

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 17 OF 2017

Mr. Jervasio Pereira

Son of Ligorio Pereira, Aged : 39,
R/o. H.No.40, Axona, Utorda, Appellant
Salcete, Goa.

V/s.

1 State

Through Public Prosecutor, High
Court of Bombay at Goa

2 Mr. Diago Pereira, Aged Major,
Business, R/o. H. No. 12,
Fiugeum, Uttorda, Goa.
(Accused no.1)

3 Mr. Lawrence Mascarenhas,
major, Son og Carlos
Mascarenhas, Business R/o. H.
No. 240, Velsao, Cansaulim –
Goa. (Accused no. 2

4 Bruno alias Braz Fernandes

Son of Antonio Fernandes
Aged:38 years, Business, R/o. H.
No.34, Falwada, Velsao, Respondents
Cansaulim, Goa. (Accused no. 3)

Mr. Galileo Francisco Teles, Advocate for the Appellant.

Mr. M. Amonkar, Additional Public Prosecutor for
Respondent No.1.

Mr. A. Clovis Da Costa, Advocate for Respondent Nos.2 and 3.

Mr. R. Menezes, Mr. N. Fernandes and Ms. G. Almeida, Advocates for Respondent No.4.

**Coram:- M. S. SONAK &
SMT. M. S. JAWALKAR, JJ.**

Reserved on : 9th September, 2020.
Pronounced on: 22nd September, 2020.

JUDGMENT (*Per M. S. Jawalkar, J.*)

Present appeal is filed by the complainant/victim against the Judgment and Order of acquittal passed by the Sessions Court, South Goa, Margao in Sessions Case No. 10 of 2012 dated 24/02/2016.

2. The case of the prosecution before the learned Sessions Judge was as under :

On 03/06/2008, the complainant Mr. Jervasio Pereira and his wife Sedwina Pereira were returning home on a motorcycle bearing registration no.GA08D5644. On the way at Utorda, when the appellant reached near the house of the accused no.1, the accused nos.1,2 and 3 came running in

front of the motorcycle with hockey stick, iron rod and knife and stopped the complainant with their common intention pulled him down and all accused assaulted him with iron rod, hockey stick and knife. The wife of the accused was also assaulted with fist blows on her face. The assault was committed on the complainant with an intention to cause his death. The accused also damaged the motorcycle of the complainant. Smt. Sedwina, wife of the complainant had also suffered injuries near left eye. As the offence under Section 307 of IPC is triable exclusively by the Court of Sessions, the case was committed to the Sessions Court.

3. After arguments before the Judge, charge came to be framed as follows:

CHARGE:

(Sections 221, 222, 223 CrPC)

I, Shri Vincent D'Silva, Addl. Sessions Judge, FTC-11, South Goa, Margao, hereby charge you 1) Diago Pereira 2) Lawrence

Mascarenhas and 3) Bruno e Braz Fernandes, as follows:

That on 1.6.2008 at about 9.30 hours at Uttorda, you with common intention wrongfully restrained the complainant, Gervasio Pereira and his wife, Selviona Pereira while they were on their motorcycle bearing no. GA-08-D-5644 and prevented them from proceeding in any direction and that you thereby committed an offence under Section 341 r/w. 34 IPC and within the cognizance of the Court.

On the aforesaid day, time and place, you with common intention committed mischief by damaging the motorcycle of the complainant bearing No.GA08-D-5644, causing loss amount to not less than ₹50 and that you, thereby committed offence punishable under Section 427 r/w. 34 of IPC and within the cognizance of the Court.

In the aforesaid date, time and place, you A-1 Diago Pereira and A-2, Lawrence Mascarenhas with common intention voluntarily caused hurt to the wife of the

complainant, Mrs. Sedwina Pereira with fist blows on her face, causing injuries to her bear left eye and that you, thereby committed offence punishable under Section 324 r/w. 34 IPC and within the cognizance of the Court.

