

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 159 OF 1994

Siraj Shahabuddin Khan aged)
about 33 years of Bombay Indian Inhabitant)
residing at Room No.2, Thakurwadi,)
Prabhakar Chawl, Dahisar (East),)
Bombay – 400 068)
(presently lodged in Jail at Yerwada)
Central Jail, Pune).).. Appellant

Versus (Orig. Accused No.2)
The State of Maharashtra)
through Dahisar Police Station, S.V.Road,)
Dahisar (E), Bombay 400 068.).. Respondent

WITH
CRIMINAL APPEAL NO. 129 OF 1994

1) Suresh Tulsiram Shinde)
2) Muneer Isak Patel).. APPELLANTS

vs. (Orig. Accused Nos. 1 & 3
respectively)
The State of Maharashtra .. Respondent

Mr. Girish Kulkarni a/w Mr. M.G.Shukla a/w Ms. Mrunmai Kulkarni for
the appellant in Appeal No.159 of 1994.
Mr. R.N.Mishra for appellant in Appeal No.129 of 1994.
Ms. A.A.Mane, APP, for the State.

CORAM: SMT. SADHANA S.JADHAV, J.
JUDGMENT RESERVED ON: 19.11.2015
JUDGMENT PRONOUNCED ON:06.04.2016.

JUDGMENT :

The appellants in Criminal Appeal No.129 of 1994 are the

original accused Nos.1 and 3 in Sessions Case No.136 of 1984, whereas the appellant in Criminal Appeal No.159 of 1994 is the original accused No. 2. The appellants herein are convicted of the offence punishable under Section 376 read with Section 144 of Indian Penal Code and are sentenced to R.I. for a period of seven years and fine of Rs.1,000/-, in default further R.I. for three months by the Addl. Sessions Judge, Greater Bombay in Sessions Case No.136 of 1984 vide judgment and order dated 10.2.1994. Hence, this appeal.

2. Such of the facts necessary for the decision of this appeal are as follows :-

(a) On 9.3.1993, the prosecutrix lodged a report at the Police Station contending therein that she is a rag-picker. That she was staying alone in a hut made of thatched roof and plastic papers. On the day of the incident, at about 10 p.m., she was sleeping in a corner of her house on a gunny bag. The house has a door of two planks. At about 1 a.m. three persons entered into her house. They woke her up. She had seen the face of three persons. She could only identify Munir, who happens to be the original accused No.3. The other two persons were unknown to her. She was knowing Munir because he was doing the business of liquor. She had

shouted at the persons who had entered her house. They had over-powered her. That she was ravished by all of them. She had tried to raise alarm, but she had been threatened of dire consequences by the accused and, therefore, she could not shout loudly. That the accused No.1 was brandishing a knife. She had fainted in her house after she was ravished by the three persons. She resided in her house for about 20 minutes. The accused No.1 left her house. She immediately approached the Dahisar Police Station and narrated the incident to the police officer. After reducing her statement into writing, she was sent for medical check up. That she was admitted in Bhagwati Hospital for four days. At the Hospital, her statement was recorded by the police. Thereafter, her statement was recorded by the police. Her neighbour had accompanied her to the police station.

3. On the basis of her report, Crime No. 50 of 1983 was registered at Dahisar Police Station. Investigation was completed and charge-sheet was filed. Case was committed to the Court of Sessions and registered as Sessions Case No. 136 of 1984. Prosecution examined as many as 12 witnesses to bring home the guilt of the accused.

4. P. W. 1 happens to be the victim of the crime. She has deposed

before the Court that on the day of incident, she was sleeping in her house at about 1.00 a.m. in the midnight. She was woke up by 3 persons. Out of them, she was knowing original accused No. 3 Munir Isaq Patel. She identified him before the Court. She has candidly admitted that she was not knowing other two accused. She was knowing accused no. 3 as he was doing business of liquor in the same area. According to her, accused no. 1 brandished the knife. He then ravished her. She has identified accused no. 1. At the time when accused no. 1 ravished her, other two accused were standing near the door of her hut. Thereafter, accused nos. 2 & 3 had indulged into similar acts with her. She has deposed before the court that she had prayed to all the accused not to ruin her life. They did not pay any heed to her prayer. Thereafter, she felt weak and fainted. She slept for about 20 minutes. Soon after the incident, accused had fled from her house. She then went to Dahisar Police Station and lodged a report. She was sent to Bhagwati Hospital by the police. She was treated as indoor patient for about 4 days. Her statement was recorded by the police. She has proved the contents of the F.I.R. and the same is marked as Exhibit 14. P. W. 1 had given description of all the three persons in her statement to the police. Her supplementary statement was also recorded by the police after about 4 – 5 days. She has further deposed before the Court that she was

