

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1084 OF 2013

Mohd.Kasif Irshad Ali

.. Appellant

Versus

The State of Maharashtra

.. Respondent

WITH

CRIMINAL APPEAL NO.220 OF 2015

Rinku Rohatash Khan

.. Appellant

Versus

The State of Maharashtra

.. Respondent

Mr.Amit Gharte, Advocate for the appellant in Criminal Appeal No.1084/13.

Mr.Satyavrat Joshi, Appointed Advocate for the appellant in Criminal Appeal No.220/15.

Mr.Deepak Thakre, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.**DATED : 5th DECEMBER, 2015**

ORAL JUDGMENT :

1 These two Appeals can be conveniently disposed of by this common Judgment and order as the appellants in both these appeals were the accused in one and the same case and were tried and convicted on a single trial held by the Sessions Judge for

Greater Bombay. The appellant Mohd. Kasif Irshad Ali (in Criminal Appeal No.1084/13) was the accused no.1, and the appellant Rinku Rohatash Khan (in Criminal Appeal No.220/15) was the accused no.2 in the said case. The learned Sessions Judge convicted the appellants of offences punishable under section 452 IPC r/w Sec.34 of the IPC and section 395 IPC. She also convicted the appellant Mohd. Kasif – additionally and separately - of an offence punishable under section 397 of the IPC. The learned Sessions Judge sentenced the appellants to suffer RI for 5(five) years and to pay a fine of Rs.5,000/- each, with respect to the offence punishable under Section 452 of the IPC r/w Section 34 of the IPC, to suffer RI for 5 (years) and to pay a fine of Rs.5,000/- each with respect to the offence punishable under Section 395 of the IPC. She sentenced the appellant Mohd. Kasif to suffer RI for 7 years and to pay a fine of Rs.7,000/- in respect of the offence punishable under section 397 of the IPC. Being aggrieved by their conviction and the sentences imposed upon them, the appellants have approached this Court by filing the above separate Appeals.

2 The prosecution case, as put forth before the trial Court as can be gathered from the FIR, the statements recorded during investigation and the evidence adduced, in brief, be stated thus :-

Dashrathbhai Patel (PW 1), at the material time, was working in the Courier Shop of Rameshkumar Kantilal Angadia situate at Hemjamata building, 2nd floor, Popalwadi, Bhuleshwar, Mumbai. Bhailal Patel (PW 4) and Nikunj Waghela (PW 5) were also working with him in the said courier shop. That, on 3rd May 2012 at about 2.00 pm, two persons – described as 'boys' by Dashrath Patel - came to the shop and said that they wanted to send 'one pettti' [Rs.1,00,000/- (Rupees One lakh)] to Nagpur and whether the courier service would send the same. Dashrath Patel replied in negative, and thereafter, the said two boys left the shop. After about 2 – 3 minutes, the said two boys came back with three more boys. One of the two boys who had come earlier, showed a revolver to Dashrath Patel, asked him and his colleagues to sit down quietly and threatened that, or else they would be fired at. One of the others pointed out a revolver to Vijay Patel, another colleague of Dashrath. The three boys who had come later, went inside the office of the courier company, searched the two cupboards that were there, took out money that was in the cupboard and put the same in a rexin bag. That, when they were about to leave from the back door of the shop, two customers arrived there. The customers were also threatened and were asked to keep quiet. Then, four of the five boys left along with the

bag containing money from the back door, and the fifth one was trying to leave from the front door. At that time, Dashrath Patel (PW 1) and his colleagues shouted '*chor, chor*'. One of the customers who had come to shop pulled the said person. Persons from the neighboring shop caught one of the offenders. On being caught, he fired in the air, however, those who had caught him, started beating him. On noticing this, the remaining four culprits ran away, throwing the bag containing money at the door steps of a nearby shop. The person who was caught, was handed over to the police patrolling van and was taken away by the police.

First Information Report was lodged by Dashrath (PW 1), and on that basis, a case in respect of the aforesaid offences was registered.

The matter was investigated into, but the Investigating Agency could arrest only the present appellants. The other offenders could not be arrested and are shown as '*wanted*'. After investigation, a charge-sheet was filed against the present appellants who were prosecuted and convicted, as aforesaid.

3 I have heard Mr.Amit Gharte, the learned counsel for the appellant in Criminal Appeal No.1084/13. As the appellant in Criminal Appeal No.220/15 had preferred the Appeal from prison, and as he had not appointed any Advocate, Mr.Satyavrat Joshi,

Advocate was appointed to prosecute the said Appeal under the Free Legal Aid Scheme. I have also heard Mr. Deepak Thakre, learned APP for the State.

4 With the assistance of the learned counsel for the appellants and the learned APP, I have gone through the entire record of the trial Court. I have carefully gone through the entire evidence and the impugned judgment.

5 The prosecution examined 11 (eleven) witnesses during the trial. The first witness, as aforesaid, is Dashrath Patel – the First Informant. The second witness - one Sanjay Shirke - is a panch in respect of the spot panchnama. The third witness Pravin Mehta – a person who does the business of Imitation jewellery on the second floor of Hemjamata building, i.e. on the same floor where the shop of courier company is situate, is the one who had, as per the prosecution case, caught Mohd. Kasif (appellant in Criminal Appeal No.1084/13). Pravin Mehta was himself injured in the incident. The fourth witness Bhailal Patel, as aforesaid, was working in the said courier company, and he is also an eye witness to the alleged incident. The fifth witness – Nikunj Waghela – is also a colleague of Dashrath Patel (PW1) and Bhailal Patel (PW 4), and was at the material time, working in the said courier shop. He

also is an eye witness to the incident. The sixth witness Mangesh More is an employee of 'Raj Garments' situate on the second floor of the said Hemjamata building. He was assaulted by one of the offenders. The seventh witness Smt.Archana Koli is an Executive Magistrate, who had held a Test Identification Parade on 23rd July 2012. The eighth witness - Tilak Thapa - was also working in Raj Garments. He had seen the incident of dacoity, and had caught one of the dacoits i.e. the appellant Mohd. Kasif. The ninth witness Dilip Dengade, was attached to the L.T. Marg Police Station as a Sub-Inspector of Police at the material time. He had visited the scene of offence, and had recorded the First Information Report. He had also drawn spot panchnama and seized Digital Video Recorder in which recording by CCTV camera that had been installed in the courier shop was done. He also carried out certain investigation into the matter, and recorded the statements of some persons. The tenth witness - Dilip Kulkarni - Inspector of Police attached to L.T. Marg Police Station is the one who had completed the investigation, and had filed a charge-sheet against the appellants. The eleventh witness – Bhavesh Nikam - is a Scientific Officer attached to Forensic Science Laboratory at Kalina. The CCTV footage that had been obtained from the CCTV cameras installed in the said courier shop was sent to him for

examination and analysis in the course of investigation. He had examined the same, and had submitted his report.