On the aforesaid date, time and place, you with common intention assaulted the complainant, Gervasio Pereira with iron rod/crow bar, hockey stick and knife on his body due to which, the complainant sustained injuries and fell unconscious and further, you pocked crow bar on both the legs of the complainant at 5 to 6 places, causing grievous injuries to him with intention or knowledge and under such circumstances that if by that act, you had caused death of Shri Gervasio Pereira, you would have been guilty of murder and that you thereby committed an offence punishable under Section 307 r/w. 34 of IPC, and within the cognizance of the Court.

AND I hereby direct that you be tried by this Court on this, the 16th day of February, 2013.

Sd/-

(Vincent D'Silva)

Addl. Sessions Judge – 2,

Fast Track Court-II,

South Goa, Margao.

4. The prosecution examined in all 12 witnesses in support of his case. After examination of the prosecution witnesses, statement under Section 313 of Cr.P.C., came to be recorded and an opportunity was granted to the accused person to examine the witnesses. Dw1 was examined by the accused in his defence. After considering the evidence on record it was held by the learned Sessions Judge that the prosecution witnesses are not reliable and possibility of the complainant meeting with an accident cannot be ruled out. It is held that the prosecution failed to establish beyond reasonable doubt that the accused had assaulted the victims and consequently, the accused were held to be entitled to the benefit of doubt. The present appeal is filed by the complainant/victim being aggrieved by the order of acquittal.

5. Mr. Galileo Francisco Teles, learned Advocate for the appellant submitted that he is not pressing for application of Section 307 of IPC read with Section 34 as from the medical evidence and other evidence on record it is clear that prosecution could not establish that there was assault by knife. Therefore, an intention of killing complainant is not substantiated. So also he is not pressing for application of Section 427 r/w. Section 34 of IPC causing loss to the motorcycle. His main grounds for challenge are as follows:

6. The Judgment and Order of the learned Sessions Judge is illegal, perverse and contrary to the evidence on record. The learned Sessions Judge failed to consider the evidence of Pw1 i.e. the appellant who was the victim in the assault and his testimony was not shaken during the cross-examination. The learned Sessions Judge erred in giving undue importance to the fact that the wife of the appellant Ms. Sedwina Pereira was not examined by the prosecution although she had suffered injuries to her eye. The learned

Trial Judge ought to have considered the evidence of Pw8 who was an independent witness and also an eyewitness whose testimony was not shaken by the defence. The learned Trial Court erred in discarding the testimony only on some minor discrepancies which were not at all material specifically when otherwise their substantial evidence is sufficient to show the involvement of the accused person in the assault. The learned Trial Court failed to consider that as the appellant was being assaulted by three accused persons and he was trying to protect himself from the assault, it is obvious that there may be some minor error while describing the weapon which was actually used to inflict the injuries.

7. The learned Trial Court erred in holding that the Test Identification Parade cannot be relied upon for the purpose of convicting the accused person on account of noncompliance of certain guidelines prescribed in Criminal Manual. The learned Advocate for the appellant relied on the following citations:

APPEAL AGAINST ACQUITTAL :

i) Chandrappa & Ors. Vs. State of Karnataka (2007) 4 SCC 415

ii) Arun Kumar vs. State of Bihar & Ors. (2017) 6 SCC 765

iii) Naval Kishore Mishra vs. State of Uttar Pradesh & Ors. (2019) 13 SCC 182.

APPRECIATION OF EVIDENCE

i) Dinkar Deoram Kamble vs. The State of Maharashtra, 1997 (1) Bom. C.R. 1.

ii) Subodh Nath & anr. Vs. State of Tripura (2013) 4 SCC 122.

iii) Mritunjoy Biswas vs Pranal alias Kurti Biswas & anr. (2013) 12 SCC 796.

TEST IDENTIFICATION

i) Mulla & anr. Vs. State of Uttar Pradesh (2010) 3 SCC 508

RECOVERY

ii) State of Himachal Pradesh vs. Jeet Singh (1999) 4 SCC 370.

