HIGH COURT OF TRIPURA
AGARTALA

Crl. A. No.33 of 2011

Sri Nikhil Debbarma,
resident of Village-Saidacherra,
P.S. Kumarghat

..... appellant

– Vs –

1. Sri Subhash Debbarma,
son of late Kshirode Deb Barma,

2. Sri Shyama Deb Barma,
son of late Arun Debbarma,

- Both residents of Village – Dhanbilash,
P.S. & P.O. Kailashahar, District – North Tripura.

..... Respondents

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellant	**:**	Ms. N. Guha, Advocate
For the respondents	**:**	Mr. A. Ghosh, PP
Date of hearing	**:**	**19.11.2014**
Date of delivery of Judgment and order	**:**	**26.02.2015**
Whether fit for reporting	**:**	**YES**

JUDGMENT & ORDER

This is an appeal by the victim under Section 372 of the Cr.P.C. against the order of acquittal dated 10.08.2011 delivered in Sessions Trial 22(NT/K) of 2011 acquitting the respondent Nos.1 and 2 from the charge under Section 376(2)(g) of the Indian Penal Code.

02. A written ejahar was lodged to the Officer-in-Charge, Kumarghat Police Station, North Tripura (Exbt.P/1) by of the victim, (PW-1) on disclosing that on 05.11.2010 at about 2 O'clock in the night while she was accompanied by her elder sister Animala

Debbarma and younger brother Karanjoy Debbarma coming to their house after enjoying a musical programme arranged on the occasion of Kali Puja at SPO Camp of Ganga Nagar under Kumarghat PS, the respondents came boarding the vehicle belonging to one Amit Debbarma and tried to talk to her. They separated her from her brother and sister and tied her mouth by a piece of cloth. Thereafter, they took her to a nearby rubber plantation belonging to one Bishangrai Debbarma and raped her forcibly. While she tried to raise alarm the respondents physically assaulted her by kicks and blows and threatened to kill her. She has further disclosed by the written ejahar that the occurrence took place nearby the house of one Monimala Debbarma adjacent to Raykandi Bazar. The respondents allegedly after committing rape left her in 'senseless condition'. When she regained her consciousness, she found her wearing apparels in torn condition and the marks of rape on her person. Around 3 O'clock she reached her home and narrated the entire fact to her mother.

03. Based on the written ejahar, Kumarghat PS Case No.103 of 2010 under Section 376(2)(G)/109 of the IPC was registered on 06.11.2010 at about 4.15 p.m. It is to be noted that the owner of the vehicle namely Amit Debbarma was also shown as the accused in the said case.

04. On completion of the investigation the final police report charge-sheeting the respondent Nos.1 and 2 was filed. In due course and on taking cognizance the case was committed to the Court of the Sessions Judge, North Tripura, Kailashahar who in turn commenced the trial by framing the charge against the respondent

Nos.1 and 2 for committing the offence punishable under Section 376(2) (G) of the IPC. The respondent Nos.1 and 2, hereinafter referred to as the accused persons wherever it is required, pleaded total innocence and claimed to face the trial.

05. To substantiate the charge the prosecution has adduced as many as 15 witnesses and introduced 6 documentary evidence including the school certificate as proof of age (Exbt.P/6). After recording the prosecution evidence both the accused persons were examined separately under Section 313 of the Cr.P.C. and the accused persons responded by stating the incriminating materials as surfaced in the prosecution evidence as false and they reiterated their plea of innocence.

06. After evaluating the evidence on record, as no evidence was adduced from the defence, the trial court returned the finding, inter alia, as under:

> ***"In this instant case relying on the evidence of the victim it is revealed that the victim girl was raped. But, there is no evidence to show that these two accused persons were involved to commit the offence of rape on her. There is no evidence to show that these two accused persons acted with the common intention and with prearranged plan, prior meeting of mind and in furtherance of that common intention committed rape on the victim girl. The victim girl was minor. She laws gang raped. But there is nothing to show that the accused were the members of that gang. In order to sustain conviction under section 376(2)(g) of the IPC for gang rape prosecution is to prove that accused persons being member of a gang in furtherance of common intention committed rape. Only the departure from the maruti vehicle in certain point of time cannot constitute an inculpatory circumstance to make a chain to show the involvement of the accused in omission of rape. Accused persons were not identified and the witnesses only presumed about their involvement. For want of identification it is doubtful whether the accused persons were involved in the commission of offence of gang rape."***

