

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 55 OF 2018

State of Goa, Through PI Old Goa, Police
Station

.... Appellant

Versus

1. Rizwan Sofik Saifi (Major), s/o Safik Saifi, aged 22 years, resident of Cabesa, St. Cruz, r/o Village Betala, Sambal, Moradabad, U.P.
2. Surendra s/o Ranabur Singh (Major), s/o Ranabur Singh, aged 20 years, s/o Sadra Mandi, Shelampur, near vegetable market, New Delhi.
3. Shamin s/o Rashid Ahmed (Major), s/o Rashid Ahmed, aged 19 years, r/o H. No. 420, Barai, Gunnor, Samband Dist., Moradabad, U.P. }
4. Bikky Singh, s/o Banupratap Singh (Major), aged 19 years, r/o Amroha, Bamboo Ghat, Fulenagar, Moradabad, U.P.
5. Pawan Kumar @ Deepak Kumar (Major), s/o Govind Singh, aged 19 years, r/o H. No. 109, Amroha, Johaya Road, JP Nagar, Moradabad, U.P.

*Deleted as
per Order
dated
30.07.2018*

.... Respondents

Mr. S.R. Rivankar, Public Prosecutor for the Appellant.

Mr. S.G. Desai, Senior Advocate with Mr. Pavithran A.V.,
Advocate for Respondent No. 1.

Mr. Kamlakant Poulekar, Advocate for Respondent Nos. 2, 4 and 5.

CORAM:- M.S. SONAK &

C.V. BHADANG, JJ.

RESERVED ON: 8th November, 2019

PRONOUNCED ON: 8th May, 2020

**Pronounced as per Chapter XI Rule 1 of Appellate Side Rules,
1960**

JUDGMENT: (Per C.V. Bhadang, J.)

By this Appeal, the appellant-State is challenging the acquittal of the respondents from the offence punishable under Sections 452, 347, 395, 397 read with Section 120-B of the Indian Penal Code, (IPC, for short) and Section 3 read with Section 25 of the Arms Act, 1959. The third respondent (A3) has since been deleted as he was found to be a juvenile and proceedings against him are pending before the Juvenile Justice Board (JJB).

2. The prosecution case may be briefly stated thus :

That on 16.06.2009, between 11.30 hours to 11.45 hours at House No. 328/1/F/I, Guru Prasad building, Dhakebhat, St. Cruz, the accused committed criminal trespass in the house of the complainant (PW-1) armed with deadly weapons such as a country made pistol and a knife and in furtherance of their common object, assaulted Smt. Zamila (PW-23), Smt. Shahin (PW-5) and the maid servant Smt. Shabana (PW-24) at the point of the country made pistol, confined them separately in the bathroom and bedroom by tying them with a dupatta and committed robbery of gold ornaments

worth ₹11,05,000/-, a mobile phone, cash of ₹1,45,000/- totalling to ₹12,51,000/-. It is also alleged that during the commission of the robbery, the respondent no.4 (A4) attempted to kill the wife of the complainant, by firing one round from the country made pistol in which the fourth respondent injured himself and thereafter, all of them fled from the spot.

3. On the basis of the complaint lodged by Muzaffar Kadri (PW-1), an offence under Crime No. 51 of 2009 was registered with Police Station, Old Goa. During the course of investigation, the Investigating Officer, (PW-35), recorded the statement of witnesses and arrested the accused from Margao Railway Station. He effected seizure of certain articles including the gold ornaments and cash and after completion of the investigation, filed a chargesheet, which was committed to the Court of Sessions and was registered as Sessions Case No.1 of 2010.

4. The learned Sessions Judge framed charge against the respondents for the aforesaid offences, to which, they pleaded not guilty and claimed to be tried. Their defence is one of total denial and false implication.

5. At the trial, the prosecution examined as many as 35 witnesses and produced the contemporary record of the investigation. The respondents did not lead any evidence in defence.

6. The learned Sessions Judge framed in all five points for determination and answered all of them in the negative and proceeded to acquit the respondents by judgment and order dated 26.11.2014, which is subject matter of challenge in this Appeal.