6 Before proceeding to evaluate and appraise the evidence adduced during the trial, the basic features of the prosecution case must be clearly understood and grasped. It must be understood clearly that the case of the prosecution is that the appellant Mohd.Kasif was apprehended on the spot and handed over to the police. The other appellant – Rinku – had, however, managed to escape and run away. It also must be kept in mind that the case is that the robbed property was left by the culprits in the premises itself, and they were not successful in taking it away. No incriminating article or object was recovered from any of the appellants. Thus, the case against the appellants rests solely on their identification as two of the culprits made by a number of witnesses. Admittedly, none of the appellants – or even the other culprits who are said to be wanted – were known to any of the prosecution witnesses. As the appellant Mohd. Kasif was apprehended on or near the spot, and was handed over immediately to the police, he was naturally not placed in any Test Identification Parade. Rinku, however, was placed in Test Identification Parade.

7 Mr.Amit Gharte, the learned counsel for the appellant Mohd. Kasif (appellant in Criminal Appeal No.1084/13) contended that there was absolutely no evidence to show that the appellant Mohd. Kasif was apprehended on the spot. He submitted that though that was the case of the prosecution, there was no witness who claimed to have apprehended him and handed him over to the police. He submitted that there was no policemen who had supposedly taken the custody of the appellant Mohd. Kasif from anyone. According to him, therefore, the theory that the appellant Mohd.Kasif was apprehended on the spot, and was immediately handed over to the police which was believed by the learned Sessions Judge, was not at all established from the evidence. As a corollary to this, he submits that since the case was not of apprehension on the spot, the appellant Mohd.Kasif too should have been placed in a Test Identification Parade, and since that was not done, no importance to his identification as one of the offenders made by the prosecution witnesses during their evidence, can be given.

8 Mr.Satyavrat Joshi, the learned counsel for the appellant Rinku (appellant in Criminal Appeal No.220/15) contended that the evidence of identification of the said appellant

as one of the offenders was not reliable and could not have been accepted. He submitted that there were a number of discrepancies in the evidence of the prosecution witnesses. He also submitted that the Test Identification Parade was held after considerable delay, and that it had not been properly held; and that, therefore, the evidence of identification in such a Test Identification Parade could not be relied upon, to corroborate or support the identification of the appellant Rinku as one of the offenders. It was submitted that since there was no other incriminating material or evidence against the appellant Rinku, it was hazardous to hold him guilty.

9 Mr. Deepak Thakre, the learned APP submitted that all these contentions were raised before the learned Sessions Judge and were properly considered by her. He submitted that the identity of the appellants was established satisfactorily, and the learned Sessions Judge committed no error in placing reliance on the testimony of the prosecution witnesses. According to him, the order of conviction as recorded by the learned Sessions Judge, is proper, legal and needs no interference.

10 That, the incident of dacoity, as spoken about by the prosecution witnesses indeed took place, cannot be doubted or

disputed. There is overwhelming evidence with respect to the fact that the incident of dacoity, as alleged by the prosecution, indeed took place. The question is only whether the appellants are (or any of them is) the culprits.

11 I have carefully examined the evidence of the prosecution witnesses, and the reasoning of the learned Sessions Judge, as reflected from the judgment with respect to the identity of the appellants as two of the culprits.

12 In his evidence, Dashrath Patel has described the incident. He did not identify the appellant Rinku (appellant in Criminal Appeal No.202/15) He has, however, identified the appellant Mohd.Kasif as one of the offenders. According to Dashrath Patel, the appellant Mohd.Kasif was amongst the two who had come to the shop initially to inquire whether an amount of Rs.1,00,000/- (Rupees One lakh) could be sent to Nagpur. Dashrath Patel initially said that he did not recollect the role played by accused Mohd.Kasif, but later on said, that he was holding a revolver. According to him, he had not seen the appellant Mohd.Kasif any time after the incident, and before he was seen by him in the Court. In the cross-examination, however,

he admitted that he did not recollect the roles of the accused persons properly. He also admitted that at the time of the incident, he was scared and was not able to understand properly as to what was going on.

13 The evidence of Shirke – panch in respect of the spot panchnama is not very significant and need not be discussed.

14 In his evidence, Pravin Mehta (PW 3) did not identify any of the appellants. He clearly said that he would not be able to identify any of the offenders. He, however, said that he had caught one of the offenders, and that the person caught by him was the one who had assaulted him on his hand with the revolver. He also says that the neighboring people gathered there, and the crowd so gathered, assaulted the said offender who had been caught. However, since he did not identify any of the appellants during his evidence, his evidence is of no value so far as establishing the identity of the appellants as the culprits is concerned.

15 The fourth witness - Bhailal Patel has also stated about the incident, and of his having seen the offenders. Bhailal also says that one of the offenders was caught, and that, he was

taken down and the crowd that gathered there, beat that person. However, as he did not identify any of the appellants as one of the culprits, and did not identify anyone as the one who had apprehended on the spot, his evidence also is of no value so far as establishing the identity of the appellants as the culprits is concerned.

16 The fifth witness Nikunj Waghela is also an employee working at the Rameshkumar Kantilal Angadiya Shop. He is an eye witness to the incident. He speaks about the incident and stated that at about 2.00 to 2.30 p.m, while he and others were present in the shop, two persons came to Dashrath (PW1), that then they went away and came back after some time along with three more persons. According to him, one out of the said three, who had come later on, pointed out a revolver at Dashrath and Vijay. That, the offenders gave threats of firing, should anybody make a sound. He also states about the offenders putting money from the 'Tijori' in the bag and then, one of them going away through the common passage between the Angadiya shop and the shop of Raj Garments. He then states that, Mangesh (PW 6) from Raj Garments then shouted and the offenders started running. That, one of them who was running from the front entry was

caught by one Thapa (PW 8) from Raj Garments and 'one trader'. He identified both the appellants. According to him, both were having revolvers, and both were giving threats by holding the revolvers. He claimed to have seen both the accused earlier during the Test Identification Parade, and of having identified them at that time. Though this witness Nikunj has claimed that he identified both the appellants as the culprits in a Test Identification Parade held earlier, obviously, he could not have identified the appellant Mohd. Kasif, in a Test Identification Parade, as admittedly, Mohd. Kasif was not placed in the Test Identification Parade, at all. (The prosecution case is that Mohd. Kasif was apprehended on the spot 'red handed', and that he was therefore not required to be placed and, in fact, was not placed in any Test Identification Parade.) In the cross-examination, he said that he did not know the name of the place where the Test Identification Parade was held. He corrected his previous statement in the further cross-examination which was taken *after recess*, and said that in the Test Identification Parade, he had identified only the appellant Rinku (Accused no.2) and not the appellant Mohd. Kasif. He said that the appellant Mohd. Kasif was already caught '*red-handed*', and that he had seen him in the Court only after the day of the incident.