called at the police station for identification of the accused. According to P.W. 1 she was directed to identify the accused from amongst 15 – 20 persons who were made to stand in a row. She identified accused no. 3 and then accused no. 2. As far as identification is concerned, P.W. 1 has deposed before the Court as follows:

“Even though, there was darkness, roof of plastic cover was torn at several places and moon light was coming from that torn plastic cover and I can easily see the faces of all the three accused in the moon light. All the three accused were in my hut for nearly for one hour.”

She has also informed the Court that Smt. Angamma Naidu & Vishwanath Bhadawad are her close neighbours.

5. The contention of the victim that she could identify the accused in the moon light was narrated to the police, however, it did not find place in her statement on the basis of which crime was registered. Learned counsel for accused no. 3 vehemently submits that this is a material omission and goes to the root of the matter. She has also admitted that there are two entrances to her hut but there is nothing like a door which can be called as entrance. The two entrances are in opposite direction of each other. That at the time of incident, there was only one illicit liquor den and gambling den in the area she lived. That people used to sit in one house and consume illicit liquor and play Matka. According to her, illicit liquor den was owned by Iqbal. It was far away from

her house. She used to fetch water from a public tap near illicit liquor den. That Munir used to handle money and serve things to customer and therefore, she knew that the name of accused no. 3 is Munir. It is also elicited in the cross-examination that distance between the den and her house is of 10 houses. That she had never talked with Munir. Iqbal Sheth used to refer him as Munir and she was acquainted with Iqbal Seth. P.W. 1 has further narrated that after the said incident, she had sustained injuries to her private parts and had to be operated at Bhagwati Hospital. She has admitted that she has not seen three persons entering her house, but had seen them only after they had entered in her house. They had not awakened her, but she got disturbed by their presence and woke up. That population is very dense in the said area. According to her, she has raised alarm, but no one came to rescue her. That Angamma is her nearest neighbour. Their house are separated by just one wall. That she had shouted 2 – 3 times after she saw accused persons in her house. Angamma and her family members also did not come to rescue her. She saw Angamma at Bhagwati Hospital on the next day in the morning. According to P.W. 1, Angamma and her family members must not have heard her cries because they were fast asleep.

6. It is a matter of record that P.W. 1 had given the description of the accused in the F.I.R. The description was about complexion and their physical

constitution.

7. It is unfortunate that cross-examiner has dealt with every detail of the act committed by the accused. In fact, it was unnecessary as it would humiliate the victim i.e. first informant. The Presiding Officer ought not to have allowed the questions.

8. It is elicited in the cross-examination that she was not aware as to whether anybody from the locality had seen the three accused coming out of her hut. She has also admitted that when she first went to the police station, she met Police Officer Mr. Pandey who reduced her report into writing. Said statement was recorded prior to referring her to Bhagwati Hospital and that she had put her thumb impression on the said statement recorded by the police. Her statement was subsequently recorded at Bhagwati Hospital and she had endorsed the same with her thumb impression. She was at the police station for one hour. She has admitted that she was aware of insensitivity of her neighbours and therefore, she did not bother to wake anybody to accompany her to the police station. At Bhagwati Hospital, she was immediately operated by the doctor as she was suffering from bleeding. Her clothes were examined by the lady doctor before they were handed over to Investigating Officer Shri. Pande. That when she met Angamma at the hospital at 7.30 a.m., she had not enquired with her as to why she did not rescue her in the previous night.