7. We have heard Mr. Rivankar, the learned Public Prosecutor for the appellant, Mr. Desai, the learned Senior Counsel for the first respondent and Mr. Poulekar, the learned Counsel for the respondent nos.2, 4 and 5. As noticed earlier, the respondent no. 3 having been found to be a juvenile in conflict with law (JCL) has since been deleted. With the assistance of the learned Counsel for the parties, we have gone through the impugned judgment and the prosecution evidence led.

8. Mr. Rivankar, the learned Public Prosecutor, submits that the learned Sessions Judge was in error in acquitting the respondents. It is submitted that although, the prosecution does not claim that the respondent no. 1, Rizwan (A1) was present at the spot, when the incident occurred, there is enough evidence to show that the said accused was a part of the conspiracy to commit the dacoity at the house of the complainant. For this purpose, the learned Public Prosecutor has referred to the evidence of several witnesses, such as, PW-8, PW-9, PW-10 and others, to submit that A1 was knowing the other accused and was part of the conspiracy to commit the offence. It is submitted that thus, taking aid of Section

120 of IPC, there were five persons, who were involved in the incident, thus making out an offence of dacoity under Section 391 of IPC. The learned Public Prosecutor has referred to the offence of dacoity as defined under Section 391 of IPC, in order to submit that it not only contemplates a person's presence, but also a person, who may be aiding and being “conjointly” involved in the commission or an attempt to commit dacoity. In the submission of the learned Public Prosecutor, the personal presence of the person-accused, in order to make a tally of five persons, is not necessary for the offence punishable under Section 391 of IPC. He, therefore, has taken exception to the finding recorded by the learned Sessions Judge in para 110 of the impugned judgment that A1 had no intention to help and aid other accused in committing the offence of dacoity. It is the alternate submission of the learned Public Prosecutor that even assuming that the number of persons involved are below five, the learned Sessions Judge ought to have considered the case in relation to the offence of robbery under Section 390 of IPC. He, therefore, submits that the acquittal on these grounds, is not legal and proper. For this purpose, the learned Public Prosecutor has placed reliance on the decision of the Supreme Court in the case of **Om Prakash & Another Vs. State of Rajasthan AIR 1998 SC 1220**.

9. The learned Public Prosecutor has then submitted that the prosecution is not only based on the identification of the accused by the victim and the recovery of the stolen property, from or at the instance of the accused, as noticed by the learned Sessions Judge in

para 111 of the impugned judgment. It is submitted that more particularly, the prosecution case is based on eye witness account of the incident given by PW-5, PW-23 and PW-24, which in the submission of the learned Public Prosecutor is natural and which inspires confidence. The learned Public Prosecutor has taken us through the evidence of these witnesses in order to demonstrate that their evidence is natural and one which inspires confidence. The learned Public Prosecutor has then referred to various circumstantial evidence, including the recovery of articles and the presence of the blood stains at the spot, which in the submission of the learned Public Prosecutor sufficiently corroborates the evidence of the eye witnesses, in particular. He placed reliance on the decision of the Supreme Court in the case of **Surajsinh @ Sonu Surajsinh Collectorsinh @ Sevaram Rajput Vs. State of Gujarat (2017) 13 SCC 128**, in order to point out the principles germane, while appreciating the evidence of the eye witnesses. It is submitted that the presence of minor discrepancies, which do not go to the root of the matter, are not material and in fact, point to the fact that the evidence is natural.

10. The learned Public Prosecutor has submitted that all the accused were apprehended at Margao Railway Station and the presence of the injury on A4 also corroborates the version of the eye witnesses that in an attempt made by A4 to fire a shot at PW-5, it was A4, who himself got injured. It is submitted that the fact that the blood group, of the blood stains found at the spot, could not be

matched with that of A4, is not decisive, if the evidence of the eye witnesses, is found to be one which inspires confidence.