17 The sixth witness Mangesh More is an employee working in the shop of Raj Garments. He was assaulted during the incident. On 3rd May 2012, at about 2.00 to 2.30 p.m, he and Thapa (PW 8) were having tea. He states about 4 – 5 persons having come to the Angadiya shop and one of them putting revolver on his head and a second assaulting him with the back side of the revolver as a result of which he started bleeding, felt giddy and collapsed. He also states that there was a scuffle, and Thapa (PW 8) and Pravin Mehta (PW 3) had caught one of the offenders i.e. the offender who had assaulted Mangesh. He also states of the police coming and the person who was caught being taken to police station. He identified the appellant Mohd. Kasif as the person by whom he was assaulted. Certain contradictions in his evidence and his statement recorded by the police during investigation under the provisions of section 161 of the Code of Criminal Procedure were brought on record in the cross-examination. His version in the examination-in-chief is that both the offenders seen by him were having revolver with them; and that, one put the revolver on his head and the second assaulted him on his head by giving a blow by the back side of the revolver. The contradiction between this evidence and his version in his

statement recorded by the police which is to the effect that 'there was one offender who was holding revolver in one hand and iron rod in another, and that, that person assaulted him on his head with an iron rod', has been brought on record and has been satisfactorily proved. He was unable to give any explanation in that regard. In the cross-examination, he further admitted that the incident of assault took place *within few seconds* before he could understand anything. This witness has not identified the appellant Rinku and was not called to attend the Test Identification Parade. Though this witness has stated that one of the offenders was caught and that that offender was taken to the police station, this does not appear to be based on his own knowledge or information. This witness has spoken about having lost consciousness on account of the blow given on his head and in the cross-examination, he said that he could not say as to in how much time he regained consciousness. He categorically admitted in the cross-examination that when he regained consciousness, he came to know that one person was caught, and taken away by the police.

18 The seventh witness Smt.Archana Koli, Executive Magistrate, is the one who held the Test Identification parade on 23rd July 2012 at the Arthur Road Jail. Her evidence makes an

interesting reading. In the examination-in-chief, she was not asked about the facts, but simply the memorandum of the Test Identification parade was got produced through her. Perhaps, the learned APP, who was in-charge of the matter, was satisfied with the statement of the witness that *the Memorandum panchnama had been signed by her and the panchas, and that the contents were correct*. This was not proper. All facts, except the contents of the documents or electronic records, are required to be proved by oral evidence (sec.59 of the Evidence Act). Here, the question was not what was recorded in the Memorandum Panchnama, but the question was, what had happened with regard to the Test Identification Parade, and what transpired during the parade. This was required to be proved by oral evidence. The Memorandum Panchnama is not a substantive piece of evidence and can be used only for corroborating or contradicting the maker or author of the said document. When Archana Koli – Executive Magistrate, was not asked anything about what had happened during the Test Identification Parade, the statements contained the panchnama cannot be read as if constituting evidence given by this witness in her examination-in-chief. Strangely, in the cross-examination, a suggestion was given to this witness to the effect that 'the identifying witness had not identified the accused no.1 (i.e. the

appellant Mohd. Kasif) before the witness (i.e. during the Test Identification Parade)' which was denied by her. Now, the Accused no.1 Mohd.Kasif was not placed in the Test Identification Parade at all, and as such, there was no occasion as ask such a question; and further, there was no occasion for the witness to make a denial of the fact that the accused no.1 was not identified by any witnesses. Anyway, this absurdity may be overlooked by believing it to be a clerical/typographical error in the notes of evidence, and believing that, perhaps, the reference is to the accused no.2 who was supposedly identified by the identifying witnesses in the Test Identification Parade.

19 The eighth witness Tilak Thapa was working in the shop of Raj Garments. It may be recalled that he and Mangesh More were drinking tea in the gallery behind the courier shop when two unknown persons – said to be the present appellants – came there. According to Thapa (PW 8), one of the two was holding a revolver in one hand, and an iron rod in the other hand, and that, that person assaulted Mangesh with the iron rod, forcefully, on his head. According to Thapa (PW 8), the other person was also having revolver with him. When Mangesh sustained a bleeding injury and starting shouting, both the said

persons ran into the courier shop where Thapa (PW 8) followed them. Thapa caught the person who had assaulted Mangesh on his head and prevented him from running away. There was some scuffle between that person and Thapa, and that, that person succeeded in escaping. Thapa then says that after the person had escaped, the crowd that had gathered outside, had caught hold of him. According to Thapa, that person while running away had fired a shot from his revolver and one of the persons from the courier shop had snatched the revolver from the hands of the said offender. It is seen that this evidence of Thapa was recorded on 29th June 2013 in the absence of the accused, and when the question of identification arose, the matter was adjourned to 1st July 2013. When Thapa's evidence was recorded on 1st July 2013, the appellants were present before the Court and Thapa then identified appellant Mohd. Kasif as the one who had assaulted Mangesh with an iron rod and the appellant Rinku as the person who was accompanying him at the time of the incident. It must be observed that recording evidence in the absence of the accused persons, was not proper. The roznama or the other record does not show that the accused persons had consented for recording of the evidence in their absence. Apparently, the presence of the accused persons before the trial Court was felt necessary by the

learned Sessions Judge only when they were required to be shown to the witnesses for establishing their identity; and not when evidence on other aspects was being recorded. This was not in accordance with law. Section 273 of the Code of Criminal Procedure clearly lays down that **all** evidence taken in the course of the trial, shall be taken in the presence of the accused, or when his personal attendance is dispensed with, in the presence of his pleader. In this case, there is nothing to indicate that the accused had waived their right to have the evidence recorded in their absence. Anyway, the matter may be left at that as no objection for adopting such a procedure appears to have been taken by the accused persons before the trial Court.

Two factors about the evidence of this witness need to be noted. The first is that his statement was recorded only on 25th May 2012. The second aspect is that he was not called to identify the suspects in the Test Identification Parade at all.

20 The ninth witness Dilip Dengade who was, at the material time, attached to L.T. Marg Police Station as PSI, is the one who had recorded the First Information Report. His evidence shows that he came to know from Dashrath (PW 1) that 'the injured' was already taken to G.T. Hospital. It is not clear from the

notes of evidence as to whom the witness was referring, whether the injured appellant, or Mangesh More, but from the context, it appears that he was referring to Mangesh More (PW 6). The rexin bag containing money was found by him on the spot. He collected the same as well as (3) three live cartridges and two (2) empties that were found on the spot. He also seized the Digital Video Recorder (DVR) from the spot in which recording by CCTV camera was made. He also seized the silver colour revolver which was found in the courier shop. It is revealed in his cross-examination that the First Information Report was registered at 7.40 p.m. He initially attempted to deny that the First Information Report was registered at about 7.30 p.m, but when the endorsement thereon was shown to him, he admitted that it was registered at 7.40 p.m. His case seems to be that the FIR was already recorded, but that it was registered late.

