on 6th March, 1997 at Gumalwado, Vagator, Anjuna, within the jurisdiction of Calangute Police Station.

3. The three Swedish Nationals, namely, P.W. 1 Christian Loets, P.W. 13 Linda Margurithe Hammarback and P.W. 14 Jennie Maria Hammarback, while returning to their respective places of residences at Vagator, were waylaid, as per the allegations of the prosecution, relieved of their belongings and P.W. 13 and 14 were then raped by the present appellants and the absconding accused.

4. After investigation the police had filed a charge-sheet against the appellants. The learned trial Judge had framed a charge against the appellants for offences punishable under Sections 395 and 376 of the Indian Penal Code. The appellants denied the charge and claimed to be tried. The defence of appellant-Thambi Nasir is that on the night the said offence is alleged to have been committed, he was in Tamil Nadu. The appellant-Babu Shaikh had taken a defence that he was in Hyderabad. The other accused have taken a defence of denial. The prosecution had examined 33 witnesses. P.W-2 to P.W-12 are the panch witnesses in respect of the various seizures and discoveries from the accused. P.W. 22 Dr. E.J. Rodrigues, P.W-24 Dr. M. B. Malliya, P.W. 25 Dr. Indrani Pal and P.W. 26 Dr. J. D.

Lawande are the Medical Officers who had examined P.W. 13 Linda and P.W. 14 Jennie and who had drawn the blood samples of the accused as well as of Linda and Jennie. P.W. 28 Devendra Singh Lamba and P.W. 30 Anil Bisht are the two witnesses from whom the belongings of the complainant, which had been deposited with them by the accused, were recovered. P.W. 21 Dattatraya Raikar and P.W. 29 Krishnanath Rivonkar are the Jewellers from whom certain ornaments are recovered. P.W. 16 Dhansingh Bahadur is a security guard, who was on duty in the vicinity where the offence was committed. P.W. 18 Hajrat Ali and P.W. 20 Sukhanand Naik are the owners of a motorcycle and taxi respectively. P.W. 23 Gabriele Stadt Muller is a victim who is alleged to have been robbed by the appellants on the morning of 7th March, 1997. P.W. 32 Sandesh T. Chodankar and P.W. 33 Umesh Gaonkar are the Police Officers who had investigated the offence. P.W. 19 Karan Singh Pooniah is the Magistrate, who had held the identification parade. The prosecution case is unfolded through the evidence of P.W. 1 Christian, P.W. 13 Linda and P.W. 14 Jennie.

5. P.W. 1 Christian states that he had come to India on 17th February, 1997 and came to Goa on 27th February, 1997. According to him, P.W. 13 Linda came to Goa on 27th February, 1997 from Sweden. P.W. 14 Jennie had come four days thereafter from Bangkok. According to him, Linda was staying in silent resort at Calangute whereas Jennie was staying in a house at Vagator and P.W. 1 Christian had engaged a room at Anjuna. According to P.W. 1 Christian, on 6th March, 1997 Jennie had met him at his house at vagator and then they had gone to Mapusa for purchasing some things on Jennie's scooter. At about 8.00 p.m. P.W. 1 Christian, P.W. 13 Linda, P.W. 14 Jennie and 5 other friends of theirs had gone to a Tibetan restaurant at Anjuna for dinner. After dinner P.W. 1 Christian was going to his room at Vagator on Jennie's scooter while Linda and Jennie had gone to restaurant Prim-rose for purchasing sweets. P.W. 1 Christian states that after he had travelled a distance of about 200 metres and was half way to his room, he was stopped by the accused by brandishing sticks and knives. He states that as the road was rough, he had to go slow. He further states that the accused took him and the scooter towards some bushes at a distance of 50 metres from the place where he was stopped. The accused had made him to sit down and they had searched his person for valuable things. According to him, he was relieved of

valuable things which included portable CD player with headphone and adapter, one CD disc, 24 CDs in one box, scuba diving glasses, silver ring, wristwatch of Russian make, shoes of Nike make, alarm clock, one belt with a big metallic buckle, one speaker of Elta make, Kodak cameras, a long belt for strapping the luggage on the motorcycle, Panasonic electric shaver, 750 U.S. Dollars, travellers cheques of 600 U.S. Dollars, Rs. 8,000/- in currency notes, sunglasses, documents of ownership of a motorcycle. The valuable of which he was relieved of also included a manual for CD player in English and German. Accused No. 4, that is, appellant-Babu Shaikh had removed P.W. 1 Christian's shoes, which were of Nike make, and had given his own shoes to P.W. 1 Christian for wearing. Significantly the catalogue/ manual of the CD player bore the passport number and signature of P.W. 1 Christian at page 13. All these articles were identified by P.W. 1 Christian during his evidence.

6. P.W. 1 Christian further states that after the accused had relieved him of his belongings, they were about to allow him to leave when at that time P.W. 13 Linda and P.W. 14 Jennie were seen coming on Linda's scooter. One accused remained with P.W. 1 Christian while the other accused also waylaid the girls and brought them to the place where P.W. 1 Christian was made to sit. On seeing P.W. 13 Linda and P.W. 14 Jennie, P.W. 1 Christian told them loudly to be calm as the accused only wanted money and they had already taken money from him. P.W. 13 Linda and P.W. 14 Jennie handed over whatever little they had to the accused. P.W. 13 Linda then told P.W. 1 Christian that the accused were making indecent advances towards her as they were petting her. P.W. 1 Christian further states that two accused armed with stick and knife were standing near P.W. 1 Christian and, therefore, he could not do anything to help the ladies. Thereafter he saw one of the accused taking Jennie a little further in the bushes. P.W. 13 Linda was at a distance of about 2 metres in front of P.W. 1 Christian and there were 8 to 10 persons and these persons started raping Linda one after the other. P.W. 1 Christian averted his face as he did not want to witness the lurid act. The incident, according to him, lasted about an hour or so and thereafter the accused allowed him to go. P.W. 1 Christian then went on the road and waited there to see if P.Ws. 13 and 14 had also been released. He was worried and, therefore, he went to the nearest restaurant at Anjuna and informed the police. After some time the police

came in a jeep and he along with the police went to the scene of the offence and searched for the two girls and the accused, but in vain. The police then dropped him near the same restaurant from where he had telephoned and the police continued with their search. He then went and informed his friends and also went to Silent Resort and informed about the incident to the friends of P.W. 13 Linda. He further states that they sought advice from their traveller company and Linda lodged a complaint with the Calangute Police on 7th March, 1997. He further states that because of the street light and also because of the light shed by the scooter, he was able to identify the accused. He further states that though it was night his eye sight had got used to the darkness and despite the darkness he could see clearly. He advanced reasons for not lodging a report immediately as he was in shock and it was night time and also because he wanted to be sure about the procedure to be followed. He further states that ten days thereafter he was taken to the Executive Magistrate for identifying his belongings and also for identifying the accused.