8. As against this, Mr. A. Clovis Da Costa, learned Advocate for the Respondent Nos.2 and 3 submitted that in case of appeal against acquittal, the scope in appeal is very

limited. He further submitted that test identification parade was not held as per procedure prescribed. Recovery of weapon is from open space cannot be relied and that the Judgment of Trial Court is legal and justified. He relied on the following citations :

TEST IDENTIFICATION :

- i) Vilas Vasantrao Patil vs. State of Maharashtra (1997 (Supp) Bom.C.R. 152)*
- ii) Thambi Nasir & Ors. Vs. State (2003 (Supp) Bom. C.R. 657)*
- iii) State of Maharashtra v. Arun Umaji Bansode (2004 (2) Bom. C.R. (Cri) 722)*
- iv) Mahesh Rohidas Kinalkar v. State of Goa (2005 (2) Bom. C.R. (Cri) 670)*
- v) Arjun G. Sandbhor v. State of Maharashtra (2012 (2) Bom. C.R. (Cri.) 614.*
- vi) Mahesh Rohidas Kinalkar vs. State of Goa (2005 (2) Bom. C.R. (Cri) 670)*

APPEAL AGAINST ACQUITTAL

- i) Chandrappa & Ors. Vs. State of Karnataka (2007) 4 SCC 415*
- ii) Kora Ghasi v. State of Orissa (AIR 1983 SC 360; 1983 Cri. L. J. 692; 1983(2) SCC 2511 1983 (1) Scale 717)*
- iii) Kali Ram v. State of H.P. (AIR 1975 SC*

2773; 1973 (2) SCC 808; 1974 Cri. L.J. 1)

iv) Ramesh Babulal Doshi v. State of Gujarat (AIR 1996 SC 2035; 1996 Cri. L.J. 2867; 1996 (4) Scale 185; 1996 (9) SCC 225.

v) Ghurey Lal vs. State of Bihar & Ors. (2015) 16 SCC 369; 2015 DGLS (SC) 1094; 2015(13) Scale 901)

vi) Ganpat v. State of Haryana & Ors. (2011 Cri. L.J. 701; (2010) 12 SCC 59.

vii) A. Shankar v. State of Karnataka (AIR 2011 SC 2302; (2011) 6 SCC 279; 2011 DGLS (SC) 470.

viii) Murugesan & Ors. Vs. State (2013 AIR SC 274; 2012 (10) SCC 383; 2012 DGLS (SC) 552).

ix) Basappa v. State of Karnataka (2014 (2) Bom. C.R. (Cri) 462)

x) Hakeem Khan & Ors. Vs. State of M. P. (2017) 5 SCC 719)

i) Ravindra Jha v. State & Ors. (2019 DGLS (Bom) 141, 2019(1) Bom. C.R. (Cri) 640; 2019 (1) Goa L. R. 274, 2019 ALL M. R. (Cri 3073. (Not appeal against acquittal but appeal against conviction)

ii) Shahul Tajdin Hamid v. State of Goa (2014) 4 Bom. C.R. (Cri.) 484) (Appeal against conviction)

RECOVERY :

i) Salim Akhtar @ Mota v. State of U.P. AIR 2003 SC 4076; (Case under TADA and material recovered was not sealed).

ii) *Sudhir Kanulna vs. State – CRIA No.33 of 2012 decided on 20.11.2013.*

9. Mr. R. Menezes, learned Advocate for Respondent No.4 submitted that the order passed by the learned Trial Court warrants no interference as:

i) Ocular evidence not found consistent.

ii) Wife of the complainant was not examined by the prosecution who is complainant along with Pw.1.

iii) Pw8 not submitted for re-cross-examination of the accused no.2.

iv) Mandatory provisions given in Criminal Manual not followed while conducting Test Identification Parade.

v) Iron rod not described consistently.

vi) MO's not properly identified recovery panchanama raised serious doubt of its genuineness.

vii) The incident was of 03/06/2008 and the accused arrested on 09/07/2008 and the recovery panchanama was carried out on the same date i.e. after one month 6 days from the date of incidence.

viii) As recovery was from open space it has no evidentiary value.