21 The evidence of the 10th witness – Dilip Kulkarni – Inspector of Police who has completed the investigation and has filed a charge-sheet in the matter shows that on 29th May 2012, he drew a spot panchnama (Exhibit-31) under which a cover of bullet was seized. That, he made arrangements for holding a Test Identification Parade on 23rd July 2012.

22 The evidence of the eleventh and last witness Bhavesh Nikam, Scientific Officer shows that on 30th May 2012, he received a parcel sent by the L.T. Marg Police Station to the Forensic Science Laboratory. That, there was a DVR, hard-disk of Seagate Company, and one empty hard-disk in the said parcel. He created the image of that hard-disk which was sent for examination. He then created one restored image of the same hard-disk. He connected the restored hard-disk to DVR and took the back-up. After examination, an analysis of the DVR, hard disk etc., he submitted his report which was tendered in evidence (Exhibit-46). In the cross-examination he said that, in the DVR there is timer which could be manually edited or altered, and that changes could be made only in respect of the time settings and the date.

23 The first point needing determination is whether the appellant Mohd. Kasif (appellant in Criminal Appeal No.1084/13) was indeed apprehended on, or near, the spot, and was handed over to the police. It is obvious that in such a case, there would be no scope to challenge the evidence of the identity of the said appellant as one of the culprit. The question of the reliability of the identification evidence arises only in case of offenders who

make good their escape after committing the offence, and are apprehended later on. It would be, therefore, proper now to focus on the prosecution evidence from the point of view of ascertaining whether it satisfactorily establishes the fact of the appellant Mohd. Kasif was one of the dacoits, who was apprehended on the spot, even at the cost of some repetition of the discussion of the evidence of some of the prosecution witnesses, keeping in mind the importance of this aspect.

24 Dashrath Patel (PW1) does state about one of the offenders having been caught by 'the neighbours'. According to him, the neighbours came and succeeded in catching one of the offenders and the others ran away. The way Dashrath Patel (PW1) has narrated this incidence of apprehension creates a doubt as to whether the apprehension of one of the offenders 'by neighbours' was actually seen or witnessed by him. Anyway, his evidence makes it very clear that the apprehended offender was not or could not be handed over to the police by him or by any persons in his presence. He has admitted in the cross-examination that the person was taken by the police from the road and the police did not enter inside the courier shop, at that time. According to him, the police did not even enter the building, at that time. He

admitted that he *came to know* from 'the neighbours' that police had come and had taken away 'one person'.

25 Pravin Mehta (PW3) also speaks of one of the offenders being caught by him. According to him, he was the one, who had assaulted him (Pravin) with a revolver. He also says that the crowd assaulted the said offender (who had been caught). However, he does not state as to what happened to that offender and whether he was handed over to the police. *Anyway, he does not identify any of the appellants as the offender, who was caught by him.*

26 Bhailal Patel (PW4) also speaks of one of the offenders being apprehended by 'neighboring shop person' and Nikunj Waghela (PW5). He also does not state as to what happened to the person, who had apprehended, except that that person was taken down and that the crowd gathered there and beat him. Though, he speaks of police coming, he does not state that that person was handed over to police. *Anyway, even he does not identify any of the appellants as the person, who had apprehended by 'the neighboring shop person' and Nikunj (PW5).*

27 Nikunj Waghela (PW5) also states that one of the offenders, who was running from the front entry, was caught by one Thapa (PW8) from Raj Garment and 'one Trader'. He, however, does not claim that any of the appellants was the one, who was apprehended on the spot. He also does not state that happened to the offender, who was caught by Thapa (PW8) and 'one trader'.

28 Mangesh More (PW6), an employee of the Raj Garments also speaks of Thapa (PW8) and Pravin (PW3) catching one of the offenders. He does say that the person who was caught was taken to police station; and has identified the appellant Mohd. Kasif as the same person. However, as far as taking of the apprehended offender to the police is concerned, it is not within the knowledge of Mangesh. In the cross-examination, he admitted that because of the assault, he had lost consciousness and that, when he regained consciousness, he *came to know* that one person was caught and taken away by the appellants.

29 Thapa (PW8), an employee of Raj Garment also speaks of one of the offenders being apprehended by him. Thapa's evidence makes it clear that the person apprehended escaped and

was later apprehended by a mob of persons, who had gathered there. Thapa also does not state what happened to the person, who was apprehended by the mob.

30 The evidence of API Dilip Dengade (PW9) shows that at about 3.00 p.m., he received a call from a mobile phone that one person was injured and one was assaulted at Hemjamata Building and that thereupon, he immediately went to the spot. His evidence shows that after registering the crime report on the basis of information given by Dashrath Patel, he went to the hospital and saw the appellant Mohd. Kasif, who had been injured. Thus, he had not taken the custody of appellant Mohd. Kasif from any of the witnesses, or from any members of the mob, who is/are supposed to have apprehended him.

31 It is at once clear that though the appellant Mohd. Kasif is said to have been apprehended on the spot, there is absolutely no evidence to show that. On the contrary, the evidence indicates that the offender who was apprehended by Pravin Mehta (PW 3) and Tilak Thapa (PW 8) managed to escape. It is true that Pravin Mehta (PW 3), Mangesh More (PW 6) and Thapa (PW 8) speak of apprehending one of the offenders and

indeed one of them was possibly caught, but he managed to escape. The case is that after having escaped, he was again caught by a mob of persons that had gathered outside. The case is that the said offender was assaulted by the mob and was handed over to the police. If the evidence with respect to the apprehension of the appellant Mohd. Kasif is carefully seen, it is revealed that no person or persons from the mob who are supposed to have apprehended Mohd. Kasif and handed him over to the police have been examined. It is also clear that there is no evidence of any police officer or policeman who claims to have taken the custody of the appellant Mohd. Kasif from any members of public. The evidence shows that Mohd. Kasif was taken to hospital, and was got admitted there as he had been badly assaulted, but who had taken him to the hospital, is not disclosed by the evidence on record. Neither Pravin Mehta (PW 3), nor Mangesh More (PW 6), nor Thapa (PW 8) speak of having actually seen the appellant Mohd. Kasif being apprehended by any mob or members of public. None of them had seen even subsequently as to who had been caught and assaulted by the mob.