7. P.W. 1 Christian was cross-examined in extenso. In the cross-examination he admits that from 7th March, 1997 till the identification parade was held, he had gone to the Calangute Police Station six to ten times. He also admitted that before the incident he had no occasion to see the accused. He admits that he did not state in his Section 164 statements that Linda and Jennie were proceeding ahead of him to their house on scooter. What he explained was that he had reached the scene of offence first and the ladies came there 20 minutes thereafter. In response to the question whether the statement under Section 164, Exhibit X-2, had been read over to him, P.W. 1 Christian had replied that the Magistrate who had recorded his statement could not understand his pronounciation of English and he had to Explain 4 to 5 times to the Magistrate. He did admit that he had stated that because it was dark on the way he was riding slowly but volunteered that another reason for riding slowly was the condition of the road which was very bad. In response to a question whether the accused who had surrounded him included the three accused he had identified, he replied that they were mixing among themselves and, therefore, he could not say. He admits that for about 20 minutes the accused were close to him. He further admits in the cross-examination that he does not remember if he had stated to the police that he told the girls to be calm

as the accused only wanted money and that they had already taken money from him. He also admits that he did not state to the police that Linda then told him that the accused were touching her all over and it appeared that they were going to rape her. He admitted in the cross-examination that the articles which he had identified as his were available in the flea market where the foreigners sold their articles. He also admitted that the road on which he was proceeding was a kutchra road and not a motorable road. P.W. 1 Christian denied the suggestion that accused No. 4 had taken his shoes and accused No. 4 had give his shoes to P.W. 1 for wearing. He also denied the suggestion that he had not been stopped by the accused and relieved of his belongings. He also denied the suggestion that he identified the articles though they did not belong to him. He admitted that the police had shown photographs of lot of people before the parade, but none of the accused.

8. P.W. 1 Christian has identified M.O. 4 as shoes given by accused No. 4 and M.O. 30 as shoes belonging to P.W. 1 Christian. He has also identified M.O. 17 Panasonic CD player, M.O. 18 Panasonic headphones, M.O. 19 adaptor, M.O. 20 Panasonic shaver. M.O. 22 compact disc stereo speaker, M.O. 23 scuba diving glasses, M.O. 24 belt with a steel buckle, M.O. 25 CD cover, M.O. 26 two catalogues/manuals, bearing the signature and passport number of P.W. 1 Christian. M.O. 29 a Russian make wristwatch, M.O. 28 white silver ring with two stones and M.O. 5 red colour alarm clock.

9. P.W. 13 Linda Hammarback states that on 6th March, 1997 at about 9.00 p.m. she along with her sister P.W. 14 Jennie and their friends which included P.W. 1 Christian had gone for dinner in a Tibetan Restaurant at Anjuna. After dinner, P.W. 1 Christian left first on Jennie's scooter and then she and Jennie went on her scooter to Primrose Restaurant for purchasing sweets. After drinking coffee and purchasing sweets, she and Jennie left the restaurant on scooter at about 11.30 p.m. for going to Jennie's house at Vagator. They were driving on a kutchra road, which goes to the house of Jennie. Since the road was rough, she had to drive the scooter very slowly. Big stones were strewn on the road and, therefore, she had to nearly stop the scooter at a place which was surrounded by bushes and trees. At that time about 10 men came from both sides of the road armed with sticks. Those

persons told them to keep quiet and stop the scooter. According to P.W. 13 Linda, those persons started searching Jennie's black bag for money and they found one hundred dollar note and Rs. 1000/- Indian currency. They also removed cigarettes, sun glasses from her bag. P.W. 13 Linda had a small bag containing about Rs. 70/-, which they had taken. Thereafter those persons told both of them to alight from the scooter and one person took the scooter and hid it in the bushes. At that time P.W. 1 Christian was brought towards them and he told them in Swedish language to be calm as those people only wanted money and he had already been robbed of his money. P.W. 13 Linda further recounts that these accused persons then pulled her hair as well as Jennie's and forced them in the bushes at knife point. P.W. 1 Christian was also forced by these persons towards the bushes. All the accused were aggressive and smelling of alcohol. Those persons had assaulted Linda and Jennie. Jennie had tried to scream once or twice but she was hit by the accused and told to keep quiet. P.W. 13 Linda further recounts that when they were taken in the bushes they were told to sit down. Jennie was at a distance of about one metre and P.W. 1 Christian was at a distance of about 2 metres. The shoes of both Jennie and Linda were removed by the accused and thereafter they started removing their jewellery, P.W. 13 Linda was relieved of her silver bracelet and silver ring with moon stone and thereafter the accused started touching her. According to P.W. 13 Linda, one of the accused had put his hand inside her panty. The accused had then asked Jennie to stand up and took her further in the bushes. P.W. 13 Linda then told P.W. 1 Christian that these accused were going to rape them.

10. P.W. 13 Linda then recounts that she was forced to lie down on the ground with one of the accused holding her by both the shoulders and other one was pointing a knife at her neck. She says that the accused removed her clothes and her underwear. She further stated that one of the accused pulled down his trousers and knelt in front of her. While P.W. 13 Linda was recounting the grisly details, the learned trial Court had noticed her demeanour that P.W. 13 had become emotional and was crying. According to her, the accused then had intercourse with her. She has identified him as accused No. 6. According to her, she was struggling all the time and trying to keep her legs crossed. After accused No. 6 had raped Linda, the accused No. 2 (appellant-Pallani Swami in Criminal

Appeal No. 38 of 2000) also committed rape on her. According to her, some of the accused were standing around her and they had a torch and they were flashing the torch on her entire body and she could see their faces in the torch light. P.W. 13 Linda further recounts that when she tried to wriggle free from their clutches, the accused who was holding a knife had put the knife in her mouth and had asked her to keep quiet. He had banged her head on the ground and had also hit her on her face three times. Thereafter, she was allowed to sit up and allowed to put on her trousers but she could not find her underwear. According to her, during this episode P.W. 1 Christian was sitting at a distance of 2 metres from her. She felt extremely embarrassed and ashamed of the incident. While she was stating so, the trial Court again noted her demeanour that she was sobbing and she was very emotional. She further states that she felt that the accused were going to kill all three of them and, therefore, she did not attempt to run away as she felt that if she had run away, they would have killed Jennie and P.W. 1 Christian.

11. P.W. 13 Linda further recounts that after some time P.W. 14 Jennie was brought there and was forced to sit down. P.W. 13 Linda then asked P.W. 14 Jennie if she was alright. The accused then told them to stand up and had allowed them to leave. By that time P.W. 1 Christian had been removed from that place. P.W. 13 Linda and P.W. 14 Jennie drove to Jennie's house, which was at a distance of about 50 to 100 metres from the scene of the offence. On reaching the house P.W. 14 Jennie called out for her friend Katja and one lap. They both had their bath, removed their clothes and put on fresh clothes. The police had come to their place about 3 to 4 a.m., but she was not sure. She had narrated the entire incident to Katja, who had told the police everything as Jennie was not in a position to speak and was still in shock. She further states that because of the assault she was having bruises all over her face, specially on her forehead, eyebrow, chin, both the shoulders, arms, inner thighs, knees and legs. They then went to the house of another friend named Per. Next day morning at about 11.00 a.m. on their way to Jennie's house they stopped near the scene of the incident to search for the shoes. She found her underwear which she had put in her bag. At about 10.00 a.m. P.W. 1 Christian had come to Per's house where he had met them and had asked Jennie if she was prepared to come to the police station but Jennie was not willing to come to the police station as she was still upset and

shocked. According to P.W. 13 Linda she along with P.W. 1 Christian went to the Anjuna outpost, from there the police took them to the Calangute Police Station where she lodged a complaint P.W. 1/A. According to her. the police had come to the hotel Silent Resort at Calangute and attached the said underwear from her. On 17th March, 1997 she and Jennie had taken part in an identification parade and in the identification parade she had identified three accused, namely, accused 1, 2 and 6 (appellant-Thambi in Criminal Appeal No. 21 of 2000, appellant-Pallani in Criminal Appeal No. 38 of 2000 and absconding accused No. 6. Before the Court she identified rest of the accused. During the trial she identified M.O. 27 silver bracelet. She also identified M.O. 33 bamboo stick which was wielded by the accused and she identified M.O. 3 as her underwear.