10. He relied on the following citations reported in ***Chandrappa and others vs. State of Karnataka*** (supra) and relied on the citations referred by learned Advocate Mr. Clovis Da Costa.

11. Mr. M. Amonkar, learned Additional Public Prosecutor for Respondent No.1 supported the appellant's case.

12. The learned Advocate for the appellant took us through the evidence of witnesses to demonstrate that the prosecution has beyond reasonable doubt established that there was wrongful restraint and assault by the accused persons with deadly weapon thereby the offence under Section 341 r/w Section 34 and offence under Section 324 r/w Section 34, is clearly made out.

13. As present appeal is against acquittal we must follow

the principles laid down in relation to adjudication of such appeals in various judgments of Apex Court. It is submitted by learned Counsel for the respondent nos, 2, 3 and 4, (accused nos.1, 2 and 3), that scope in appeal against acquittal is very limited when there is appeal against the order of acquittal. He relied on the citation ***Chandrapa & Ors. Vs. State of Karnataka***, (supra) wherein the Hon'ble Apex Court held that when there is appeal against acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent Court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the Trial Court. Learned Counsel for the appellant also relied on the same judgment and pointed out that in the very said judgment, general principles regarding powers of an appellate Court while

dealing with the appeal against an order of acquittal laid down as under :

(1) An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', good and sufficient grounds, 'very strong circumstances', distorted conclusions', 'glaring mistakes'. etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double

presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

14. The learned Counsel for the appellant has also relied on the citation of ***Arun Kumar vs. State of Bihar and others*** (supra), wherein appeal was filed by the son of the deceased against the final order passed by the High Court dismissed the appeal which was against the acquittal of accused persons. Wherein Hon'ble Apex Court laid down how the powers of appellate Court in case of appeal against acquittal to be exercisable. It reiterated power of appellate

Court to review evidence in appeal against acquittal is as extensive as its powers in appeals against convictions, but that powers is with the note of caution that appellate Court should be slow in interfering with orders of acquittal unless there are compelling reasons to do so. In that matter before Hon'ble Apex Court, it was a case of assault using guns and lathis leading to death of one and injuries to others. It is observed by the Apex Court that High Court uphold acquittal of accused persons by a cursory and cryptic order. In view of non-exercise by High Court of its appellate powers in a proper manner, case was remanded back to High Court for hearing afresh on merits.

15. The learned Counsel for the appellant Shri G. Teles, has also relied on *Naval Kishore Mishra vs. State of Uttar Pradesh and ors.*, (supra), wherein Hon'ble Apex Court held that appeal against acquittal by victim has to be dealt with as a regular appeal after insertion of Section 372 proviso. It is also held that rejection of leave to file appeal is irrelevant for

maintainability of appeal if victim files it after the said amendment.

16. In *Chandrappa vs. State of Karnataka* (supra), Hon'ble Apex Court, covered judgment from *AIR 1934 PC 227(2) Sheo Swarup & Ors. vs. King Emperor* upto 2006 on appeal against acquittal and laid down proposition of law regarding powers of the Appellate Court while deciding with an appeal against acquittal. As such, Appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

17. It is consistently held by Apex Court since 1939 that the High Court while sitting in appeal against acquittal, has full power to review the evidence but it should be with caution. Thus while deciding the present appeal, rival contentions will have to be evaluated by keeping in mind the principles laid down by the Apex Court.

18. Pw1 complainant/victim, deposed that the incident occurred on 03.06.2008 at Uttorda near the house of the

accused no.1- Diago. On that day at around 8.00am he had gone to Margao alongwith his wife on a bullet motorcycle bearing no.GA08 D5644 as he was sick. He returned at around 9.30am from Margao. When he reached near the house of the accused no.1- Diago, all the three accused i.e. Diago Pereira, Bruno Fernandes and one Lawrence Macarenhas (described as one unknown person in complaint) came running on the road and stopped his vehicle. At that time, Accused no.3 Bruno caught hold of handle of his motorcycle, Accused no.2 Lawrence caught hold of collar of his shirt and pulled him down from the motorcycle and accused no.3 Bruno pushed his motorcycle on the ground. Accused no.1 armed with hockey stick, accused no.3 Bruno was holding knife and iron rod and accused no.2 was carrying crow bar (parroi) and all of them started assaulting him with the said weapons. A1- Diago while assaulting with hockey stick, complainant tried to save himself by holding the hockey stick with both hands at that time, accused no.3 – Bruno @ Braz came running with iron bar and assaulted him