32 Thus, there is actually no evidence to show that appellant Mohd. Kasif was apprehended by a mob and was taken to

hospital and was handed over to the police. The prosecution witnesses, who are speaking of the apprehension of one of the offenders by the mob, are not saying so on the basis of their own knowledge. In spite of this, that appellant Mohd. Kasif was caught by a mob, or members of public, was beaten, was handed over to the police / taken to hospital, must be held to have been proved because appellant Mohd. Kasif himself admits of having been caught by the mob of persons while on road and / of being beaten by the mob requiring his hospitalization. However, even in such a case, it was necessary for the prosecution to have established that the offender who was apprehended by some of the prosecution witnesses inside the Hemjamata Building, and who managed to escape and run away, *was the same person that had been apprehended by the mob.* There is no such evidence. At best, such an inference could have been drawn, *had there been evidence about the precise time when and/or the place where, appellant Mohd. Kasif was apprehended.* However, since, there has been no evidence at all, in that regard, all that can be said is this :- i) that one of the offenders was apprehended by some of the prosecution witnesses, but he escaped; and ii) that, **one person** (who is proved to be the appellant Mohd. Kasif only because he admits it) was apprehended by a mob of persons (all unknown). The inference of identity of

the person who was apprehended inside the Hemjamata Building by some of the prosecution witnesses as the same person who was apprehended by the mob, cannot be drawn in the absence of any evidence whatsoever, in that regard. As aforesaid, there is not even circumstantial evidence in that regard, which would have been of the time and place, where appellant Mohd. Kasif was apprehended by a mob of persons (all unknown).

33 Since there is no evidence to indicate that the offender who was accosted and caught by the prosecution witnesses inside the Hemjamata building, and who had managed to escape, was the same person who was apprehended by the mob, handed over to the police and taken to the hospital, it cannot be accepted that the case against the appellant Mohd. Kasif has to be judged on the basis that he was apprehended on the spot. Thus, the theory of the appellant - Mohd. Kasif having been apprehended on the spot, and therefore, there being no doubt about his identity, has to be discarded; and the question of his guilt is to be decided on the basis of the reliability of the evidence of his identification as one of the offenders.

34 The evidence against the appellant Rinku is also consisting only of his identification as one of the offenders made by a number of witnesses. However, there is a difference in the case of the appellant Mohd. Kasif and the appellant Rinku with respect to the identification of evidence, inasmuch as while Rinku was placed in a Test Identification Parade where he is alleged to have been identified by prosecution witnesses, Mohd. Kasif was admittedly not placed in any Test Identification Parade. It is also undisputed that Mohd. Kasif was not shown to any of the prosecution witnesses after his apprehension by a mob of persons and after he was handed over to the police. *Thus, the evidence against Mohd. Kasif lies only in his identification as one of the culprits made by the identifying witnesses for the first time in Court.*

35 It will not be out of place to discuss here the principles governing the appreciation of identification evidence. Experience and judicial pronouncements indicate that identification of persons not previously known to a witness, for the first time in Court, is considered as a weak piece of evidence, and that, errors often occur in identification evidence. Glanville Williams in his celebrated book '**Proof of Guilt**' recounts that in England and America, most of the spectacular miscarriages (of

justice) have been due to wrong identification of the defendant (accused) as the culprit. The learned author has quoted a number of other learned authors and scholars who hold the view that 'evidence as to identity based on personal impressions is, perhaps, of all classes of evidence, the least to be relied upon and that therefore, unless supported by other facts an unsafe basis for holding a man guilty.' (**Proof of Guilt** by Glanville Williams, Third Edition, published by Steven & Sons Ltd, 1963) (Pages 106 to 124)

36 Since such identification evidence would be of a weak nature and since it would be hazardous to base a conviction solely on such identification, the Investigating Agencies usually hold the Test Identification Parades in the course of investigation. Holding of such Test Identification Parades serves a dual purpose. First, if the suspect is identified by a witness from amongst a number of persons, it provides an assurance to the Investigating Agency that the investigation is proceeding on proper lines. Secondly, when the identifying witnesses would later on identify the culprit in the Court, the previous identification of the culprit made by him during a Test Identification Parade would serve as corroboration to the subsequent identification in Court. Thus, though substantive evidence of identification lies in the identification of the culprit

made by a witness in a Court of Law, the identification of the culprit/suspect, made previously by that witness in a Test Identification Parade, serves as corroboration to the substantive evidence of identification.

37 It is in this background that the evidence of identification against both the appellant, needs to be examined. The appellant Mohd. Kasif, it may be recalled, was not placed in Test Identification Parade at all, (because the case of the Investigating Agency was that he had been apprehended on the spot which aspect is not satisfactorily proved). The question is whether the evidence of the witnesses who have identified the appellant Mohd. Kasif as one of the culprits, for the first time during their evidence in Court, can be safely relied upon.

38 Mohd. Kasif was identified during the trial by four witnesses – Dashrath Patel (PW1), Nikunj Waghela (PW 5), Mangesh More (PW 6) and Tilak Thapa (PW 8).

39 Dashrath Patel (PW 1) has not been able to state as to what role was played by the appellant Mohd. Kasif in the incident. He has attributed the role of putting a gun on his head to one of the offenders, and of putting the gun on the head of Vijay Patel

(who was not examined as a witness) to another. A third was attributed the role of showing the gun to other staff. He also said that one of the offenders went back side, and that, that person had a scuffle with Mangesh More (PW 6), and that, that person had assaulted More (PW 6). Dashrath Patel (PW 1) has given the role of taking the rexin bag, but leaving it there itself to one of the offenders. However, he does not say which of these acts, was or were performed by the appellant Mohd. Kasif. He categorically states that he is not able to recollect the role played by the appellant Mohd.Kasif in the incident. The only details about the appellant's actions that he could give is that the appellant was amongst the two who had come initially (and not among the three who came later on).

40 PW 3 – Pravin Mehta, it may be recalled, has not identified any of the appellants. Same is the case with Bhaidas Patel (PW 4) who also said that he would not be able to identify any of the offenders.

41 Waghela (PW 5) had also witnessed the incident of dacoity. He also says that initially only two of the offenders came, went out and then back after some time along with three more

persons. According to him, one of the offenders who was running from the front entry was caught by Thapa (PW 8) and 'one trader'. He has identified the appellant Mohd. Kasif as well as the appellant Rinku, and had said that both of them were having revolvers with them and were giving threats by revolver. It may be recalled that he claimed to have identified both the appellants in a Test Identification Parade held earlier. According to him, appellant Mohd. Kasif as well as appellant Rinku, both were amongst the three persons who had come later on. Now, it may be recalled that according to Dashrath Patel (PW 1), the appellant Mohd. Kasif was among the two who had initially come. Anyway, what is significant is that the witness is obviously wrong when he claims to have identified the appellant Mohd. Kasif in a Test Identification Parade, as Mohd. Kasif was not placed in a Test Identification Parade, at all. Such a glaring mistake – saying that he identified two when he could have identified only one – cannot be easily ignored. Though the witness later on (after recess) corrected it by saying that he had identified only one person and had made a mistake earlier in stating that he had identified two, the doubt about the reliability of this witness cannot be resolved. It is also significant that according to this witness, after the Test Identification Parade, he came to the police station, and that all

the writings were done there. He also admits that *in the Test Identification Parade, police had come* – though it was supposedly held in prison. What is further significant is that he could not state that the Test Identification Parade was held in prison and said that he *'did not know the name of the place where the Test Identification Parade was held'*. Now, if the Test Identification Parade was held in prison, and if the witness had really attended the same, it would not be possible for him to 'not know the name of the place'. Prison is such a place, the entry inside it cannot easily be forgotten. Forgetting the 'name of the place' when it was held in prison, cannot be accepted at all. Considering the infirmities in his evidence it is doubtful whether he had indeed taken part in a Test Identification Parade. *Not knowing the place where the Test Identification Parade was held; claiming that the identified two persons in the Test Identification Parade i.e. both the appellants (though he later on corrected himself); stating that the police were present in the Test Identification Parade; and that the writings (relating to the proceedings of Test Identification Parade) were done at the police station after the parade, when considered together, are sufficient to cast a doubt about the witness, indeed, having participated in a Test Identification Parade.*