12. She was also cross-examined extensively. In the cross-examination she admitted that she knew P.W. 1 Christian about 3 years prior to the incident. She denied that P.W. 14 Jennie and P.W. 1 Christian were living in the same house. She was confronted with her statement at Exhibit P.W. 1/A that since 5th March, 1997 Jennie was staying in a house with P.W. 1 Christian but she clarified that to mean that though P.W. 1 Christian had slept in that house he did not move his belongings till the night of the incident. She expressed her ignorance whether vehicles were passing on the road where the incident had taken place but she was emphatic that when the incident was going on no vehicles had passed. She admitted that there are houses at a distance of 500 to one kilometre from the place of the incident excepting Jennie's house. In the cross-examination she was asked to describe the wearing apparel of the accused and she had described the wearing apparel by saying that one of them was wearing a Jean, one of them a beige colour pant, some were wearing dotted trousers. She further stated that the accused were not speaking in English but in some local language. She was confronted with the complaint in which it was stated that the accused were sneaking in Hindi and Konkani, which she clarified as local language. She further stated that during the intercourse she had not been denuded but her shirt, dress and socks were on her person. She stated that the surface on which she was made to lie down was a rough surface and with stones. She clarified that she was not a virgin at the time of the incident. She had stated that she had resisted when the two accused had raped, but the only resistance which she could offer was to

cross her legs and turn her face. She also admitted in the cross-examination that she did not raise any alarm as she dared not to do so. She also admitted in the cross-examination that she had suffered some infection in her vagina but no injuries as such and it took some days for the infection to be cured. She admitted that she did not try to notice any seminal stains either on her body or her clothes as she did not want to look at them as they were filthy but there were seminal stains on her vagina. She further admits that after reaching home she removed her clothes and kept them in a pile for the maid to wash them. She also admitted that she had suffered some injuries on the back as also on the back of the head. She also admitted that when the police had come at 4.00 a.m., her friend Katja had narrated the incident to them. The police had left the house saying that they would go and look for the culprits and did not return and, therefore, it was not possible for her to file a complaint at that time. She hastened to add that from 12th March to 17th March, 1997 she did not visit the Calangute Police at all.

13. In the cross-examination she did admit that the night of the incident was a dark night. She also admitted that she did not mention in the complaint the features, identification mark or the dress of each of the culprits as they were many. She admitted that she had identified the three accused in the parade as she had seen them at the time of the incident with her own eyes. She denied that she did not identify accused 1, 2 and 3 in the identification parade. In respect of M.O. 27 silver bracelet, she stated that she had worn it for one year and, therefore, she could identify it. She expressed her ignorance if similar types of bracelets were available in the market. She also denied the suggestion that M.O. 27 bracelet did not belong to her. An omission regarding the accused pulling her hair and Jenny's hair was proved in the cross-examination vis-a-vis her report Exhibit P.W. 1 /A. She had also stated in her complaint that she had narrated that a silver ring with moon stone had been robbed but she could not say how it was not recorded. She also admitted that she had stated before the police that one of the accused had put his hand in her panty and in the vagina. The reason given by her for not recording the said fact in her report was the police had recorded her complaint only in one and half page stating that they would make it short and she was not asked all the details as were asked to her in the Court. She ascribed similar reasons for not stating in her complaint that she was held by one of the accused by her shoulders

and another accused was pointing a knife at her neck and that the accused had removed her pant and her underwear. She admitted that she did not state in her complaint that accused No. 6 put his penis in her vagina and had intercourse with her and that he was trying to touch her breast and kiss her and that she was struggling all the time to keep her legs together and, therefore, it took long time for accused No. 6 to get into her. The reason given by her is that she was narrating the complaint to a man and it was 'hurting me to say all that'. The trial Court again observed and recorded her demeanour that tears had welled up in her, eyes. She also admitted that she did not state in her complaint that thereafter another accused pulled his pant down, lay on her, put his penis in her vagina and had intercourse. For this omission she has given the same reason. She denied the suggestion that the accused were not flashing any torch. She admitted that she did not state in her complaint that she felt that the accused would kill all three of them and that she and Jennie had taken a shower and put on fresh clothes. She admitted that she did not state about the bruises in her complaint because, according to her, her injuries were visible and she had been examined by a Medical Officer. She clarified that injuries on her face and head were caused by slaps and the injuries on her back were caused while she was lying on the ground and the injuries on her thighs were caused because her legs were forced apart and the injuries on her arms were caused because she was held down tight. She admitted that she did not receive any injuries on her buttocks or on the lower part of the legs as she had kept her knees up and she had her dress below her buttocks. She denied the suggestion that the accused had not stopped her and Jennie and had not robbed their belongings and raped them. She denied the suggestion that she was implicating the accused at the instance of the Calangute Police.

14. P.W. 14 Jennie Hammarback in her evidence states that on 6th March, 1997 she along with her sister Linda P.W. 13 and Christian P.W.I had dinner at Tibetan Restaurant at Anjuna. She further states that after dinner she along with P.W. 13 Linda went to Primrose Restaurant on a two wheeler. They left Primrose Restaurant at about 11.30 p.m. for going to her house. P.W. 13 Linda was driving the scooter and was required to drive it slowly. According to her, when they reached near a big banyan tree, they had to slow down and as they slowed down

about 9 to 10 persons, who were hiding in the bushes, came running towards them. The said persons were carrying knives and sticks in their hands and they forced them to stop. P.W. 14 Jennie further states that she was having a bag containing 100 dollars and Rs. 1,000/- in Indian currency notes and she was relieved of this money by the persons who had stopped them. The said persons then pulled them off the two wheeler and took them about 100 metres away. These persons had forced them to sit down on the ground where they robbed P.W. 13 Linda and P.W. 14 Jennie of their jewellery. According to P.W. 14 Jennie, she was then wearing three gold rings, three silver rings with amber stones, one silver ring with turquoise stone, 3 silver bracelets and a watch. P.W. 14 Jennie further states that she was relieved of her shoes in order to prevent her from running. She also states that during the entire episode those persons were very aggressive and were stinking of alcohol. P.W. 1 Christian had told them to calm down. Those persons who had obstructed them then took all three of them in the bushes and P.W. 1 Christian was sitting close to them. Torch light was flashed on the face of P.W. 14 Jennie as also on P.W. 13 Linda. According to P.W. 14 Jennie, they then dragged her by her hair at the point of a knife to a distance of about 100 meters away from P.W. 13 Linda and P.W. 1 Christian. She further states that she was pinioned to the ground by two persons sitting on her arms. According to her, when they had been dragged from the two wheeler, accused No. 5 (appellant Rajesh son of Pandurang Chodankar in Criminal Appeal No. 34 of 2000) was holding them at knife point and when she was made to lie down, it was accused No. 5 who was pointing a knife at her neck. According to her, thereafter those persons took turns at holding the knife at her neck while her trousers and underwear were removed and she was first raped by accused No. 1 (appellant Thambi Nasir in Criminal Appeal No. 21 of 2000). Because of the pain she tried to scream but the persons holding her arms had gagged her mouth. She has stated that thereafter about 7 to 8 persons one after the other had forcible intercourse with her. She has identified the accused as who had raped her to be accused Nos. 4, 5 and 6 (appellants Babu Shaikh, Rajesh and accused No. 6 Arjun Shaburao Dhakne). Thereafter she was asked to stand up and to put on her clothes and then she was asked to go. She was taken to the place where P.W. 1 Christian and P.W. 13 Linda were sitting. On her asking the key of the scooter was given to her. She

did not see P.W. 1 Christian there. While going she was told by those persons not to switch on the headlight of the scooter. From the place of the incident she went to her house, which was hardly about 100 meters away. She stated that on 7th March, 1997 she had been taken by the Calangute Police to the Hospital at Bambolim, where she was examined by a doctor. She has stated that in the identification parade she had identified accused Nos. 1, 4 and 6 and had also identified one of her rings. She had identified M.O. 2 as her underwears and M.O. 31 as the silver ring with amber stone.