9. PW-1 has further deposed that on 15th March, she was discharged from the hospital. On the same day, she was called by the police for identification parade. Police had been to her house at around 7.30 p.m. or 8 p.m. She has categorically admitted that the police had come to her house and taken her straight to the police station and no intimation or message was given to her regarding identification parade before 7.30 or 8 p.m. After she went to the police station, she was made to sit in one room. From the said room, she was taken to another room by one person. That person was not a policeman. The said person had taken her to another room for identification. The door of that room was open. From the room in which she was sitting with the Inspector, she could see window of the identification room. That window was open. It is further admitted that from the room from where she was seated, she could see movement in the room where test identification parade was to be held. There were 15 – 16 persons along with three accused standing in a row. One lady was also sitting in that room. She could not recollect the colour of clothes worn by the accused at the time of identification parade. She had identified three persons. She had identified all the three accused one after another. The lady sitting in the room had written something on a paper and PW-1 had signed the same. The room where the T.I. Parade was conducted

had one door and one window. At the time of identification parade, door and the window were open. She has denied the suggestion that she had implicated the three persons at the instance of Iqbal Sheth.

10. After recording of the abovementioned evidence, the learned Sessions Judge had framed additional charge against the accused for having committed an offence punishable under Section 376(2)(g) of IPC. The plea of the accused was recorded. They had denied the charges.

11. The learned counsel for the appellants, at this stage, submits that thereafter the accused were not given an opportunity to cross-examine the witness on the charge under Section 376(2)(g) of IPC.

12. PW-2 Dr. Ashwini Wagh had examined the victim at Bhagwati Hospital. The medical case papers of the victim are on record. It clearly shows that on 9th March, 1983, at about 4.20 a.m. she was taken to the hospital by police constable of Dahisar Police Station. She was discharged on 15th March 1983 at 9.15 a.m. That is the day when test identification parade was conducted.

13. PW-3 Angamma Govind Naidu has turned hostile. Her evidence need not be discussed.

14. PW-4 – Iqbal Pathan has acted as a panch for seizure of clothes of the victim. He has admitted in the cross-examination that the writing on the label Exhibit 22 was already written prior to their signature. He has also admitted that he had no knowledge of the panchnama nor the procedure. It is pertinent to note that the seizure panchnama of cloths of the victim were signed by two male panchas. There was no female panch.

15. PW-5 Atmaram Tawde was attached to Dahisar Police Station. He has deposed before the Court that on 8.3.1983, he was on detection staff duty. He was assigned night duty. PSI Pandey was on duty as Station House Officer. At about 2.30 a.m., one lady by name 'x' came to the police station. She told the police that she was subjected to rape by three persons. Her hair were scattered. She was having bleeding. PSI Pandey had directed him to take her to Bhagwati Hospital. PW-5 had taken her to the hospital in a police jeep. The victim was admitted in Ward No.3. PSI Pandey reached Bhagwati Hospital at 5 a.m. and had recorded statement of the victim. Thereafter, the clothes were seized. In the cross-examination,

the witness was asked about the possibility of moon in the sky. That according to him, he had seen moon in the sky on the earlier day around 7 to 8 p.m. He has admitted that there was sufficient moon light and he had seen the moon in the sky on that night when he was taking the victim to the hospital. Similarly, when he visited the scene of offence, he had noticed sufficient moon light. He has admitted that he had not disclosed about the moon light in his previous statement because he was not asked about it. He has admitted that they reached the scene of offence in the morning and not at night. It is reiterated in the cross-examination that when the victim had been to the police station, she was bleeding.

16. PW-6 Dipali Chavan was a practising Advocate at the time of recording of evidence. On 15.3.1983 at about 7.30 p.m. a police constable had requested to hold an identification parade in C.R. No.50/1983. She had selected the room for holding T.I. Parade. Upon her instructions, the police officer had called upon two panchas. She met the accused persons in the Station House Room. She enquired about their names. Only accused were present in the Station House Room. The accused had given their names. She had enquired with the identifying witness thereafter. At the time when she was making enquiries with the accused, the identifying witness was

sitting in PI Thoravade's room. From the said room, nothing was visible. She had selected PI Thoravade's room for holding T.I. Parade. The said room had one window. Thereafter, she had instructed police to get the dummies. She had selected 13 people from amongst the dummies. All the three accused had refused to change their clothes and occupied the places of their choice. According to her, the window and the door were closed at the time of holding test identification parade. The identifying witness had identified all the three accused. The identification parade started at 8 p.m. and concluded at 8.55 p.m. She has proved the memorandum of test identification parade which is at Exhibit 2.

17. PW-6 was appointed as a Special Executive Magistrate from the year 1983 till date. That was the first occasion when she was conducting test identification parade.