11. Insofar as the delay in conduction of the identification parade is concerned, reliance is placed on the decision of the Supreme Court in the case of **Anil Kumar Vs. State of Uttar Pradesh (2003) 3 SCC 569**. It is submitted that the incident in question has occurred in broad daylight and the eyewitnesses had sufficient opportunity to watch the assailants and in such circumstances, the delay, if any, in holding the TI parade is inconsequential. It is submitted that the evidence of TI parade is only by way of corroboration and if, the identification made by the witnesses in the Court, is found to be acceptable, the failure to conduct the TI parade or its non-acceptance, wherever it is conducted, is inconsequential and not decisive. He submits that the manner of appreciation of the evidence, by the learned Sessions Judge, of the prosecution witnesses, in general and that of the eye witnesses, in particular, is perverse. The learned Public Prosecutor has strongly urged that the view taken by the learned Sessions Judge is an impossible view and therefore, needs interference.

12. Mr. Dessai, the learned Senior Counsel for the respondent no. 1 (A1) has supported the impugned judgment. It is submitted that admittedly, even according to the prosecution, A1 was not present at the time of the alleged incident, nor he is stated to be present in or around the vicinity of the spot of the incident. It is

therefore, submitted that there is neither involvement in the actual incident by physical presence to “conjointly” commit robbery or dacoity nor there is any evidence to show that A1 was aiding the other accused in commission of such offence. The learned Senior Counsel has submitted that the discovery of the motorcycle from A1 is not established and even otherwise, it is not sufficient to make out a case of conspiracy or of A1 being involved conjointly with other accused or of aiding the other accused in commission of such offence. It is submitted that even assuming that A1 was known to the other accused, it is not sufficient to hold that A1 was a part of conspiracy with the other accused. He, therefore, submits that acquittal of A1 is legal and proper.

13. Mr. Poulekar, the learned Counsel for the respondent nos. 2, 4 and 5 has also supported the impugned acquittal. It is submitted that the entire prosecution case is false and fabricated and the attempt by the Investigating Officer (PW-35) for such fabrication and planting is writ large on the face of the record. It is submitted that the alleged recovery from A2, A4 and A5 is not proved by acceptable evidence. He submits that the evidence of identification is crucial, in the case of the present nature, which in the present case is doubtful and unacceptable. The learned Counsel has taken exception to the manner in which the entire investigation is carried out, in order to submit that it is improbable that the Margao police, Panaji police and the Railway police would have an occasion, at the same time, to know about the presence of all the

accused at the Margao Railway Station, when the offence was admittedly registered at Old Goa Police Station. He has taken strong exception to the alleged arrest of the accused at Margao Police Station. In this regard, he has taken us through the evidence of PW-2, with regard to the discrepancy of the timing. He submits that the evidence of PW-4, Munir Ali Khan, who is one of the pancha witnesses to the attachment panchanama at the Railway Station, is not acceptable, as he is related to the family of the complainant and is not an independent witness. He, therefore, submits that the arrest of the accused at the Railway Station is doubtful. He has referred to the evidence of PW-26, P.I., Tushar Lotlikar, to submit that the material to show the source of knowledge of the Police Officer, about the location of the accused, is not produced. He, therefore, submits that the arrest of the accused as well as the alleged recovery at the Margao Railway Station is doubtful. He also submits that the blood sample of A4 was not taken, in order to match the blood group of the blood stains found at the spot and the chance fingerprints, although, probable at the artefacts, were not taken. It is submitted that one chance fingerprint of A4, which was taken, which is matched, has rightly been rejected by the learned Sessions Judge for want of certificate under Section 165 B of the Evidence Act. It is submitted that the identification in the Court for the first time (where the identification parade is either not conducted or is found to be unacceptable) is a weak evidence, and no reliance can be placed on the same. It is submitted that there is also no evidence about the custody of the muddemal articles,

before they were sent for the report of the Chemical Analyser. In this regard, he pointed out that the extract of the muddemal register is not produced. It is submitted that there is no evidence to show that the ornaments recovered were indeed gold ornaments. He also submitted that the evidence of the ballistic expert is not acceptable as the individual mark of the pistol is not compared with that of the bullet. He submits that the microscopic examination was not conducted and only trial shots were taken. Lastly, it is submitted that the evidence of the eye witnesses is shaky and is not acceptable and not inspiring confidence. It is submitted that there is no acceptable evidence as to how the assailants had entered the house of the complainant, when the main gate was said to be latched from inside. It is submitted that there are inherent discrepancies inter se in the evidence of PW-5, PW-23 and PW-24 and therefore, the evidence of the eye witnesses has rightly been rejected. It is submitted that the Investigating Officer has not made any attempt to probe the role of PW-24, who is the maid servant, as the possibility of the maid servant having facilitated the entry and the possibility of her being a party to the conspiracy, with some unidentified persons, cannot be ruled out.