15. In the cross-examination she admitted that since 5th March, 1997 she was staying in her house alongwith P.W. 1. She has also admitted that the road by which she was coming was not a motorable road as such. She was confronted with her statement before the police in which she had stated that there were about 7 to 8 persons whereas in her evidence she had stated 9 to 10 persons. Her explanation is that they were many but she did not count them exactly. She was confronted with her statement in which she had stated that they were taken 20 meters away whereas in her evidence she had stated 100 meters. She also admitted that she did not state before the police that she was pulled by her hair. She stated that she could not say which of the accused were holding her by her arms as they were behind her head and also they were doing it by turns. She also admitted that she had stated to the police that one of them was pointing a knife at her neck but she could not offer an explanation as to why it was not recorded. She admitted in her cross-examination that the surface on which she was made to lie down was a very hard surface and, therefore, she had an injury on her lower back. She also admitted not to have stated to the police that when she tried to scream, her mouth was gagged. She stated that she had suffered injuries on her lower back, on the inner thighs and on her arms due to the rape committed on her and also as those persons were hitting her. She denied the suggestion that when the incident of rape was going on she had closed her eyes. As a counter to this suggestion, she has stated that she had kept them open as something wrong was being done to her. She admitted that she was not a virgin before the incident of rape. She had stated that the underwear which she was wearing at the time of the incident had been cut by the accused in their attempt to remove it and she had handed over to the doctor the underwear, which she used thereafter and that had

seminal stains. She has also stated that her whole body was paining and she had been infected by gonorrhea. In the cross-examination she had stated that accused No. 1 had pulled them by the hair and he was leading the group. She also stated that she had tried to struggle and obstruct when she was being raped. She admitted that it was a dark night. She has stated that she was embarrassed and, therefore, she might not have stated to the police that one of them was sitting on her right arm and the other on her left arm. She admitted that it was not recorded in her statement before the police that accused No. 5 was holding them at knife point. She was asked the following questions to which she has given these answers :--

'Q : Did you state to the police that A-1 then pulled down his trousers and underwear and then forced his penis into my vagina?

A : Though I did not use exactly those words but I had stated to the police that that is what has happened.

Q : Did you state to the police that they tried to kiss you and touch your breasts?

A : That is what had happened but I had put it in word to the police by using the word that they raped me. I also want to add that I could not speak very good English then and that it is not my native language.'

She admitted that after the incident she had gone to her house and had a bath and had kept aside the clothes which she was wearing at the time of the incident. She admitted that during the night when the police had come to her house, she did not have any talk with the police as at that time she could not speak being under shock. She denied the suggestion that the injuries which she had suffered were not on account of the incident.

16. The various contradictions and omissions which have been brought out in the cross-examination of P.W. 1 Christian, P.W. 13 Linda and P.W. 14 Jennie are not on the material aspect of the incident as deposed to by these witnesses. These contradictions or omissions do not affect the credibility of these witnesses. I have, therefore, no hesitation in holding that P.W. 1 Christian, P.W. 13 Linda and P.W.

14 Jennie were waylaid and robbed of their belongings and P.W. 13 Linda and P.W. 14 Jennie were raped by the persons who had stopped them. The fact that they were raped is corroborated by the medical evidence of P.W.22 Dr. E. J. Rodrigues, who had examined P.W. 13 Linda and P.W. 14 Jennie. The medical report of P.W. 13 Linda is at Exhibit P.W.22/A and the medical report of P.W. 14 Jennie is at Exhibit P.W.22/E-1, P.W.22 Dr. Rodrigues found the following injuries on the person of P.W. 13 Linda :--

- '(1) Abrasion reddish and fresh 0.5 x 0.5 cms., upper back of right forearm.
- (2) Linear abrasion with soft scab of 2 cms. on base of right index finger dorsal aspect.
- (3) Bruise reddish 4 x 3 cms. upper medial aspect of right thigh.
- (4) Bruise reddish 8 x 2 cms. lower medial aspect of right thigh.
- (5) Bruise reddish 2 x 1 cms. mid front of right leg.
- (6) Bruise reddish 3 x 2 cms. upper medial aspect of left leg.
- (7) Bruise reddish 1 x 1 cms. just above medial end of left eyebrow.
- (8) Bruise reddish 0.5 x 0.5 cms. left side lower lip mucousal surface.
- (9) Abrasion reddish 5 x 5 mm. left cheek.
- (10) Bruise with swelling tender to touch 3 x 3 cms. left side occipital region of skull.
- (11) Abrasion of 4 x 3 cms. reddish upper back of right shoulder.
- (12) Abrasion of 3 x 2 cms. reddish mid back of left shoulder.'

After examining her P.W.22 Dr. Rodrigues opined (1) there is evidence of sexual intercourse, (2) there are injuries on the body of the victim and (3) vaginal swabs and slides prepared to be sent to Serologist at Hyderabad as he found spermatozoa in the vaginal smears, therefore, sexual intercourse must have been

within 24 hours of his examination.

17. P.W. 22 Dr. Rodrigues also examined P.W. 14 Jennie and on examination he found the following injuries :--

- '(1) Bruise reddish fresh of 4 x 3 cms. medial aspect of left thigh.
- (2) Bruise reddish fresh 2 x 2 cms. on lower medial aspect of left thigh.
- (3) Bruise reddish fresh 3 x 1 cms. upper front of left leg.
- (4) Lacerations of 0.5 x 0.5 cms. tip of left 3rd toe.
- (5) Bruise reddish fresh 4 x 3 cms. on mid medial aspect of right thigh.
- (6) Bruise reddish fresh 2 x 1 cms. lower front of right thigh.
- (7) Bruise reddish fresh of 2 x 1 cms. on mid medial aspect of right knee.
- (8) Abrasion of 1.5 x 0.5 cms. transverse mid outer aspect of right side neck.
- (9) Abrasion reddish fresh area 6 x 6 cms. over Lamba sacral region.'

P.W. 22 Dr. Rodrigues opined that vaginal smears slides are positive for spermatozoa and were sent to the Serologist. There was evidence of sexual intercourse and there were injuries on the body and the genitals of the victim.

18. The evidence of P.W. 13 Linda and P.W. 14 Jennie that they were raped is amply corroborated by the medical evidence of the Medical Officer P.W. 22 Dr. Rodrigues. I will now examine if the material on record connects the accused as the offenders who have robbed P.W. 1 Christian, P.W. 13 Linda and P.W. 14 Jennie and had committed rape on P.W. 13 Linda and P.W. 14 Jennie.