In the cross-examination, she has admitted that at the time when test identification parade was conducted, she was just a student, but taking into consideration her social work, she was appointed as Special Executive Magistrate. At the relevant time, she was not doing any social work, but was the President of Mahila Front of Congress (I) Party. She has also admitted that before appointment as SEM, police enquiry is held. Prior to conducting the test identification parade, she had visited Dahisar Police

Station on 3 – 4 occasions. She was well conversant with the topography of the Dahisar Police Station. A constable had come to her residence to call her for conducting the test identification parade. She has also admitted that the victim had reached the police station before her. The accused were brought from the Borivli General Lock-up to Dahisar Police Station. She has also admitted that she had not seen anybody bringing the accused from Borivli General lock-up to Dahisar Police Station. She was informed by PI Bhakare that the accused were in the lock-up. The T.I. Parade was conducted in the first chawl of Dahisar Police Station. The Charge Room of Dahisar Police Station is a different place. When she entered the charge room, she had seen three accused persons sitting there. No police officer was in the said room. It is also admitted that the police had brought the dummies of their own and she had selected dummies. She had not made any enquiry with the dummies. According to her, she could judge the status of the accused and the society from which they hailed. She could give the said information on the basis of appearance of the accused like the clothes worn by the accused, the complexion etc. She has also admitted that she could not tell as to whether the police officer or police personnel had acted as a dummy. She has also admitted that all the three accused did not have similar physical feature. She has also admitted that she had not described

the similarity in appearance of the accused and the dummies in the memorandum. She has admitted that she would not be in a position to say as to whether the police had shown the accused persons to identifying witness. There was no complaint by the accused at the time of test identification parade. It is also admitted by her that the panch had brought the accused from the lock-up to the room where T.I. Parade was conducted. The panch was holding the hands of all the three accused persons when they were brought in the room. The memorandum of test identification parade is at Exhibit 27.

18. PW-7 Ismail Ali Yusuf Patel happens to be the resident of Shanti Nagar Zopadpatti, Dahisar. He has acted as a panch for the scene of offence panchnama. He has also acted as a panch for the seizure of clothes panchnama of the accused. It is admitted in the cross-examination that PW-7 was working on the handcart of his uncle Ismail Ibrahim Patel. It is admitted by him that his uncle Ismail had also acted as a panch in this case. According to him, Angamma had shown the scene of offence. He has also admitted that the panchnamas were prepared earlier and that he had signed the labels subsequently.

19. PW-8 – Dr. Chintaman Gavhane was attached to Nagpada Police Hospital. He had examined the accused persons. He had not taken blood sample of the accused as there was no requisition by the police.

20. PW-9 Dr. Sudha Tandon was attached to Bhagwati Hospital. She had examined the victim on 9.3.1983. The victim had come with the history of alleged rape by three persons at 1 a.m. The victim had sustained abrasions. There was a linear tear on the left paraurethral region. The said injury was sutured under a local anesthesia. She was admitted in the hospital. She was administered antibiotic injections. The victim was discharged on 15.3.1983. The medical case papers of the victim are at Exhibit 41 collectively.

In the cross-examination, she has admitted that the injuries which were noticed by her were minor injuries in nature, but the patient was kept in the hospital because her haemoglobin was low and she was being treated for anemia. In the medical case papers, there is no mention of the type of clothes worn by the victim. The report was prepared by the Registrar of the Hospital. She has reiterated the history narrated by the victim. The attention of the witness was drawn to the contents of the

medical case papers. She has denied the suggestion that the victim was passing through her menstrual period. The witness has candidly admitted that she is not an expert in Forensic Science.

21. PW-10 Dr. D.D.Mahimkar was practising as a Gybnaecologist. At that time, he was the Registrar at Bhagwati Hospital. He had examined the victim on 9.3.1983 at about 4.30 a.m. That the victim had sustained injuries. She was confronted with Modi's Medical Jurisprudence. According to her, the victim was initially examined by a House Surgeon in the casualty room and was admitted in the ward after she examined her.