07. Ms. N. Guha, learned counsel appearing for the victim has submitted that the said finding is perverse inasmuch as the victim's statement has wrongly been evaluated by the trial court. The victim has made a statement which was recorded under Section 164(5) of the Cr.P.C. by the Magistrate on 09.11.2010 and she had stated that two Debbarma youth gagged her mouth by a handkerchief and took her inside Bishangrai Debbarma's rubber plantation and raped her. Later on the victim identified the accused persons during trial but the trial court discarded such identification holding that without any corroboration by previous Test Identification Parade (TIP) held by the Magistrate it cannot be inferred that they were the real culprits. Ms. Guha, learned counsel has submitted that identification for the first time in the trial is a substantive piece of evidence and that cannot be brushed aside in the fashion as has been done by the trial court. She has further urged that the chain of circumstances has been so substantially proved that it excludes the hypothesis of innocence and clearly demonstrates the involvement of the accused persons in the offence. Thus, she has contended that despite the adequate incriminating materials the finding of the trial court is entirely unwarranted in the circumstances of the case. To support her contention Ms. Guha, learned counsel has relied on the decision of the apex court in ***Malkhan Singh and others vs. State of M.P.*** reported in ***(2003) 5 SCC 746*** where it has been held that:

> ***"7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive***

evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly 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, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad v. Delhi Administration (AIR1958SC350); Vaikuntam Chandrappa and Ors. v. State of A.P. (AIR 1960 SC 1340); Budhsen and Anr. v. State of U.P. ((1970) 2 SCC 128 and Rameshwar Singh v. State of Jammu and Kashmir ((1971) 2 SCC 715.

10. It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court.

16. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fat to examine. In the instant case the courts below have concurrently found the evidence of the prosecutrix to be reliable and, therefore, there was no need for the corroboration of her evidence in court as she was found to be implicitly reliable. We find no error in the reasoning of the courts below. From the facts of the case it is quite apparent that the prosecutrix did not even know the appellants and did not make any effort to falsely implicate them by naming them at any stage. The crime was perpetrated in broad daylight. The prosecutrix had sufficient opportunity to observe the features of the appellants who raped her one after the other. Before the rape was committed,

she was threatened and intimated by the appellants. After the rape was committed, she was again threatened and intimidated by them. All this must have taken time. This is not a case where the identifying witness had only a fleeting glimpse of the appellants on a dark night. She also had a reason to remember their cases as they had committed a heinous offence and put her to shame. She had, therefore, abundant opportunity to notice their features. In fact on account of her traumatic and tragic experience, the faces of the appellants must be got imprinted in her memory, and there was no chance of her making a mistake about their identify. The occurrence took place on March 4, 1992 and she deposed in Court on August 217, 1992. The prosecutrix appears to be a witness on whom implicit reliance can be placed and there is no reason why she should falsely identify the appellants as the perpetrators of the crime if they had not actually committed the offence. In these circumstances if the courts below have concurrently held that the identification of the appellants by the prosecutrix in court does not require further corroboration, we find no reason to interfere with the finding recorded by the courts below after an appreciation of the evidence on record."

08. Reliance has also been placed on ***Daya Singh vs. State of Haryana*** reported in ***(2001)3 SCC 468*** where the apex court has held that:

"13. The question, therefore, is--whether the evidence of injured eyewitnesses PW37 and PW38 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 eyewitnesses 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 two fold. 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."

09. In ***Dana Yadav alias Dahu and others vs. State of Bihar*** reported in ***(2002)7SCC295*** as relied by Ms. Guha, learned counsel for the appellant, the apex court has reiterated the law as under:

38. In view of the law analysed above, we conclude thus:-

(a) If an accused is well known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and sheer waste of public time to hold the same.