19. The prosecution has examined P.W. 19 Karan Singh Pooniah, who was working as an Additional Deputy Collector and Executive Magistrate on 17th March 1997. As per his evidence on 17th March 1997 he received an intimation from P.I. Calangute for holding an identification parade. The said intimation is at Exhibit P.W. 19/A. On receipt of the said intimation, P.W. 19 Karan Singh issued

summons to the parties on the same day and the identification parade was held on the same day, that is, 17th March 1997 at 5.00 p.m. In the said identification parade the present 5 appellants and original accused No. 6 were brought separately with their heads duly covered. They were made to sit in the Court room of the Deputy Collector, Mapusa. Before the accused were brought, the identifying witnesses had been brought and were made to sit in the room adjoining to the Court room. Care was taken to see that the identifying witnesses were not able to see the accused when they were in the Court room. According to P.W. 19 Karan Singh, the two Stenographers Miss Bela and Mrs. Archana Torne assisted him in conducting the identification parade. Four local persons had been called to act as dummies. The accused and the dummies were made to stand in two rows. The accused had been asked if they would like to change their clothes and appellant Pallani and appellant Rajesh changed their shirts. Thereafter the person assisting P.W. 19 Karan Singh brought the identifying witness P.W. 13 Linda and she was asked to identify the accused. She identified appellant Thambi Nasir and appellant Pallani, who were standing in the first row. She identified original accused No. 6 Arjun Dhakne, who was standing in the second row. P.W. 14 Jennie when asked to identify the accused, identified original accused No. 6 Arjun Dhakne and she identified appellant Thambi Nasir and appellant Babu Shaikh. Prior to bringing P.W. 14 Jennie for identification, the accused had been asked if they desired to change their places in line or change their clothes. The appellant Babu Shaikh had changed his shirt. P.W. 1 Christian when asked to identify the accused, identified appellant Rajesh and appellant Thambi in the first row while he identified original accused No. 6 Arjun Dhakne, appellant Mehboob and appellant Babu Shaikh. The memorandum of the identification parade is Exhibit P.W. 19/C. P.W. 19 Karan Singh has also deposed about the various articles which had been identified by P.W. 1 Christian, P.W. 13 Linda and P.W. 14 Jennie.

20. Mr. Section D. Lotlikar, the learned senior advocate has argued on behalf of appellant Thambi and Mrs. Agni on behalf of the other appellants in Criminal Appeal Nos. 31, 32, 34 and 38 of 2000. After the arguments had been concluded, the appellant Babu Shaikh in Criminal Appeal No. 32 of 2000 requested this Court to permit him to appoint advocate Mr. G. Kanekar to argue his appeal. Accordingly, the hearing of the appeal was adjourned to facilitate Mr. Kanekar, the

learned counsel appearing for appellant Babu Shaikh, to study the paper book and submit his arguments. Mr. Kanekar has been heard in Criminal Appeal No. 32 of 2000.

21. The learned counsel for the appellants have urged that the identification parade which was held by P.W. 19 Karan Singh was a farce. According to them, there should have been at least four dummies for each accused. Further, according to the learned counsel, more than two accused ought not to have been placed in an identification parade. The learned counsel also submitted that P.W. 1 Christian had admitted in his evidence that from 12th to 17th March he had gone to the Calangute Police Station to know about the progress of the case and P.W. 13 Linda and P.W. 14 Jennie had also gone to the Calangute Police Station to know about the progress. Relying on this admission, it is submitted that there was every possibility that the accused, who were then in police custody, may have been shown to the identifying witnesses. Further, it is submitted that the dummies, who were placed in the identification parade, were not of similar height or features as that of the accused. Thus, according to the learned counsel for the appellants, the identification parade was a total farce. The learned counsel for the appellants have relied on the Judgment in *Ramcharan Bhudiram Gupta v. The State of Maharashtra*, : 1996(1)BomCR190 . The Division Bench of the Bombay High Court has observed as hereunder :--

'There are some infirmities in the evidence of identification, which render it unworthy of acceptance. Firstly, the procedure of holding the identification as laid down in the Criminal Manual issued by the High Court of Judicature, Appellate Side, Bombay has not been followed. The Manual provides that not more than two suspects at a time should be put for identification in one parade but, in the instant case, three persons viz., the appellants and co-accused were put up together for identification in one parade. In fact, the Executive Magistrate went to the extent of saying that 'I am not aware about the High Court Criminal Manual about the method of holding the parade'. This is a shocking state of affairs. It is expected that in future, it would be ensured that the Magistrates who conduct identification proceedings, are at least aware of the High Court Criminal Manual which deals with the manner in which they are to be conducted. Court would like to emphasise

that little value can be given to the identification held in breach of provisions contained in Criminal Manual of this Court. Secondly, in the identification memo, there is no mention of the fact that dummies mixed with the appellants bore similar physical appearance and hence, Court does not think it safe to believe the Magistrate when he deposed to this effect in the trial Court. Once the Court entertains doubts about dummies bearing similar physical appearance being mixed with the appellants, at the time of their test identification, the Court has no option but, to reject the evidence of identification.'

22. Reliance is also placed on the Judgment in Ganesh Bhagwati Pandian v. State of Maharashtra, 1985 Cri LJ 191, wherein it is observed as under :--

'In Chapter 1 of the Criminal Manual issued by this Court it has been directed that two suspects roughly of similar appearance should be paraded with at least twelve other persons, but when the two suspects are not similar in appearance, separate parades should be held using different persons on each parade.'

23. It is true that the number of dummies per accused should be in the ratio of 1:4 or 1:6. In the present case six accused had been put up for identification in the parade and only 4 dummies had been used to stand alongwith the accused. Generally not more than two accused should be placed in an identification parade. The dummies so placed alongwith the accused should be of similar appearance to the accused. In this case the medical examination reports of the appellants disclosed that the appellants had some distinguishing features and it appears that no effort was made to have dummies who were similar in appearance to the appellants. It is quite possible that the appellants had been shown, while in police custody, to P.W. 1 Christian. P.W. 13 Linda and P.W. 14 Jennie have denied that they had been to the Police Station to inquire about the progress of the case. Be that as it may, there is no satisfactory evidence in respect of the identification parade. An important piece of evidence, which has corroborative value has been lost to the prosecution because of the ignorance of the Executive Magistrate of the procedure to be followed while holding the test identification parade. The Executive Magistrates holding the test identification parade are expected to know at least the basic features or the basic safeguards to be observed while holding a

test identification parade. In the present case, therefore, no reliance whatsoever can be placed on the test identification parade and the same has to be discarded completely.

24. The learned trial Court in paragraph 25 of the Judgment has held that the seizure of the clothes of appellants Pallani, Mehboob, Babu Shaikh and Rajesh, though human spermatozoa was found on them, cannot be held against the appellants as the attachment of the said clothes as being those of the appellants was not free from doubt. Similarly the learned trial Court has also not relied upon the finding of human spermatozoa on the underwear of the appellant Thambi Nasir as the presence of human spermatozoa on it could be for a variety of reasons. The learned trial Court in paragraph 27 of the Judgment has also found that the evidence of recovery of articles allegedly purchased from the money involved in the dacoity was far from satisfactory and, accordingly the evidence of P.W. 2 Vincent Ferrao (panch witness), P.W. 21 Dattatraya Raikar (goldsmith) and P.W. 29 Krishnanath Rivonkar (goldsmith) does not assist the prosecution. The learned trial Court has found that the evidence of P.W. 18 Hajrat Ali and P.W. 20 Sukhanand Naik, examined by the prosecution to prove that the appellants had reached the scene of the offence by a motorcycle and a taxi was found to establish the overall veracity of the prosecution case and the presence of some of the accused at the place of occurrence. These findings of the learned trial Judge cannot be faulted.

25. The circumstantial evidence relating to discovery and seizure of various articles against the appellants is as under :--

(a) Original Accused No. 1 Thambi Nasir:--The evidence of P.W. 33 P.I. Umesh Gaonkar is that the appellant Thambi Nasir (original accused No. 1) was arrested on 11th March 1997. A house search panchanama of the house of appellant Thambi Nasir was conducted in the presence of P.W. 2 Vincent Ferrao. The house search panchanama is at Exhibit P.W. 2/A. In the house search panchanama M.O. 6 knife and M.O.5 alarm clock were seized. The alarm clock M.O. 5 has been identified by P.W. 1 Christian as belonging to him. In the prosecution evidence there is a slight discrepancy in respect of the date on which appellant Thambi

Nasir came to be arrested. P.W. 22 P.S.I. Chodankar has stated that he had arrested appellant Thambi Nasir on 16th March 1997 at Vasco da Gama and had brought him to Calangute Police Station. The learned trial Court in paragraph 32 of its Judgment has declined to accept the statement of P.W. 32 P.S.I. Chodankar in this behalf, as according to the learned trial Court, the evidence of P.W. 33 P.I. Umesh Gaonkar that he had arrested the accused No. 1/appellant Thambi Nasir on 11th March 1997 was borne out from the case diary which the learned trial Court had perused.