42 Mangesh More (PW 6) is another who had identified the appellant Mohd. Kasif as the person who assaulted him and who was apprehended by Pravin Mehta (PW 3) and Thapa (PW 8). There are some discrepancies in his evidence about the happenings of the incident when the same is compared with that of the other witnesses. *In the cross-examination, he admitted that the assault had taken place within some seconds before he could understand anything, and that, he had lost consciousness as a result of the assault.*

43 Thapa (PW 8) has also identified both the appellants as the offenders. According to him, the appellant Mohd. Kasif is the one who had assaulted Mangesh (PW 6) with an iron rod. It may be recalled that the statement of this witness was recorded by the police only on 24th May 2012 i.e. after the arrest of the appellant Rinku which was on 22nd May 2012. He was in Mumbai till 14th May 2012, but still his statement was not recorded earlier. He was also not called to identify the offenders in the Test Identification Parade.

44 In my opinion, the evidence of the identity of the appellant Mohd. Kasif though given by four persons, cannot be

safely accepted. There are a number of reasons for taking this view. The first is that the prosecution case – and also that of the witnesses – is that appellant Mohd. Kasif was caught on the spot. It has already been observed that though one of the offenders might have been caught by the prosecution witnesses in the passage outside the courier shop, still, he had managed to escape. A person – believed to be one of the offenders – was caught by the mob that had assembled on the road. None of the witnesses had seen whom the mob had apprehended. None of the witnesses had seen the person – believed to be one of the offenders – after he had been apprehended by the mob. None of the witnesses had seen the mob handing over the apprehended offenders to the police. The appellant Mohd. Kasif does not dispute that he was apprehended by the mob that had gathered on the road, was beaten, was handed over to the police and taken to the hospital. *Since the witnesses who are identifying the appellant Mohd. Kasif obviously know and believe that Mohd. Kasif was apprehended by the mob that had gathered on the road, and since that also believe that the person who was apprehended by the mob was the one who was from amongst the offenders, they would automatically think that the appellant Mohd. Kasif is the one who had been caught by them, but who managed to escape. It cannot be overlooked in this context*

that Dashrath Patel (PW 1) and Waghela (PW 5) actually could not have witnessed the incident of apprehension of one of the offenders as the apprehension took place while one of the offenders was going away from the passage between the various shops on the second floor of Hemjamata building. Pravin Mehta was in his imitation jewellery shop at that time, and according to him, it is only on hearing the cries of Mangesh More (PW 6) that he went in the passage and saw the assailant. Even Waghela (PW 5) states that the offenders had called him also inside the shop, and that the apprehension of one of them took place after one of them had gone outside through the common passage. Mangesh More (PW 6) doesn't speak of anybody else except Pravin Mehta (PW 3) and Thapa (PW 8) coming there, after the incident of assault, and he does not speak about the presence of either Dashrath Patel (PW 1) or Waghela (PW 5) in the passage after the incident and before the said offender managed to escape from there. Even Thapa (PW 8) does not state about Dashrath Patel (PW 1) or Waghela (PW 5) coming to the passage. As a matter of fact, Thapa (PW 8) does not speak even about Pravin Mehta (PW 3) coming there, and claims that he alone had tried to apprehend one of the offenders who had assaulted Mangesh (PW 6).

45 A careful consideration of the evidence of Dashrath Patel (PW 1), Pravin Mehta (PW 3), Waghela (PW 5), Mangesh (PW 6) and Thapa (PW 8) shows that none of them is very clear as to what exactly happened. There are some variations in their versions, and though some of them can be termed as 'natural' or of not of much consequence, there appears to be a doubt as to who was the one who was caught in the common passage between the shops. It is evident that the witnesses are saying that he was the appellant Mohd.Kasif because all of them know that Mohd. Kasif was the one who was apprehended by the mob, was beaten and was taken to hospital. Instead of testing the reliability of the claim of the witnesses about the identity of the appellant Mohd. Kasif as the one who had assaulted Mangesh (PW 6) by holding a Test Identification Parade, the Investigating Officer attempted to project the case to be of a person who was caught 'red-handed' on the spot. When appellant Mohd. Kasif was admittedly not previously known to any of the prosecution witnesses, when he was not placed in a Test Identification Parade; when the best evidence against him – which could have been of the persons apprehending him and handing him over to the police and of the policeman/policemen who had obtained his custody from the

members of the public, was not adduced; when the witnesses are not uniform as to the role played by him in the incident of dacoity and evidently had no sufficient opportunity and/or a proper frame of mind to observe the offenders; and when there is absolutely no other evidence against the appellant to connect him with the alleged offences, it is unsafe to rely on the identification evidence to hold that Mohd.Kasif was one of the offenders.

46 So far as the appellant Rinku is concerned, he was apprehended from his native place on 25th May 2012 and arrested. There was no recovery of any weapon or any part of the robbed property from, or at his instance. Thus, the case against him also solely depends on the reliability of his identification as one of the offenders made by the prosecution witnesses.

47 If the evidence in that regard is analyzed, it is found that except Waghela (PW 5) and Thapa (PW 8), no other witness has identified the appellant Rinku. Dashrath Patel (PW 1) has identified only the appellant Mohd.Kasif. Pravin Mehta and Bhaidas Patel have identified none. Mangesh (PW 6) has identified only the appellant Mohd.Kasif. Thus, out of the two witnesses Waghela (PW 5) and Thapa (PW 8), Waghela (PW 5) is

the only one who has identified the appellant Rinku in the Test Identification Parade. Thapa (PW 8) was not called to take part in the Test Identification Parade at all.

48 Thapa (PW 8), while identifying the appellant Rinku, has given him the role of having accompanied another offender – said to be the appellant Mohd. Kasif. It may be recalled that Thapa's statement was recorded by the police much later i.e. after apprehension of the appellant Rinku. It was recorded on 25th May 2012, and there is no proper or satisfactory explanation about this delay in recording the statement. There is, further, no explanation of his not having been called in the Test Identification Parade for identifying the offenders. Thapa's evidence, keeping in mind the delayed recording of his statement under section 161 of the Code of Criminal Procedure, and the same not being corroborated by the evidence of identification in a Test Identification Parade, cannot be safely accepted to establish the identity of the appellant Rinku as one of the dacoits.