14. Mr. Poulekar, the learned Counsel has submitted that the scope of interference available in an Appeal against acquittal is limited. He submits that if the view taken by the learned Sessions Judge is reasonable and probable, no interference is called for, even where other view is equally possible. He submits that the learned

Sessions Judge after properly appreciating the prosecution evidence, has rightly found that the prosecution has failed to establish its case beyond reasonable doubt and therefore, no case for interference is made out.

15. We have carefully considered the rival circumstances and the submissions made. We would first like to deal with the case of the prosecution with regard to the involvement of A1, Rizwan. Admittedly, even, according to the prosecution, A1, had not entered into the flat of the complainant and was not present at the time of the incident in the flat or even in the vicinity. Thus, it cannot be said that A1 had conjointly committed or even aided the commission of dacoity with the other accused. The prosecution evidence, in order to demonstrate the involvement of A1 in the conspiracy under Section 120B of IPC, in our considered view, is not acceptable and has rightly been disbelieved by the learned Sessions Judge. The prosecution in this regard has relied upon the evidence of several witnesses, including that of PW-8 to show the involvement of A1 in the conspiracy, to claim that A1 was aiding the other accused and/or was conjointly involved in committing dacoity, within the meaning of Section 391 of IPC. The learned Sessions Judge has dealt with this part of the evidence in para 46 onwards and in para 110 of the impugned judgment has held and in our view rightly so, that A1 was neither present in the flat nor there is evidence that he was present in the vicinity with the intention to help and/or aid the other accused. We would now propose to briefly

consider the prosecution evidence with regard to the alleged involvement of A1.

16. PW-8, Prashant Bhandari, is a pancha witness on recovery of a motorcycle bearing no. GA-03-A-8418, which was allegedly used while committing the dacoity/robbery in the flat of the complainant. The discovery of the said motor cycle is made allegedly at the instance of A1 from an open space in front of the place where A1 was residing at Cabeca, St. Cruz, where the vehicle was parked.

17. PW-6, Ramdas Banaulikar, is the owner of the said vehicle, who states that he had given the said vehicle to Sadanand Naik (PW-11), who is his brother-in-law. Sadanand states that the motorcycle was lent to PW-7, Thomas Mendes, who in turn gave it to A1, Rizwan.

18. This entire evidence becomes inconsequential, when the discovery itself falls through. PW-8, Prashant Bhandari, who is a pancha on the discovery is facing prosecution in a sessions case and has acted as a pancha witness in two other cases. Be that as it may, in our view, the discovery is not proved by acceptable evidence and even if, assumed to be proved, is inconsequential, as it does not lead to any incriminating circumstance.

19. PW-9, Gabriel Gonsalves, is the owner of the premises in which one Firoz Khan, who was working as a fabricator at Mercedes, was staying. He states that about 15 days prior to the incident, a friend of Firoz Khan (who according to the prosecution is none other than A1) came to the residence of Firoz Khan. He states that on 16.06.2009, police from Old Goa Police Station came to his residence with A1 and told him that A1 has committed dacoity of gold ornaments and cash at St. Cruz. The evidence hardly takes the case of the prosecution any further.

20. PW-10, Firoz Khan states that A1 was working for one Benny at Calapur and A1 had stayed with him for 10 to 15 days. Except this, nothing has come in his evidence. Even this part of the evidence is found to be by way of an improvement by the learned Sessions Judge.

21. PW-7, Thomas Mendes claims that on 14.06.2009 at around 2:00 p.m., A1 had come to Paulo Travels at Panaji. He (A1) wanted to hire a private vehicle for carrying his fabrication material. PW-7 directed him for the said purpose to PW-6. This evidence, at the highest, can show that A1 was hiring vehicles from PW-7 and nothing else.