22. Kapildeo Pandey was attached to Dahisar Police Station. In the early hours of 9.3.1983, the victim had lodged a report. He had noticed blood stains on her saree and therefore, had referred her to Bhagwati Hospital along with a police constable. He has proved the omissions and contradictions in the evidence of the other witnesses. He has narrated about the steps taken by him in the course of investigation. It is pertinent to note that according to the Investigating Officer, the accused were arrested by him. Accused No.3 was arrested at about 8.45 p.m.on 9.3.1983 at Kashimira. Accused Nos. 1 and 2 were arrested thereafter. He has further

admitted that at that time Dahisar Police Station did not have lock-up. Accused were sent to Borivli General Lock-up. The entry was taken in the station diary, but the station diary was washed away in 1985 at Dahisar. The distance between Dahisar and Borivli Lock-up is 2 kms. The investigation was taken over by I.O. Bhakare. He had not taken any entries in respect of providing spare clothes to the accused. The memorandum of blood grouping of the accused was not sent to the hospital. At a subsequent stage, he has deposed that all the three accused along with victim lady were sent for blood grouping together.

23. PW-12 Ramchandra Bhakare had taken over the investigation from PW-11. He has deposed before the Court that Angamma had shown the place of offence. A panchnama was drawn which is at Ex.29. The said panchnama was drawn by PW-11. Upon enquiry, it was learnt that accused No.3 Munir was hiding himself. The accused No.3 was arrested at Village Kashimira. In the course of interrogation, accused No.3 had given the addresses of accused Nos. 1 and 2. They visited Chuna Bhatti, Dahisar (East) and arrested both the accused Nos. 1 and 2. They were brought to Dahisar Police Station. Their clothes were seized. The panchnama was drawn by SI Pandey and the accused were sent for medical examination.

On 15.3.1983, test identification parade was conducted at Dahisar Police Station. The supplementary statement of the victim was recorded.

24. It is admitted in the cross-examination that the full name and address of Munir was not mentioned in the FIR. In the intervening period i.e. after lodging of FIR and arrest of original accused No.3, no supplementary statement of the victim was recorded. The accused No.3 was arrested on the basis of the FIR. On the basis of the FIR, they had obtained the previous history of accused No.3 Munir and it was revealed that he was dealing in liquor business. The records were washed away in the flood of 1985 and, therefore, there was no documentary evidence to show that accused No.3 was working as a bootlegger prior to the incident. That according to the said witness, the police wanted to confirm the identity of accused No.3 and, therefore, identification parade was held. Nobody's statement was recorded on the spot. According to him, he had not requested the doctor for the blood grouping of the accused. He had taken prior permission of the Court before the accused were sent to police hospital on the second occasion. On the date of the incident, accused were in general lock-up at Borivli. It took about 45 minutes to bring the accused to Dahisar Police Station. According to this witness, accused were brought

to the police station before the arrival of the accused.

25. The evidence on record indicates the following :-

- (i) The victim was ravished.
- (ii) Although the victim resided in a densely populated area, nobody paid heed to her cries on 9.3.1983.
- ((iii) That she was ravished and had suffered serious injuries to her private parts.
- (iii) That the original accused No.3 was arrested on 9.3.1983 from Village Kashimira.
- (iv) It appears that original accused Nos. 1 and 2 were arrested on the basis of the disclosure statement made by accused No.3.
- (v) The victim was hospitalized till 15.3.1983. Soon after her discharge, the police had been to her house and had taken her for the purpose of identifying the accused.
- (vi) Test identification parade was held between 8 p.m. To 8.55 p.m. at Dahisar Police Station.
- (vii) That the victim was knowing original accused No.3 and she had specifically named him in the FIR.

- (viii) That the victim had named accused No.3 in the FIR and had also given description of his clothes.
- (ix) The victim was treated as an indoor patient till 15.3.1983.
- (x) Test identification parade was conducted on 15.3.1983.
- (xi) The activities in the room where the test identification parade was conducted was visible from the room where the identifying witness was seated.
- (xii) According to the prosecution, she had identified all the three accused.
- (xiii) Accused Nos. 1 and 2 were arrested on the basis of the disclosure statement of accused No.3.

26. The statement of a co-accused would be inadmissible in evidence unless his statement is considered under Section 30 of the Indian Evidence Act. In the present case, all the three accused have denied their involvement in the said evidence. It is their case that they are falsely implicated. The main thrust of accused is that the victim could not have identified the accused in the midst of the night as there was no light available in her hut. However, it is established that there was sufficient moon light. The victim had specifically named original accused No.3 as she had identified him as the person who was working in the liquor den which was in close proximity of her hut. PW-3 Angamma has resiled from

her earlier statement and was declared hostile by the prosecution.