49 Waghela (PW 5) has, undoubtedly, claimed to have identified appellant Rinku also in the Test Identification Parade previously held, but his evidence, as discussed earlier, suffers from

a number of major infirmities. He claims to have identified both the appellants in a Test Identification Parade, when admittedly, only one of them was placed in the Parade and this statement of Waghela is obviously incorrect, and is likely to be a result of the anxiety to support the prosecution case. When, as per the prosecution case, the Test Identification Parade was held in a prison that Waghela (PW 5) should say that he did not know the 'name of the place' where Test Identification Parade was held, is surprising as a prison can be easily distinguished from other places. His claims that 'the police were present in the Test Identification Parade', and that 'the writings were done at the police station' also demolish the value of the Test Identification Parade.

50 The Test Identification Parade was held on 23rd July 2012 which is after a gap of more than two months from the apprehension of the appellant Rinku. There is no satisfactory explanation as to the delay in holding the Test Identification Parade.

51 There is also no evidence to show that during the period from his apprehension, and till the Test Identification Parade was held, the Investigating Agency had taken precautions to keep

the face of the appellant Rinku covered, so as to ensure that he is not seen by anyone. It is well settled that it is for the prosecution to assert that such precautions, were taken, in case the prosecution intends to derive support to the identification made in the Court by the evidence of the previous identification in the Test Identification Parade.

52 In my opinion, neither the evidence of Thapa (PW 8) about the identity of appellant Rinku – which is not supported by a previous identification of the said appellant in a Test Identification Parade – (for which there is no explanation), nor the evidence of Waghela (PW 5) who does not seem to be a reliable witness – at any rate, not *wholly reliable* – can be safely accepted, particularly because there are also serious doubts about a proper Test Identification Parade having been held, to conclude that the appellant Rinku was one of the offenders.

53 I have carefully gone through the impugned judgment. The learned Sessions Judge *did* notice the discrepancies in the prosecution evidence, but still found the evidence acceptable. The learned Judge observed in paragraph no.31 of the impugned judgment as follows :-

“..... about the identification of accused no.1 there can hardly be any iota of doubt, not only because he was caught hold of at the spot red-handed and handed over to the police and after being admitted to hospital but also, because he has been categorically identified by the four witnesses whose presence at the spot is proved beyond realm of dispute and whose presence at the spot is but natural. Admittedly as the accused no.1 was very much stranger to the witnesses, there is no reason for them to falsely implicate the accused in the case.

54 As regards the accused no.2 (appellant Rinku), the learned Sessions Judge observed as follows :-

“..... there is evidence of PW 6 Mangesh More, PW 8 Tilak Thapa and most importantly PW 5 Nikunj Waghela who has identified him not only at the time of trial in the Court but also in the Test Identification Parade. Again the evidence of these three

witnesses need not be doubted. They were very much present at the spot and one of them – Mangesh More was also injured in the incident. Needless to say that they had sufficient time to observe the accused persons and no reason at all to implicate accused no.2 falsely in the case.

55 These observations made by the learned Sessions Judge do not appear to be sound. As discussed earlier, the appellant Mohd. Kasif cannot be treated as an offender who is caught on the spot 'red-handed'. The offender who had been caught by the prosecution witnesses had escaped, and was believed to be the same who had subsequently been caught on road by the mob, None of the witnesses who had caught him, had seen who was actually being caught, or had been caught by the mob. It was easy to ascertain this from the evidence of police witnesses, but the same was not done. Therefore to treat the case of appellant Mohd. Kasif on the basis that he was caught on the spot, was not correct. As regards the appellant Rinku, the learned Sessions Judge did not take into consideration that Mangesh (PW 6) and Thapa (PW 8) had not at all been called to identify the

offender in the Test Identification Parade, and no reason for this failure on the part of the Investigating Agency was given. When the question of unreliability of the evidence of the identification in the Test Identification Parade was raised, the learned Sessions Judge declined to give any importance to that aspect by observing that the evidence of Test Identification Parade is only supporting evidence to be used for corroborating, and that the substantive evidence is the identification of the culprit in the Court. What the learned Sessions Judge overlooked is that in the absence of corroborating evidence, the question of accepting the substantive evidence, would need a more careful and thorough consideration. The learned Sessions Judge also observed that the scuffle between the witnesses who attempted to apprehend the appellant Mohd. Kasif must have taken place for about 10 – 15 minutes, which observation is without any basis whatsoever. If the account of the incident as given by the witnesses is seen, it is clear that the incident lasted for a very short time. In fact, the whole of the facts that are found in the prosecution case, are not witnessed by any single witness. The estimate of time, as given by the learned Sessions Judge, does not seem to be logically proper, but in any case, in the absence of any evidence, such a conclusion, on the basis of which a further conclusion – that the witnesses had

sufficient time to observe the culprit – was drawn, ought not to have been arrived at.

56 Regarding the aspect of the delayed holding of the Test Identification Parade, the learned Sessions Judge appears to have misread the evidence. She has observed (in para 58 of the impugned judgment) that the Test Identification Parade was held on 23rd May 2012. She observed that the accused no.2 was brought from his native place and arrested on 22nd May 2012. She observed that since the Test Identification Parade was held on 23rd May 2007, it cannot be said that there was any delay in holding Test Identification Parade. Actually, the Test Identification Parade was held on 23rd July 2012, and there is no confusion in that regard. It is an admitted position and the witnesses have said so. This fact went unnoticed by the learned Sessions Judge who thought that the Test Identification Parade had been promptly held on the apprehension of the appellant Rinku. The possibility of the learned Sessions Judge having come to a conclusion about the reliability of the identification evidence, having been influenced by a belief that the Test Identification Parade was held on 23rd May 2012 is apparent.

57 The emphasis placed by the learned Sessions Judge on *the witnesses having no enmity with the appellants so as to falsely implicate them*, as a factor for placing implicit reliance on their evidence, is not sound and in accordance with the well settled principles. Moreover, the possibility that is required to be ruled out is not only the possibility of the witnesses deliberately telling lies with the object of falsely implicating the accused persons, but also the possibility of their making a mistake in the matter of identification. Evidence of identity based on personal impressions is recognized to be a weak kind of evidence and ordinarily, unless supported by other facts, is treated as an unsafe basis for holding an accused guilty. In **Harinath and Anr. Vs. State of Uttar Pradesh**¹ Their Lordships had an occasion to discuss the principles governing the evidence of identification. Their Lordships referred to Prof. Borchard's '*Convicting the Innocent*', and observed that it records several criminal convictions in which the accused was subsequently proved innocent and that the major source of error was to be found in the identification of the accused by the victim of the crime. Their Lordships quoted the following from the said book :-

1 1988 1 SCC 14

“The emotional balance of the victim or eye-witness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the accused personally - the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the accused. [Para.17 of the reported Judgment (emphasis supplied)]

Thus, that the witnesses had no enmity against the appellants, is, by itself, not a ground for the acceptability of their evidence as to the identity – or for that matter – for accepting any other type of evidence also.