22. PW-14, Hemant Malik, is working as a Technician at GMC. PW-16, Salim Ansari, who only states that A1 was working for one Benny and that A1 was having a mobile number having last

digit as 922. PW-20, is the Nodal Officer for Maharashtra and Goa. PW-29, Nemkhan is the Scientific Officer. The evidence of these witnesses is insufficient to connect A1 with the offence or to show that he was part of the conspiracy with the other accused.

23. A brief reference is necessary, at this stage, to the evidence of PW-12, Amberai Dessai, who is working as a room boy at Elite Lodge at Panaji. He states that on 14.06.2009 at around 10:00 p.m., one youth came asking for a room stating that there were three other persons, who would be staying with him in the room. The said person produced the PAN Card, which is at Exhibit 94 i.e. of A1, Rizwan. A1 wrote his name and other details in the register along with the name of Deepak Kumar and Vicky and they stayed during the night and checked out on 15.06.2009 at 7:30 a.m. and while leaving, Surendra Kumar (A2) signed the register. On the same day, at around 7:30 p.m., all the four persons came back to the said lodge and stayed in room no. 103, when the register was signed by A1 and they checked out on 16.06.2009 at around 7:00 to 7:30 a.m. On the same day, at around 8:00 p.m., the Panaji police came to the said lodge and seized the extract of the register (Exhibit-95) and the copy of the PAN Card (Exhibit-94). Except this, nothing has come in the evidence of PW-12.

24. Even assuming that A1 had stayed with A2, A4 and A5 in Elite lodge, such a circumstance by itself in the absence of any other incriminating circumstance is not sufficient to connect A1 or

to show his complicity in the alleged offence alongwith the other accused. We, therefore, find that no exception can be taken to the acquittal of A1 and that his acquittal needs to be confirmed.

25. This takes us to the prosecution case as against respondent nos. 2, 4 and 5.

26. It is true that the offence of dacoity as defined under Section 391 of IPC requires five or more persons, conjointly attempting to commit robbery. However, as has been rightly submitted on behalf of the appellant, if the number falls below five, on account of acquittal of one or more accused, the prosecution case can always be considered to see as to whether the offence of robbery is made out or not, in respect of the remaining accused. It is necessary to note that the offence of robbery and dacoity are of the same nature and genre and in fact dacoity, is an aggravated form of robbery, which requires a minimum number of five persons committing robbery. In the case of **Om Prakash** (supra), out of five accused, two were acquitted and therefore, it was found that the conviction of the remaining accused for dacoity, could not stand and hence, their conviction was altered to one under Section 392 of IPC. Thus, in the present case, it is necessary to find out whether, the offence of robbery and/or any other offence as charged, is made out or not, against the remaining accused i.e. A2, A4 and A5.

27. The learned Sessions Judge has considered the prosecution case insofar as A2, A4 and A5 are concerned in para 110 onwards. The learned Sessions Judge has noticed that the prosecution has relied on the identification of these accused in the TI parade and the recovery of the weapons and the stolen property from the accused in order to establish their guilt. Before us, the learned Public Prosecutor has also relied upon the presence of the injury on the person of A4 in order to submit that it corroborates the evidence of the eye witnesses in this case. We propose to consider the submissions so made in the context of the evidence on record and the findings recorded by the learned Sessions Judge. Before advertng to the same, it is necessary to note the well established principles governing the scope and ambit of the challenge in an Appeal against acquittal. It is now well settled that where two views are equally and reasonably possible, out of which the trial Court has chosen one, this Court would not substitute its view on the ground that it is more plausible. In other words, it is only when the view taken by the trial Court is shown to be perverse or an impossible view, that this Court can justifiably interfere in the order of acquittal. (See the decision in the case of **Chandrappa & Others Vs. State of Karnataka (2007) 4 SCC 415**).