26. P.W. 2 Vincent Ferrao, who is a panch witness, has stated that on 11th March 1997 he was called at the Vasco Police Station at about 8.30 p. m.. Appellant Thambi Nasir was present at the Police Station and another panch was also present. The appellant is said to have made a statement that he would show some articles belonging to foreigners. Appellant Thambi Nasir then led the panch and the police in a jeep to New Vaddem to a room situated behind a bar. The said room of appellant Thambi Nasir was locked and was opened by his wife with a key. The appellant Thambi Nasir then produced a red colour citizen make alarm clock and one Kashmiri knife. These are the two articles which are recovered in the house search panchanama Exhibit P.W. 2/A. The learned trial Court has accepted this recovery from the house of appellant Thambi Nasir.

27. On 14th March 1997, appellant Thambi Nasir was interrogated by P.W. 33 P.I. Umesh Gaonkar and the statement of the appellant came to be recorded vide Exhibit P.W. 2/F Colly. In the said statement the appellant Thambi Nasir volunteered to disclose the foreigner to whom black colour speaker, one CD and catalogue were given. The evidence of P.W. 2 Vincent and P.W. 33 P.I. Umesh Gaonkar is to the effect:-- proceeded in a police jeep to a place inside the naval quarters. On reaching near one building, appellant Thambi Nasir went to the rear door of the residence and knocked on the door. One person opened the door and appellant Thambi Nasir asked him to give whatever Thambi Nasir had given him. The name of the person who had opened the door was one Fukreti. The said person had brought a bag and handed it over to appellant Thambi Nasir. From the bag one Elta speaker (M.O. 22), scuba diving glasses (M.O. 23), CD cover with CD inside (M.O. 25), one gray colour belt with steel buckle (M.O. 24) and two

catalogues of Panasonic CD, one of which was in English and the other in a foreign language (M.O. 26). The said articles were attached by a panchanama Exhibit P.W. 2/E. Alongwith these articles some other articles were also seized which pertain to another case. A list of the articles which were seized was prepared and the said list is P.W. 2/F. The Catalogue (M.O. 26), which was seized in pursuance to the statement of the appellant Thambi Nasir is identified by P.W. 1 Christian. He has stated that the catalogue in the English language bore his passport number and his signature. All these articles which were seized in pursuance to the statement of the appellant Thambi Nasir have been identified by P.W. 1 Christian as belonging to him.

28. On the same day, that is, on 14th March 1997 in the evening one Devendra Lamba, who is examined as P.W. 28 came to the Police Station and produced a wrist watch stating that it had been given to him by the appellant Thambi Nasir. The said wrist watch came to be attached in the presence of P.W. 2 Vincent vide Attachment panchanama Exhibit P.W. 2/G. A receipt was issued to P.W. 28 Devendra Lamba in respect of the attachment of the wrist watch and the said receipt is at Exhibit P.W. 2/H. The said wrist watch (M.O. 29) was identified by P.W. 1 Christian as belonging to him. The attachment panchanama in respect of wrist watch, Exhibit P.W. 2/G refers to a confession being made by the appellant and P.W. 28 Devendra Lamba producing the said wrist watch in pursuance of a request by appellant Thambi Nasir to do so. P.W. 28 Devendra Lamba has stated that the wrist watch (M.O. 29) remained with him, therefore, he had handed over the said wrist watch to the police. There is nothing in the cross-examination of P.W. 28 Devendra Lamba which would discard his statement that the wrist watch (M.O. 29) had been given to him by appellant Thambi and he had produced the same before P.W. 33 P.I. Umesh Gaonkar. Though in Exhibit P.W. 2/G it is stated that the appellant had made a disclosure statement, the seizure of the wrist watch (M.O. 29) is on production of the same by P.W. 28 Devendra Lamba. His statement that it was given to him by the appellant is not shattered during the cross-examination. The said wrist watch has been identified by P.W. 1 Christian as belonging to him. Therefore, it can be said that wrist watch (M.O. 29) had been given by the appellant to Devendra Lamba P.W. 28, which had been produced by the said Devendra Lamba before the police.

29. The circumstantial evidence relating to discovery and seizure of various articles against the appellant Pallani is as under :--

(b) Original accused No. 2 Pallani son of Kamyaswami:-- The appellant Pallani was interrogated by P.W. 33 P.I. Umesh Gaonkar on 14th March 1997 and the appellant volunteered to show the CD walkman, CD head phone, AC adapter and a shaving machine which had been given by him to one Anil Bisht. The statement of appellant Pallani was recorded and is at Exhibit P.W. 2/D. As per the evidence of P.W. 2 Vincent and P.W. 33 P.I. Umesh Gaonkar, appellant Pallani led the police and the panchas to the house of said Anil Bisht, who was present at the house. Anil Bisht has been examined by the prosecution as P.W. 30. Appellant Pallani asked the said Anil Bisht to hand over the articles which had been given to him by the appellant. Anil Bisht is alleged to have produced CD walkman (M.O. 17), CD head phone (M.O. 18), adapter (M.O. 19) and electric shaver (M.O. 20) which had been placed in one plastic bag (M.O. 21). The attachment panchanama of the said articles is at Exhibit P.W. 2/D1. The attachment panchanama also refers to the seizure of some articles which had been handed over by P.W. 28 Devendra Lamba to P.W. 30 Anil Bisht and which were seized. The list of the articles seized is at Exhibit P.W. 2/D2.

30. P.W. 30 Anil Bisht has been examined and he states that he was working in the Indian Navy since the year 1981. On 14th March 1997 the appellant Pallani had come with the police and had asked for the items which he and one Lamba had given to him. According to P.W. 30 Anil Bisht, P.W. 28 Devendra Lamba had come to his house for keeping certain articles. At that time P.W. 28 Devendra Lamba was accompanied by the appellant Pallani. He had handed over the bag to the police and the police had attached the articles in it. P.W. 30 Anil Bisht identified M.Os. 17, 18, 19, 20 and 21 which he had handed over to the police. Despite the cross-examination P.W. 30 Anil Bisht emerges as a truthful witness. He has denied the suggestions that the appellant Pallani Swami had not come along with the police when the articles were seized and that Devendra Lamba and Pallani had not kept the articles at his place. The M.Os. 17, 18, 19 and 20 seized by the police from the house of P.W. 30 Anil Bisht have been identified by P.W. 1 Christian as belonging to him.

31. The evidence of P.W. 2 Vincent corroborates the evidence of the police officers and proves the factum of seizure of these articles. No doubt P. W. 30 Anil Bisht has stated that the appellant Pallani and P.W. 28 Devendra Lamba had come to his place about 20 days prior to 14th March 1997 and had kept the articles. The incident took place on 6th March 1997. On the basis of this discrepancy, it is urged that obviously these articles M.Os. 17, 18, 19 and 20 seized from the house of P.W. 30 Anil Bisht are in no way connected with the incident. Obviously when P.W. 30 Anil Bisht states that these articles were kept at his place by P.W. 28 Devendra Lamba and appellant Pallani about 20 days back, he is mistaken in this as these M.Os. have been identified by P.W. 1 Christian as belonging to him. Even otherwise, the statement of P.W. 30 Anil Bisht regarding 20 days must be by approximation and not with any degree of mathematical certainty. This discrepancy, therefore, according to me, does not affect the identification of the property by P.W. 1 Christian as belonging to him. The credibility of the recovery of these articles is also not affected by this discrepancy.