58 It is not that the identifying witnesses can be said to be deliberately lying, and it is also correct that the discrepancies in

their evidence were bound to occur considering the suddenness of the incident and the fear generated in the mind of the witnesses at that time. However, that itself indicates that the account given by the witnesses might not be reliable, and therefore, the Courts ought to look for corroboration. In appreciating the evidence, one of the sound principles is that whether better evidence of the facts was available, could have been given; and whether, the same was still not given. In this case, indeed it seems that the appellant Mohd. Kasif was caught by a mob who had assembled on the road. It is also clear and undisputed that he was assaulted by the mob and was required to be hospitalized. It was open for the prosecution to have examined the persons who actually apprehended Mohd.Kasif which would have thrown light on where and under what circumstances he was apprehended. The least that could have been done was to examine the policeman who had taken him to the hospital. It was also open for the prosecution to have produced the 'history' behind the assault which, undoubtedly, is taken by the Doctors in all medico legal cases before admitting a patient. All this is not given in evidence, and consequently, where and under what circumstances appellant Mohd. Kasif was caught, is not at all clear.

59 Further, CCTV cameras had been installed in the shop and the footage of the CCTV camera was also collected in the course of investigation. A copy of the same was, however, not supplied to the accused persons, and this CCTV footage was not played during the recording of evidence and in the presence of the witnesses. This CCTV footage – if was clear – would have been quite clinching for fixing the identity of the culprits. The learned Sessions Judge observed that the prosecution did try to place reliance on the CCTV footage, but the CCTV footage was produced at the fag end of the trial, and that the accused did not get any opportunity to cross-examine the prosecution witnesses on this aspect. The learned Sessions Judge observed that it was necessary for the prosecution to get the CCTV footage proved properly. She observed that the persons found present or involved in the CCTV footage should be specifically proved by the maker, or by any person who was present at the time of the incident. Observing that none of the witnesses examined by the prosecution was shown this CCTV footage prior to the trial or even during the trial, and that, therefore, the contents of the CCTV footage were not properly proved, she did not admit the same in evidence. She, however, came to the conclusion that even without the evidence of CCTV footage, there was other evidence on record which was

sufficient to prove the involvement of the appellants in the incident.

60 In my opinion, the approach of the learned Sessions Judge in this regard, was not quite proper. The evidence against the appellants was only of their identification as the culprits, which evidence, by itself was not convincing. It was not supported by a previous Test Identification Parade in case of appellant Mohd. Kasif. In case of appellant Rinku, though it was supported by a Test Identification Parade, it having been held after a period of two months from his arrest, and there being no evidence – or even a claim – that after his arrest the appellant Rinku was kept under a veil, the evidence of identification in the Test Identification Parade made by a solitary witness, was hardly sufficient to corroborate the substantive evidence of the identity. It was, therefore, absolutely necessary to have the CCTV footage proved, if necessary, by recalling the witnesses, and giving an opportunity to the appellants to cross-examine these witnesses. When such crucial evidence was kept out of consideration, this was not a fit case to rely on the evidence of identification of the appellants – which was the only evidence against them – to hold that the charge against them was satisfactorily proved.

61 The Courts have to beware of being misled by half-truths, or individually weak/defective pieces of evidence. While considering the reliability and acceptability of the prosecution evidence in a given case, the prosecution case should be viewed as a whole. Among other things, the quality of the investigation as a whole would be extremely relevant in that context. In this case, there are some obvious lacunae in the prosecution case. Since not much turns on them, they may be mentioned here, only briefly. In the course of investigation, a revolver, three cartridges and two empties were recovered from the spot. From where the cartridges came, is not clear. There is a reference in the prosecution evidence, of somebody having snatched the revolver from the hands of one of the offenders, but there is nothing further than that. Moreover, the case is that one of the offenders fired *one* shot by his revolver *while running away*. When there is reference to a single shot being fired, finding of two empties on the scene of offence is mysterious. Certainly, this does not create a doubt about the articles in question having indeed been seized, but it creates a doubt about the manner in which the events have happened. Moreover, if the offender who fired a shot from his revolver while running away, is the same who was apprehended by the mob, one

would expect the revolver with him, and no revolver was found with the appellant Mohd.Kasif. Instead, a revolver was found inside the shop. Evidently, some part of the prosecution case has been suppressed from the Court. Also, there is a delayed recording of FIR and delayed registration of crime. In the background of the fact that one of the supposed offender was apprehended immediately after the incident on the road and that, the police had visited the scene of offence within a few minutes from the incident, the gap of about more than four hours to register the offence is inexplicable. The possibility of this time having been utilized to mould the prosecution case suitably, in the light of apprehension of appellant Mohd. Kasif (who was believed to be one of the offenders) cannot be ruled out. The history of the incident, as must have been recorded by the Medical Officer while admitting the appellant Mohd. Kasif in the hospital, was also suppressed. The time when the appellant Mohd. Kasif was taken to the hospital, has also not been disclosed, though the hospital record in that regard would have been available. All these aspects when considered together, along with the possible and well recognized hazards in accepting the identification evidence of the type as has been led in the present case, render it extremely unsafe to hold any of the appellants guilty.

62 In my opinion, this was a case where the appellants were certainly entitled to the benefit of reasonable doubt which arises on the evidence of the prosecution considered as a whole. They, therefore, should have been given benefit of that doubt, and should have been acquitted.

63 Before parting, it may be observed that the learned Sessions Judge has convicted and sentenced the appellant Mohd. Kasif of an offence punishable under section 395 IPC, and separately also for an offence punishable under section 397 of the IPC. Section 397 of the IPC does not create a separate or distinct offence. It merely provides for punishment to an aggravated form of robbery or dacoity. In fact, the proper charge against the appellant Mohd.Kasif would have been of an offence punishable under section 395 of the IPC read with section 397 of the IPC. Sentencing the appellant Mohd.Kasif of an offence punishable under section 395 of the IPC, and also separately of an offence punishable under section 397, simplicitor, was not proper.

64 Appeals are allowed.

65 The impugned judgment and order of conviction of the appellants is set aside.

66 The appellants are acquitted.

67 Each of them shall be set at liberty forthwith, unless required to be detained in some other case.

68 Fine, if paid be refunded to them respectively.

69 A copy of this judgment be forwarded to the appellants in prison.

70 Appeals are disposed of.

(ABHAY M.THIPSAY, J)

CERTIFICATE

**Certified to be true and correct copy of the original signed
Judgment/Order.**