28. It is necessary to see whether the findings so recorded can be said to be perverse or an impossible view.

29. The learned Sessions Judge after elaborate consideration of the prosecution evidence has come to the following conclusions in para 267 of the judgment:

- A. The identification of the accused by victims in the identification parade is not proved.*
- B. Identification in the Court cannot be relied upon since identification done during identification parade immediately after the incident itself is doubtful.*
- C. Recovery panchanama is not proved beyond doubt and*
- D. There are serious loopholes left in the investigation with respect to finger prints, blood examination and ballistic examination and the evidence adduced is not sufficient to link the accused to the robbery.*

30. We first propose to refer to the evidence of PW-1, who is the complainant and the evidence of PW-5, PW-23 and PW-24, who claim to be the eyewitnesses to the incident. PW-1, Muzaffar Kadri, is the husband of PW-5, Shahin Kadri and son of PW-23, Zamila Kadri. PW-24, Shabhana Ali is the maid servant working in the house of the complainant (PW-1). PW-1 has a computer business and has one shop at St. Inez and another at the 18th June Road and is staying at House No. 328 at St-Cruz alongwith his father Manzoor, mother (PW-23), Zamila, wife Shahin (PW-5) and his minor daughter, who at the relevant time was three years old. He claims that Shabhana Ali was working at their house as a maid servant. On 16.06.2009, he left the house at about 10:00 a.m. His father had left prior thereto at 9:30 a.m. and only PW-5, PW-23 and

PW-24 were at his house. At around 11:30 a.m., he received telephone call from his father stating that four persons had entered the house and committed robbery of gold ornaments, cash etc. He called the police and thereafter, went to Old Goa Police Station and on the basis of his statement, an offence came to be registered at Crime No. 51 of 2009. He has given the details of the gold ornaments, which were stolen. He has also stated that the persons, who had entered in his flat were in the age group of 20-25 years and has given the details of their clothes, which obviously would be on the basis of the information given by PW-5, PW-23 and PW-24.

31. Principally, we have to consider the evidence of the eye witnesses. PW-5 states that on 16.06.2009, her husband went to the shop at around 10:45 a.m. and only her mother-in-law, her minor daughter and the maid servant were left in the house. The maid was in the kitchen washing utensils. Her mother-in-law was washing clothes in the bathroom. She asked the maid servant to look after the child and she went to the toilet. After five minutes when she opened the door of the toilet, she heard her mother-in-law crying and shouting and one person catching the neck of the maid servant with a pistol in his hand. He was pointing the pistol to the maid servant. The said person was wearing a shirt and long pants. At that time, one more person came with a knife towards her from her mother-in-law's bedroom and took her (PW-5) to her bedroom and demanded cash. He was speaking in hindi. Her daughter was crying. She has then stated about one of the persons (A4) having

fired a shot from the country made pistol in which A4 himself got injured and about the robbery of the gold ornaments and the cash.

More or less on similar lines is the evidence of PW-23 and PW-24. Although, the learned Sessions Judge has noticed certain discrepancies, inter se in the evidence of these witnesses, we find that the matter basically turns on the aspect of the identification of the accused.

Identification Parade:

32. Special Judicial Magistrate, Maria Mascarenhas, PW-25, has conducted identification parades on 20.06.2009 and 03.08.2009. The identifying witnesses are PW-5, PW-23, PW-24, who are the eye witnesses and one Vishnu Mashelkar (PW-13), who is the taxi driver and claims to have carried the four accused in his taxi from Karmali Railway Station to Ponda. Be that as it may, the learned Sessions Judge has disbelieved the TI parade, on the ground that the same is conducted in breach of para 16 of the criminal manual, which lays down the guidelines for conduction of such parade and we propose to agree with the finding so recorded. The learned Sessions Judge has elaborately considered the evidence and has rightly come to the conclusion that the parade was not conducted as per the guidelines. For instance, it has come in the evidence of PW-25 that the parade was jointly conducted in respect of all four accused. There were six dummies engaged in relation to each of A4, A5 and the juvenile and seven dummies in respect of A2 and they were all made to stand together for the parade in four

lines forming a square. It has also come in the evidence that after each of the identifying witnesses left, the accused were not given any opportunity to change their position and there was only one witness, Mr. Silvano, who was there. The learned Sessions Judge has found that the guidelines require at least two witnesses, the object being that when one of the witnesses goes to bring the identifying witness, the other pancha has an opportunity to continue to be at the spot to ensure that the entire proceedings are conducted in accordance with the procedure laid down. We find that the learned Special Judicial Magistrate has not followed the guidelines, which aim at the conduction of the TI parade, to which, a certain amount of credibility and veracity can be attached. Thus, the learned Sessions Judge is justified in discarding the TI parade. However, at the same time, it is necessary to note that even where the identification parade is not conducted (which would include a case where the identification parade is found to be defective and not acceptable), the question is whether, the identification by the witness made for the first time in the Court, is acceptable in a given case or not.