27. It is a matter of record that the victim was seriously injured. The incident cannot be doubted.

28. The evidence of PW-5 would explicitly show the plight of the victim. She had been to the police station in the midst of the night. That at the time when she had gone to the police station, she was bleeding and hence the police officer had rightly referred her to Bhagwati Hospital without wasting time in recording her statement.

29. There is no specific motive for the victim to implicate original accused No.3 as they were not on cross terms. The accused No.3 has also not stated that the victim had any animus against him. The victim was not knowing the original accused Nos. 1 and 2. It is true that the evidence as far as T.I. Parade is concerned is a corroborative piece of evidence.

30. The learned APP submits that the victim had identified the accused before the Court which is a substantive piece of evidence.

The Court cannot be oblivious of the fact that the trial was conducted after 10 years of alleged incident. The accused are seated at a particular place in the Court room at the time of trial and the faces of the accused are not

covered when they are brought to the Court and, therefore, it would not be difficult for the victim to identify the accused before the Court. As far as original accused No.3 is concerned, the prosecution has proved its case beyond reasonable doubt.

31. As far as the involvement of accused Nos. 1 and 2 is concerned, the evidence is in the nature of identification at the test identification parade and identification in the Court. At the cost of reiteration, it cannot be ignored that the trial was conducted after 10 years of the alleged incident. The accused were on bail during the pendency of the trial. The test identification parade was not conducted in accordance with the mandate laid down in the Criminal Manual. It cannot be ignored that the features of the accused and the dummies selected for the test identification parade were dissimilar. In the first information report, the victim had only stated the approximate age and the of the other two accused besides accused No.3.

32. In the case of **Rajesh Govind Jagesha vs. State of Maharashtra AIR 2000 SC 160**, the Hon'ble Apex Court has held as follows :-

“The test identification is considered as a safe rule of

prudence for corroboration. Though the holding of the identification proceedings may not be substantive evidence, yet such proceedings are used for corroboration purposes in order to believe or not the involvement of the person brought before the Court for the commission of the crime. The holding of identification parade being a rule of prudence is required to be followed strictly in accordance with the settled position of law and expeditiously.”

33. It is a matter of record that T.I. Parade was conducted in Dahisar Police Station. In the present case, the investigating agency had caused arrest of the original accused Nos. 1 and 2 on the basis of the statement given by original accused No.3 while in custody. A statement by co-accused is inadmissible in evidence. It would need corroboration in all particulars which is absent in the present case and, therefore, original accused Nos. 1 and 2 deserve to be given benefit of doubt.

33A. This Court in the case of **State of Maharashtra vs. Rajesh Alias Kaka Madanlal Soni & Ors. Madanlal Soni & Ors. Reported in 1998 ALL MR (Cri) 471** has observed as follows :-

“16. We strongly deprecate the practice of conducting identification at police stations; a practice which we are informed at the Bar is only prevalent in Greater Bombay. The sooner it is abandoned the better it is because, the

probability of the suspects being shown to the witnesses prior to the test identification is always there at the police station. At any rate, on account of such a practice, there is always a lurking suspicion in the mind of the court that the witnesses might have seen the suspects prior to the test identification.”

In the present case, the accused were brought from Borivali General Lock-up to Dahisar Police Station and T.I. Parade was conducted therein. Moreover, PW-6 was conducting the test identification parade for the first time and she could not specifically state as to whether any police person had acted as a dummy. The whole exercise of conducting test identification parade would be of no significance in such circumstances.

34. There is positive evidence on record that the accused Munir was known to the victim on the date of the incident and she had identified him at the time of the incident, this would make T.I. Parade of Munir futile. It is in these circumstances that the evidence as against the appellant Munir will have to be appreciated on a different footing than that of the other accused who were unknown to the victim.

35. As far as Munir is concerned, the defence has failed to shatter the prosecutrix about his involvement in the cross-examination. The victim has categorically stated that she was sure that the third person was Munir. She had seen him several times before the incident. She knew his name

because the owner of the bar, where he was working, would call him as Munir. The accused Munir has not challenged his identity till the recording of evidence had commenced. At the cost of reiteration, it can be said that there was no reason for the prosecutrix to implicate Munir. The suggestion that she has implicated him at the behest of his owner holds no good ground. Hence, the appeal filed by Munir deserves to be dismissed.