(b) In cases where according to the prosecution the accused is known to the prosecution witnesses from before, but the said fact is denied by him and he challenges his identity by the prosecution witnesses by filing a petition for holding test identification parade, a court while dealing with such a prayer, should consider without holding a mini inquiry as to whether the denial is bona fide or a mere pretence and/or made with an ulterior motive to delay the investigation. In case court comes to the conclusion that the dental is bona fide, it may accede to the prayer, but if, however, it is of the view that the same is a mere pretence and/or made with an ulterior motive to delay the investigation, question for grant of such a prayer would not arise. Unjustified grant or refusal of such a prayer would not necessarily enure to the benefit of either party nor the same would be detrimental to their interest. In case prayer is granted and test identification parade is held in which a witness fails to identify the accused, his so-called claim that the accused was known to him from before and the evidence of identification in court should not be accepted. But in case either prayer is not granted or granted but no test identification parade held, the same ipso facto can not be a ground for throwing out evidence of identification of an accused in court when evidence of the witness, on the question of identity of the accused from before, is found to be credible. The main thrust should be on answer to the question as to whether evidence of a witness in court to the identity of the accused from before is trustworthy or not. In case the answer is in the affirmative, the fact that prayer for holding test identification parade was rejected or although granted, but no such parade was held, would not in any manner affect the evidence adduced in court in relation to identity of the accused. But if, however, such an evidence is not free from

doubt, the same may be a relevant material while appreciating the evidence of identification adduced in court.

(c) <u>Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in court</u>.

(d) Identification parades are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable despatch for the purpose of enabling the witnesses to identify either the properties which are subject matter of alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on right lines and the persons whom it suspects to have committed the offence were the real culprits.

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check value to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) <u>In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction</u>.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above.

However, Ms. Guha, learned counsel has placed emphasis on sub-para 38(c) and 38(f) of ***Dana Yadav alias Dahu and others vs. State of Bihar.***

10. As regards the requirement of the Test Identification Parade and its probative value, another decision of the apex court in

Pramod Mandal vs. State of Bihar reported in ***(2004)13SCC150*** has been relied. The apex court in the said case has enunciated as under:

> ***"20. It is neither possible nor prudent to lay down any invariable rule as to the period within which a Test Identification Parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the Courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the Test Identification Parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification.***
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> ***21. Lastly in Malkhan Singh and others vs. State of Madhya Pradesh (2003)5SCC746 a three Judge Bench of this Court of which one of us (B.P. Singh, J.) was a Member, after considering various decisions of this Court observed thus :-***
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> ***"It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly 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, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example,***

> ***the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration".***

11. Appearing for the State, Mr. A. Ghosh, learned PP has fairly submitted that unless the identification of the offenders are established beyond reasonable doubt, no finding of conviction is likely to be returned. In this case, the victim could not identify the accused persons. Only she has stated that two Debbarma youths committed the heinous offence. Mr. Ghosh, learned PP has fairly submitted that the Investigating Officer failed to carry out the Test Identification Parade in terms of Section 9 of the Evidence Act when the accused persons were arrested. Mr. Ghosh, learned PP however has submitted that the accused persons were arrested after a long time when the victim filed the written ejahar. There is no representation from the respondents despite due notice from this Court.

12. In order to appreciate the contentions as advanced by the learned counsel for the parties, it would be appropriate to make a brief survey of the evidence as recorded in the trial.

The victim's statement was recorded under Section 164(5) of the Cr.P.C. (Exbt.P/4) where she has simply stated that two 'Debbarma youths' after gagging her mouth by a handkerchief

dragged her to a nearby rubber plantation belonging to one Bishengrai Debbarma and raped her. She lost her consciousness. That occurrence took place on 05.11.2010 at about two at night. She claimed that by the light of the neighbouring house she could identify the accused. In the trial she has stated that while she was returning after attending an Orchestra organized in the SPO Camp two youths *"attacked us, assaulted my elder sister and didi and forcefully took away inside Bisanrai Rubber Garden and forcefully raped me there. I lost my sense. After recovery of sense I returned to home and told the fact to my parents. I told them that I could identify the attacker if I see them. Next day I came to Kailashahar. A petition was written by Mohari on my dictation and I signed in the petition."* She identified the ejahar (Exbt.P/1). The statement made by the victim (PW-1) in the trial is quite cryptic than her ejahar and she has introduced some new facts.