33. The Supreme Court in the case of **Dana Yadav @ Dahu & Others Vs. State of Bihar (2002) 7 SCC 295** has held that the evidence of the identification of the accused in the Court is substantive evidence and that of test identification parade, though, is primary evidence, is not a substantive one and the same can be used only for corroboration of the accused, made by the witness in the

Court. This is what is held in para 38:

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

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

rejected or although granted, but no such parade was held, would not in any manner affect the evidence adduced in court in relation to identity of the accused. But if, however, such an evidence is not free from doubt, the same may be a relevant material while appreciating the evidence of identification adduced in court.

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

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

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

the same is a rule of prudence and not law.

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

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

34. It can thus be seen that although, the evidence of identification in Court is the substantive evidence and is admissible, the same by its very nature is a evidence of a weak character, unless corroborated by the previous identification in a properly conducted test identification parade. The necessity of a TI parade arises only where the accused or the suspect is not previously known to the witness. It has also to be shown on the basis of evidence that the identifying witness had sufficient opportunity to see the perpetrators at the time of the incident and had not seen the suspects prior to the conduction of the parade. Further, as held by the Supreme Court in the case of **Dana Yadav** (supra) ordinarily where the accused is not named in the FIR (which would include a case where the accused is not known to the witness), his identification for the first time in Court should not be relied upon in the absence of a properly conducted TI parade.

35. Coming to the present case although, there are circumstances to indicate that PW-5, PW-23 and PW-24 had sufficient opportunity to see the perpetrators, as the incident is alleged to have happened in broad daylight at the house of the complainant, the identification by these witnesses in the Court, in our considered opinion, cannot be accepted or relied upon in the absence of a properly conducted TI parade. It is necessary to note that a case where the TI parade is conducted in gross violation of the procedure laid down (which is to ensure that the TI parade is one which inspires confidence), has to be equated with a case where there is no TI parade conducted. In our considered opinion, although the evidence of PW-5, PW-23 and PW-24 would indicate that there was an incident of house trespass and robbery, the evidence is insufficient to establish beyond reasonable doubt to show the involvement of respondent nos. 2, 4 and 5 in the said incident.

36. Recovery of the ornaments and the weapons used in the commission of the offence.

The learned Sessions Judge has considered this aspect from para 188 of the judgment, in the context of the evidence of the panch witness Munir (PW-4), PC Suryakant Yadav (PW-17), P.I., Tushar (PW-26), P.I., Santosh (PW-30) and P.C., Vasudev (PW-34). We have carefully gone through the evidence of these witnesses and the reasoning articulated by the learned Sessions Judge and we do not find any reason to take a different view. There are inherent

inconsistencies and improbabilities in the evidence of these witnesses as noticed by the learned Sessions Judge, particularly, about the arrest of the accused at the Margao Railway Station. It is difficult to see as to how the police authorities from the Old Goa Police Station (where the offence was registered and was being investigated), the Panaji Police Station and the Margao Railway police converged and the arrest was effected at the Railway Station Margao. Even insofar as the gold ornaments are concerned, the evidence indicates that a gold smith, Mr. Pradeep Karekar had certified during the conduction of the panchnama about the authenticity of the gold ornaments, which were sealed at the Railway Station. However, PW-1, PW-5 and PW-23 have stated that they identified the ornaments in the Old Goa Police Station on 20.06.2009 in the presence of a goldsmith after removing the seals, which in the opinion of the learned Sessions Judge raises a doubt about the verification and sealing of the articles at the time of the drawing of the panchanama at the time of their attachment. There is also a circumstance based on the transfer warrant under which the Investigating Officer PW-35 had obtained custody of A4 and A5. The transfer warrant does not make mention of the knife, bullets, phones and the watches, although the transfer warrant mentions other articles. The copy of the muddemal register of the Old Goa Police Station or the Railway Police Station is not produced. We do not find any reason to take a different view on the finding so recorded by the learned Sessions Judge.