36. On 7.1.2011, this Court had apprised the learned Advocate Shri R.N.Mishra and the appellants that the matter would be taken up for final hearing. Subsequently, the hearing of the appeal was adjourned at the request of the Advocate for the appellants. Bailable warrant was issued against the appellant-accused Suresh Tulsiram Shinde. On 6.7.2011, Mr. Mishra, learned Advocate appearing in Criminal Appeal No.129 of 1994 had submitted that he had no instructions. Mr. Mishra had withdrawn appearance for the appellants. None appeared for the appellants. Therefore, this Court (Coram: Smt. Sadhana S. Jadhav, J.) was constrained to issue non-bailable warrant. Advocate Shri M.G.Shukla was appointed to espouse the cause of the appellant Suresh Shinde on 11.9.2014. An application was filed on 4.12.2014 for recalling the order issuing non-bailable warrant in Criminal Appeal No.159 of 1994. The appellant appeared before the Court on 4.12.2014 and had given an undertaking that

he would remain present on the date of final hearing of the appeal. Hence, the application was allowed. In fact, this Court had heard learned Advocate Shri Mishra and the other Advocates on 5.11.2015 and the matter was closed for orders. The learned Advocate Mr. Mishra had submitted that he would make additional submissions as early as possible since he was out of town for quite some time. Till today, learned Advocate Mr. Mishra had not tendered additional submissions or any citation in support of the original accused No.3 - Munir and, therefore, this Court has proceeded with the dictation of the Judgment.

37. Upon considering the evidence adduced by the prosecution, it is clear that the prosecution has miserably failed to establish the identity of the original accused Nos. 1 and 2 since the test identification parade was not conducted in accordance with the guidelines given in the Criminal Manual and hence they deserve to be acquitted by extending the benefit of doubt. However, the same parameter would not apply to accused No.3 – Munir since the victim had identified him at the time of the incident and had therefore specifically named him as the culprit in the first information report. It is not denied that he was not working in the liquor bar situated in the close proximity of the hut of the prosecutrix. Hence, his appeal deserves to be dismissed.

38. It is unfortunate that in a series of cases like the present one, the investigating agencies had not conducted the investigation in accordance with law and, therefore, the accused are benefited. It is true that the accused would not be entitled to acquittal for lacunas in the investigation, but in the present case, the evidence as against accused Nos. 1 and 2 is based upon the test identification parade as they were unknown to the victim. It is incumbent upon the Court of law to appreciate the evidence against the accused within the prescribed parameters of the Code of Criminal Procedure and the Indian Evidence Act and, therefore, the accused are acquitted by extending benefit of doubt. The investigating agencies are eyes and ears of the Court. The Court cannot be oblivious that in the present case, the trial had commenced after 10 years of the alleged incident and the appeal is being heard finally after 22 years. Therefore, there would be constraints upon the Court to travel beyond the record and proceedings and substitute the evidence adduced by the proecutrix.

ORDER

- (i) Criminal Appeal No. 129 of 1994 is partly allowed.
- (ii) The conviction and sentence of the appellant – Suresh Tulsiram Shinde for the offence punishable under Section 376(2)(g)

of Indian Penal Code imposed by the Addl. Sessions Judge, Gr. Bombay in Sessions Case No.136 of 1984 is hereby quashed and set aside.

(iii) However, the conviction and sentence of the appellant/accused – Munir Issak Patel in Criminal Appeal No.129 of 1994 is maintained.

(iv) The appellant/accused – Munir Issak Patel to surrender before the Addl. Sessions Judge, Greater Bombay within six weeks from 6th April, 2016.

(v) Criminal Appeal No.159 of 1994 is allowed.

(vi) The conviction and sentence of the appellant – Siraj Shahabuddin Khan imposed by the Addl. Sessions Judge, Gr. Bombay in Sessions Case No.136 of 1994 are quashed and set aside.

(vii) Bail Bonds stand cancelled.

(viii) Fine paid be refunded to the appellant.

Both the Appeals stand disposed of.

(SMT.SADHANA S. JADHAV, J.)