PW-2, Sri Nikhil Deb Barma, father of the victim has stated that when her daughter did not return at about 2 at night but her other daughter and son had returned from the same programme, he and his wife went out for search and one Maruti vehicle was stopped by them on the road and the driver told them that two passengers of Maruti, Shyama and Subash got down from the vehicle and did not come back. Then they met Chairman Sashi Mohan of their village. After some time their daughter (the victim) came near the Maruti with tears. She was weeping and told two youths raped her. We assumed that Subash and Shyama might have raped her. Accordingly, we filed the ejahar. He had identified the wearing apparels which were seized by the police (Exbt.MO 1).

PW-3, Smt. Kajal Devi Debbarma, the victim's mother has stated that nine years back at night on the date of Kalipuja her daughter (the victim) along with other son and daughter went to enjoy orchestra in the SPO Camp. Except the victim her daughter and son returned home. As the victim did not return, they took up a search. She restrained one Maruti vehicle but her daughter was not seen in that car. The driver told her that two youths got down from the vehicle. Driver told the names of those youth when the police officer came, as Shyama and Subhas. Her daughter (the victim) came there and she was weeping and told them that two youths had taken her in the jungle and raped her. Her daughter has told that one youth was dark and other was fair.

PW-4, Smt. Dhyanmanta Debbarma is a constable who escorted the victim for medical examination to Kumarghat Primary Health Centre. She is also the witness of the seizure of the vaginal swab as collected by the Medical Officer.

PW-5, Smt. Manju Rani Debbarma is a neighbour of the victim. On the day of occurrence she was called by PW-3 and at the relevant point of time she was the chairman of Saidacherra Gaon Panchayat. She told her that the victim was missing. She claimed to have accompanied them to Rajkandhi Bazar. She has made the statement that a Maruti vehicle had already been restrained. When they call the police officer Sashi Mohan Debbarma, he came out and talked to the driver and the driver told that two youths left the vehicle. Thereafter, the victim came there and she told that two tribal youths had tortured her. She could not tell the name of the youths. It may be noted that PW-5 did not corroborate the

statement of PW-3 that the driver told to the police officer the name of the tribal youths.

PW-6, Sukrasil Debbarma also accompanied in the search when he was reported that the victim was missing. He however has stated that they restrained one Maruti car and the police officer was called. However, the victim by that time appeared there weeping. The victim disclosed that she was raped by two tribal youths.

PW-7, Sri Dhananjoy Debbarma is the brother of the victim. He has stated as under:

"Nine months back in the last Kalipuja I along with my elder sister Roma and others went to Ganganagar SPO camp for enjoying the orchestra function. We returned to home at about 3 a.m. ..... (the victim's name is withheld) was missing. We informed our friends. ..... (the victim's name) returned in the dawn and told that two tribal youths had raped her. She could not say their name. Daragababu talked with the driver."

It is to be noted that PW-7 according to the victim was present when those tribal youths intervened in her journey back to their home but strangely PW-7 did not corroborate that vital part of the evidence.

PW-8, Sri Huangshngri Darlong was a Staff Nurse in the Kumarghat PHC. She has stated that in the hospital one Dr. Sulakshna collected the vaginal swab.

PW-9, Sri Mangal Chand Debbarma has stated nothing material for the prosecution case.

PW-10, Sri Sanjoy Debbarma followed the suit of PW-9.

PW-11, Sri Sashimohan Debbarma is the police officer who was posted on the relevant date at the camp at Ganganagar. He has stated that at about 3.30 a.m. the village Chairman, Manju Rani Debbarma, PW-5 and her husband informed him over telephone about the incident. He rushed to the Rajkandi market at once and found one Maruti van there. One Nikhil Debbarma informed him that his daughter (the victim) was raped by Shyama and Subhas Debbarma but the victim did not tell anything. The driver of the said vehicle disclosed his name as Ajit Debbarma. He informed him that two passengers, Shyama and Subhas Debbarma, had fled away from the vehicle.

PW-12, Md. Shyamsuddin Ahammed, an Advocate's clerk wrote the ejahar on 06.11.2010 as per the dictation of the victim.