32. The circumstantial evidence relating to discovery and seizure of various articles against the appellant Memboob is as under :--

(c) Original accused No. 3 Mehboob Nadaf :-- The appellant Mehboob Nadaf was interrogated by P.W. 33 P.I. Umesh Gaonkar on 14th March 1997 and on interrogation the appellant volunteered to discover silver jewellery kept at the sugarcane juice stall. The said disclosure statement was made in the presence of P. W. 3 Gabriel Noronha and the said statement is at Exhibit P.W. 3/A. According to P.W. 3 Gabriel the appellant led the pancha and the police to Khariawado to a sugarcane juice stall. One Janardhan Prajapati was the owner of said stall and was present. Appellant Mehboob asked the said Janardhan to hand over the parcel of the clothes kept by him. Janardhan handed over some clothes in a polythene bag to the appellant Mehboob. The appellant opened the said polythene bag and from the folds of his trouser removed a small parcel wrapped in paper containing a silver bracelet. There were other silver articles in the said parcel which were not connected with the present case. The said silver bracelet was attached vide Attachment Panchanama P.W. 3/B. The said bracelet M.O. 27 was identified by P.W. 13 Linda as belonging to her. The prosecution has examined

P.W. 17 Janardhan Prajapati, who also corroborates the factum of seizure. According to him, the appellant Mehboob had come to his stall on 9th March 1997 and after bath had put his clothes in a plastic bag and had given it to P.W. 17 Janardhan for keeping the same. After some time appellant Mehboob had come there changed his clothes and had handed over the polythene bag to P.W. 17 Janardhan Prajapati. On 14th March 1997 appellant Mehboob had come alongwith the police and P.W. 17 had handed over the said parcel to the appellant from which some silver ornaments were seized. P.W. 17 Janardhan has identified M.O. 27 as the silver ornament which was seized by the police. P.W. 17 Janardhan was cross-examined and he denied the suggestion that the appellant Mehboob did not visit his stall or that he did not know him at all. P.W. 17 Janardhan also denied the suggestion that appellant Mehboob had not handed over the plastic bag to P.W. 17 Janardhan. There is nothing in the cross-examination of P.W. 17 Janardhan to disbelieve the fact that the appellant had given him a plastic bag on 9th March 1997 and the same was seized by the police on 14th March 1997 containing a silver bracelet M.O. 27. The evidence of P.W. 33 P.I. Umesh Gaonkar is amply corroborated by P.W. 3 Gabriel Noronha and P.W. 17 Janardhan Prajapati.

33. The circumstantial evidence relating to discovery and seizure of various articles against the appellant Babu Shaikh is as under :--

(d) Original accused No. 4 appellant Babu Shaikh :-- Appellant Babu Shaikh was interrogated by P.W. 32 P.S.I. Chodankar and the appellant Babu Shaikh volunteered to point out the place where the shoes were kept. This statement was made by appellant Babu Shaikh in the presence of P.W. 4 Prakash Palyekar. P.W. 4 Prakash in his evidence stated that on 16th March 1997 he was called by the police to act as a panch. According to him, one Babu had produced some shoes at the Police Station and, accordingly, a panchanama was recorded. The said witness P.W. 4 Prakash immediately corrected himself to state that the appellant Babu (accused No. 4), was at the Police Station and he made a statement that he would show the shoes of a foreigner. The appellant then led the panch and the police to a room. He knocked the door of the said room and it was opened by a woman, who gave her name as Jaya. Jaya on being asked by the police affirmed that appellant Babu Shaikh was residing in that room. The appellant Babu Shaikh

then entered the room and took out a pair of shoes from the loft. He handed over the shoes to the police, which were attached under panchanama Exhibit P.W. 4/A. The shoes M.O.30 had been identified by P.W. 1 Christian as belonging to him. It was urged before me that P.W. 1 Christian had not identified the shoes M.O. 30 in the identification parade. P.W. 1 Christian was never confronted with this. The memorandum of the identification is not a substantive piece of evidence. The contradiction therein had to be put to the witness, giving him an opportunity of explaining the contradiction. P.W. 1 Christian was never confronted with the fact that he had failed to identify his shoes in the identification parade. The evidence of identification parade can at best be used as corroborative piece of evidence. P.W. 1 Christian has identified the shoes M.O.30 as belonging to him in Court. In such circumstances, it cannot be urged that the identification of the shoes M.O. 30 is a weak piece of evidence connecting Babu Shaikh. According to the evidence of P.W. 1 Christian appellant Babu Shaikh had removed his own shoes and had given it to P.W. 1 Christian while removing the shoes which were worn by P.W. 1 Christian. The shoes belonging to Babu Shaikh M.O. 4 were produced by P.W. 1 Christian in the police station in the presence of P.W. 9 Gladwyn Rebello and seized by P.W. 32 P.S.I. Chodankar on 9th March 1997. The recovery of shoes, M.O. 30, connects this appellant with the crime.

34. The circumstantial evidence relating to discovery and seizure of various articles against the appellant Rajesh is as under :--

(e) Original accused No. 5 appellant Rajesh:-- P.W. 33 P. I. Umesh Gaonkar had interrogated appellant Rajesh on 14th March 1997 and appellant Rajesh volunteered to produce a silver ring. The statement was recorded in the presence of P.W. 3 Gabriel Noronha and is at Exhibit P.W. 3/C-1. According to P.W. 3 Gabriel, the appellant Rajesh led the police and the panch witness to a house. Appellant Rajesh knocked on the door and the door was opened by the mother of appellant Rajesh. The appellant Rajesh took the police and the panch with him to a room and searched behind the photographs which were mounted on the wall. After searching, he removed a silver ring with two stones. The said silver ring is M.O. 28. The said silver ring was attached under panchanama Exhibit P.W. 3/C. The said silver ring was identified by P.W. 1 Christian as belonging to him.

35. It is urged before me by the learned counsel appearing for the appellants in these appeals that the identification of the appellants for the first time in Court without being corroborated by a valid test identification parade is valueless. It is also urged before me that it was a dark night when the incident had taken place. In such circumstances, P.W. 1 Christian, P.W. 13 Linda and P.W. 14 Jennie did not have an opportunity of observing the offenders and, therefore, the identification of the appellants in Court is a weak piece of evidence on the basis of which no conviction could be sustained. The learned Public Prosecutor for the State Mr. Lawande submitted before me that the prosecution witnesses P.W. 1 Christian, P.W. 13 Linda and P.W. 14 Jennie had adequate opportunity of observing the features of the accused as the incident lasted for nearly one hour. He has also submitted that, though there is no satisfactory evidence regarding the identification parade, the presence of the appellants at the scene of offence is squarely established by the incriminating articles which have been recovered at their instances and which have been identified by the witnesses as belonging to them. Mrs. Agni, the learned counsel appearing for the appellants, has relied on the Judgment of the Supreme Court in *State of H.P. v. Lekh Raj*, : 2000 CriLJ44 . Reliance is placed on paragraph 3 of the Judgment, which is reproduced as hereunder :--