37. This takes us to the aspect of an injury being found on the left hand little finger of A4. According to the prosecution case and the evidence of the eye witnesses, A4 in an attempt to fire by a country made pistol injured himself. It is the case that the bullet caused a hole in a drawer in an almirah and lodged itself in a white and ash colour sock. In so far as the first aspect of an injury being found on the person of A4 is concerned, the prosecution has also relied upon the blood stains found at the spot and some clothes. However, the prosecution evidence led on the point, including that of the forensic expert only indicates that the blood stains were of a human male. The learned Sessions Judge has noticed that the prosecution has not co-related the same to be that of A4. The learned Sessions Judge has found that not even the evidence about collection of the blood sample of A4 has been produced. Insofar as the aspect of the lodging of the bullet in the drawer is concerned, there are two circumstances considered by the learned Sessions Judge in this regard. First is that significantly, there was no damage to the socks, which is improbable, if a bullet after piercing the drawer lodges itself in such socks. Secondly, the ballistic expert, Mr. Siddambary (PW-31) has stated that the hole in the drawer is not caused by the bullet. This according to the learned Sessions Judge is indicative of an attempt to fabricate evidence.

38. Lastly, there are certain aspects pertaining to the nature of the investigation carried out. We are conscious of the fact that any lapses in the investigation, even if there be any, by themselves,

are not sufficient to disbelieve the prosecution case. The matter would depend on the facts and circumstances of each case, including the nature of the lapses and whether independent of any such lapses there is sufficient and acceptable prosecution evidence to show the complicity of the accused in the crime. In a given case, such lapses can form an additional reason and a circumstance not to accept the prosecution case, if other evidence produced is not sufficient to establish the guilt beyond reasonable doubt. In the present case, we would only notice two aspects which could have readily strengthened the prosecution case. First is with reference to the non obtaining of the blood sample of A4. At least nothing in this regard is produced on record and second is non obtaining of any chance fingerprints. For instance, no attempt has been made by the Investigating Officer to obtain the fingerprints of A4 and compare them with the finger prints on the pistol (Exhibit-10 A) or from the knife to match them with those of A5.

39. It is necessary to note that the prosecution has examined Mr. V. Rajakrishnan (PW-21), who is an expert working with the finger print bureau at Verna, Goa. His evidence is only regarding two chance prints found from the spot, which according to this witness were matching with the finger impression of A5 Pawankumar @ Deepak Kumar. Here also, the evidence is that the photographs of the chance prints were obtained by HC Pednekar, who was a photographer attached to the bureau. Significantly, Mr. Pednekar has not been examined as a witness by the prosecution.

That apart, the evidence of PW-21 shows that only photographic enlargements of the chance prints were sent to him. Most importantly, PW-21 states that he does not know where and when the specimen finger impressions of A5 were taken.

40. In the case of **Surajsinh** (supra) the Supreme Court found that an injured witness is a natural witness and in such a case discrepancies in evidence regarding crime bullet shells and the pistol recovered cannot displace the eyewitness account. In that case, it appears that the appellant and the other assailants were known to the deceased and his wife, who was PW-5 and an eyewitness to the incident. In the present case, although, we find that there is evidence of occurrence of some incident at the house of the complainant, the principal issue is about the identification of the accused as discussed earlier.

41. In the case of **Anil Kumar** (supra) one of the questions was whether a delay of 47 days in holding the identification parade would vitiate the same. In that case, on facts it was found that the circumstances in which the occurrence took place were sufficient for the witnesses to note the facial features and expressions and mere delay of 47 days in holding the TI parade would be inconsequential. In that case, it was also found on facts that sufficient precautions were taken to ensure that the witnesses did not have the chance to see the accused prior to the holding of the TI parade. In the present case, there are serious lapses as noticed

earlier in holding of the TI parade, which vitiates the same.

42. The case of **Surajsinh** (supra), in our opinion, turned on its own facts. In that case, there was the kidnapping of a boy aged seven years for ransom, whose evidence was found to be natural and acceptable.

43. We have carefully gone through the judgment of the learned Sessions Judge. We find that the view taken by the learned Sessions Judge is a plausible view. Thus, no case for interference is made out. The Appeal is accordingly dismissed.

C. V. BHADANG, J.

M. S. SONAK, J.

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