PW-13, Sri Sudhangshu Debnath is the In-charge of the Joyganti Class XII School. He has confirmed that he issued the certificate in favour of the victim writing her date of birth as 26.12.1994 (Exbt.P/6) based on the entry made in the admission register. In the cross examination, he has however stated that the victim may not be their student at the time of issuing the certificate.

PW-14, Sri Parendra Reang identified the hand writing of Padmasen Chakma who was In-charge of the investigation for the substantive part. Later on it came to PW-14 who after collecting the report from the CFSL submitted the charge-sheet.

PW-15, Sri Padmasen Chakma as already stated conducted the substantive part of the investigation and he narrated

briefly how he had conducted the investigation by way of visiting the place of occurrence, recording the statements of the witnesses, collecting the medical examination report, causing the seizures etc. He has stated to have sent the vaginal swab as collected by the Kumarghat PHC to the Central Forensic Science Laboratory for chemical examination.

13. On appreciating the record of evidence what appears is that the Medical Officer who conducted the medical examination and prepared the medical report was not examined. As a result, neither the medical examination report of the victim nor the potency examination report of the accused persons was introduced in the evidence. However, the question whether the sexual assault as alleged by the victim has been proved to be the rape or not is not under challenge. As such, the consideration in this appeal would remain confined to the question whether the prosecution has established the identification of the accused persons who committed rape on the victim. There is not an amount of doubt that the victim did not know the accused persons from before and she encountered them allegedly on the hour of the occurrence. She could see their face by help of an electric light from a neighbouring house, close to the place of occurrence.

14. From the evidence of PWs. 2, 3, 5 and 11, it surfaces that the driver of the vehicle as stated disclosed the name of two youths. Even he did not say in which place those youth got down from his vehicle. There is no dispute that even though some of the witnesses assumed that the accused persons might have committed the offence, the police did not put them under the Test Identification

Parade in terms of Section 9 of the Evidence Act. The identification of the two youths as it appears has been sought to be established by the purported identification as made by the victim stating that *"These two accd. raped me but I cannot say their name."* Whether such identification can be the basis of the conviction or not particularly when by way of acquittal the presumption of innocence in favour of the respondent Nos.1 and 2 has been consolidated. Whether or not to rely on such identification for the purpose of returning the finding of conviction in view of the law as enunciated by the apex court, the surrounding circumstances play a vital part. It is the prosecution case that the rape took place during the time of Kalipuja and at night about 2 to 2.30 on 05/06.11.2010. According to the almanac, the night was dark and to identify unknown persons in such surrounding is astoundingly difficult. When the victim disclosed that she could identify the accused by dint of light placed in a nearby house the Investigating Officer did not investigate in that aspect. At least, the source of light was not seized and no statement has come from the Investigating Officer (PW-14) in the trial.

15. In ***Malkhan Singh and others vs. State of M.P.*** reported in ***(2003) 5 SCC 746*** It has been held that "It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently a weak

character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly 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, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions."

16. No doubt in ***Dana Yadav alias Dahu and others vs. State of Bihar*** the apex court has also held in the exceptional circumstances only the evidence of identification for the first time in Court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction. The exceptional circumstances has been placed in para 32 (b) of ***Dana Yadav alias Dahu and others vs. State of Bihar*** as reproduced hereinabove. Here we are not confronted with such situation as the admitted position is that the accused persons were strangers to the victim.

17. In ***State of Maharashtra vs. Suresh*** reported in ***(2000)1 SCC 471*** the apex court has enunciated the law as regards the necessity or the probative dimension of the Test Identification Parade 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 test identification parade is two fold. 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."***

18. Having regard to all these decisions in consideration, according to this Court, the decision in ***Malkhan Singh and others vs. State of M.P.*** fits in this case. In ***Malkhan Singh*** the apex court has emphasised where the identifying witness had only a fleeting glimpse of the appellants on a dark night, then such identification may not be relied for the purpose of conviction. In the case in hand, the surrounding was dark and she might have a fleeting glimpse of the accused persons and identifying such accused persons after nine months for the first time in the trial cannot provide the basis for identification of the accused persons, relying on which they may be convicted. Hence, this Court does not find any perversity in the finding returned by the trial court. Accordingly, this appeal fails and is dismissed.

Send down the LCRs forthwith.

JUDGE

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