'3. Respondent 2 has been acquitted by the High Court on the ground that his identity could not be established by the prosecution at the trial. The admitted position is that the name of Respondent 2 was not known to the prosecutrix and thus his name was not mentioned in the FIR. She had, in the written report lodged with the Superintendent of Police, Mandi on 11-10-1993, stated that Respondent 1 'with another person whose name is not known to the complainant intercepted the complainant from her back and gagged her mouth. They pounced upon her and made her lie down on the road and had forcible sexual intercourse with her'. In her statement before the trial Court the prosecutrix admitted that she had not known Respondent 2 earlier and further that no identification parade was conducted by the investigating agency. She further admitted having seen Respondent 2 in the Court only after the day of occurrence. How Respondent 2 was named as an accused person is a mystery shrouded with doubts which has not been properly and sufficiently explained by the prosecution. During the investigation of a crime

the police agency is required to hold identification parade for the purposes of enabling the witness to identify the person alleged to have committed the offence particularly when such person was not previously known to the witness or the informant. The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt in the mind of the Court regarding his involvement. Identification parade may also not be necessary in a case where the accused person at the trial for the first time is, from its very nature, inherently of a weak character. This Court in *Budhsen v. State of U. P.*, : 1970 CriLJ1149 held that the evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances the complainant or the witness came to pick out the particular accused person and the details of the part which he allegedly played in the crime in question with reasonable particularity. In such cases test identification is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them. There may, however be exceptions to this general rule, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration. Though the holding of identification proceedings are not substantive evidence, yet they are used for corroboration purposes for believing that the person brought before the Court was the real person involved in the commission of the crime. The identification parade even if held, cannot, in all cases, be considered as safe, sole and trustworthy evidence on which the conviction of the accused could be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant.'

36. Mrs. Agni. the learned counsel for the appellants, has also relied on the Judgment of the Supreme Court in *Rajesh Govind Jagesha v. State of Maharashtra*, : 2000 CriLJ380 and particularly to paragraph 4 of the Judgment, which is reproduced hereunder :--

'In cases where a person is alleged to have committed the offence and is not previously known to the witnesses, it is obligatory on the part of the investigating agency to hold identification parade for the purposes of enabling the witnesses to

identify the person alleged to have committed the offence. The test identification is considered as a safe rule of prudence for corroboration. Though the holding of the identification proceedings may not be substantive evidence, yet such proceedings are used for corroboration purposes in order to believe or not the involvement of the person brought before the Court for the commission of the crime. Hence, identification parade ought to be held strictly in accordance with the settled position of law and expeditiously. The delay, if any, has to be explained satisfactorily by the prosecution.'

Mr. Lawande, the learned Public Prosecutor appearing for the State, has relied on the Judgment of the Supreme Court in *Daya Singh v. State of Haryana*, : 2001 CriLJ1268 . The learned Public Prosecutor has relied on paragraph 12 of the Judgment, which is reproduced hereunder :--

'12. The question, therefore, is -- whether the evidence of injured eye-witnesses PW-37 and PW-38 is sufficient to connect the appellant with the crime beyond reasonable doubt. For this purpose, it is to be borne in mind that purpose of test identification is to have corroboration to the evidence of the eye-witnesses in the form of earlier identification and that substantive evidence of a witness is the evidence in the Court. If that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. Further, where reasons for gaining an enduring impress of the identity on the mind and memory of the witnesses are brought on record, it is no Use to magnify the theoretical possibilities and arrive at conclusion -- what in present day social environment infested by terrorism is really unimportant: In such cases, not holding of identification parade is not fatal to the prosecution. The purpose of identification parade is succinctly stated by this Court in *State of Maharashtra v. Suresh*, : (2000)1SCC471 as under : 'We remind ourselves that identification parades are not primarily meant for the Court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence'.'

37. The Judgment of the Supreme Court in State of H.P. v. Lekh Raj : 2000 CriLJ44 (supra) has held that the evidence of identifying the accused at the trial for the first time is, from its very nature inherently of a weak character. The Supreme Court in Daya Singh's case : 2001 CriLJ1268 (supra) has held that the purpose of identification is to have corroboration of the testimony of the eye-witnesses in the form of earlier identification and that substantive evidence of a witness is the evidence in Court. If that evidence is found to be reliable, then absence of corroboration by test identification would not be in any way material.

38. In the present case the identification parade conducted by P.W. 19 Karan Singh cannot be relied upon as it suffers from legal infirmities. Therefore, the evidence of P.W. 1 Christian, P.W. 13 Linda and P.W. 14 Jennie will have to be analysed with a view to find out if these witnesses had adequate opportunity, despite it being a dark night, of observing the accused to create a lasting impression on their minds. P.W. 1 Christian, P.W. 13 Linda and P.W. 14 Jennie, foreigners had been exposed to a very traumatic incident. They had been waylaid, dragged to nearby bushes, relieved of their belongings and P.W. 13 Linda and P.W. 14 Jennie had been raped by the accused. The entire incident lasted for nearly one hour. P.W. 1 Christian has stated in his evidence that because of the street light and the light of the scooter, he could identify the assailants. P.W. 13 Linda and P.W. 14 Jennie have stated that the accused were flashing torch light on their bodies because of which they could identify the persons who had raped them. Moreover, P.W. 1 Christian has given an explanation by saying that though it was a dark night, gradually their eyesight got used to the darkness and he could see properly. This was not a case where the witnesses had only a fleeting glimpse of the accused or an incident which they were relieved of their belongings in a twinkling of the eye and the accused had fled thereafter. All the accused were in the company of the witnesses for nearly an hour. P.W. 1 Christian had seen the accused from close quarters. In fact P.W. 13 Linda and P.W. 14 Jennie had been raped by the appellants and it is unlikely that they would forget the features or that the features would not be impressed on their minds. All the three witnesses had unerringly identified the appellants in the test identification parade which unfortunately had to be discarded because of legal infirmities. The identification of the appellants by these witnesses in the Court, therefore, according to me, can be

relied upon. The identification of the appellants by these witnesses is fortified by the various articles which have been recovered from the custody of the appellants. The evidence in respect of those articles can be relied upon to corroborate the factum of identification of the appellants by these witnesses in Court. The circumstantial evidence provides evidence which links the appellants with the commission of the offence. The articles have been recovered from the appellants soon after the commission of the crime. The recovery thus links the appellants with the commission of the crime.

39. The prosecution has also examined P.W. 23 Gabriele Stadt Muller, a German national, who had a house in the vicinity where the incident had taken place. According to her, on 7th March 1997 at about 4.00 a.m. while she was taking her motorcycle for going for a party, 8 persons had come to her house armed with sticks and knife and had forced her to open the house. She has identified appellant Mehboob. She has also identified appellants Thambi Nasir and Babu Shaikh as persons who had come to her house. She has stated that she was robbed of articles. The appellants are being prosecuted in respect of the dacoity committed by them at Gabriele's house. The evidence is subject matter of another prosecution. It would be difficult at this stage to say whether Gabriele had correctly identified the appellants or not as that would affect the prosecution which is said to be pending. Evidence of Gabriele also cannot be accepted as showing the conduct of the accused. However, some inference can be drawn that the appellants on that day were seen in the vicinity where the crime against P.W. 1 Christian, P.W. 13 Linda and P.W. 14 Jennie had been committed.

40. Thus, I find that the prosecution has been able to establish the offences against the present appellants. The identification of the appellants by P.W. 1 Christian, P.W. 13 Linda and P.W. 14 Jennie for the first time in Court is amply corroborated by the circumstantial evidence in respect of recovery of various articles from their possession. According to me, the trial Court was perfectly right in accepting the prosecution evidence and convicting the appellants for the offences for which they were charged. There is, thus, no merit in the present appeals and the same deserve to be dismissed.

41. The appeals are, therefore, dismissed. The conviction and sentence passed by the Sessions Judge, North Goa, Panaji in Sessions Case No. 4 of 1997 against the appellants is confirmed.

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