on his right elbow. All the three accused started assaulting him with the weapons all at a time. He was assaulted on both his legs, back side and shoulders. When accused no.1- Diago assaulted on his head with hockey stick he fell down unconscious. His wife was assaulted by the accused with fist blow on the left eye. He deposed that he gain consciousness after about 15 minutes.

19. His brother arrived at the spot and took him directly to the Verna Police Station. The police referred him to Cansaulim Primary Health Center. There he was given first aid and thereafter referred to Hospicio Hospital, Margao where he was admitted for about 8 days. He further deposed that when he lodged the complaint, his wife was also present in the Police Station. She also signed the complaint. He has also lodged prior to the present complaint two more complaints against accused no.1- Diago, one on 13/05/2008 and the other on 15.05.2008. However police failed to take any action.

20. The defence tried to establish that complainant is of complaining nature. It has come on record that there was complaint lodged by said Diago against the present appellant and he was chargesheeted for having committed offences under Sections 341, 503 and 323 of IPC. However, he was acquitted in the said case.

21. Attempt was made by the defence to show that the complainant is in habit of lodging complaints. In fact, it is a sudden attack as alleged by the complainant and, therefore, some minor discrepancy cannot be the basis for totally discarding the evidence of witnesses and giving benefit of doubt to the accused person.

22. The learned Trial Judge, gave much importance to description of weapons in the hands of accused person. It is observed by learned Trial Court that there is no consistency in the deposition made by Pw.1 and Pw.8. Pw.8 nowhere deposed that he saw knife in the hand of one of the accused. It is observed that Pw.8 was at a distance of 10 to 15 metres

from the motorcycle of the complainant when accused came running towards the complainant and, therefore, it is held that it cannot be said that he was at such long distance that he could not have seen the knife which, according to Pw.1, was of six inches in length. The learned Trial Judge observed that Pw.8 deposed that iron rod was less than one metre in length. It was a crow bar and was round in shape and he did not remember whether it had spiral lines or it was plain whereas Shri Jervasio, Pw.1, the complainant has stated that the length of the rod was more than one cubic foot and rod recovered at the instance of accused no.1 was rectangular in shape and its length was 20 inches. It is observed that rod recovered is not of the description given by Jervasio, Pw.8.

23. In our considered opinion, the learned Trial Judge totally failed to appreciate that Pw.1, complainant, was knowing two of the accused persons. He mentioned the name of those two accused persons i.e. accused nos. 1 and 3 in the complaint itself, along with third unknown person.

The assault by weapons like rod, hockey stick was sudden and nobody has that photographic memory to recollect every minute detail. It is unreasonable to expect from witness to answer whether that rod was having spiral lines or it was plain and round shape. So far as length is concerned, Pw.1, complainant, described it as having length of more than one feet, whereas, Pw.8 described it as less than one metre and as per recovery panchanama, it is around 20 inches in length. So, we do not see any material discrepancy so as to totally disbelieve the testimony of Pw.1 or Pw.8. The answers depends on what questions put to the witness. Admittedly, Pw.8, seen the incident from 10 to 15 metres and, therefore, naturally, he would not be able to say whether there was a knife or it was kitchen knife or whether rod was having spiral lining or plain what was the make of hockey stick etc. For that reason, disbelieving total evidence of Pw.1 and Pw.8, is unjustified. Pw.1, as well as Pw.8, both are consistent on attack by three persons out of them two were known to complainant whose names were also given in the

complaint. It has also specifically deposed by Pw.8 that he was not knowing complainant or his brother nor having any connection prior to incident. On that day, he was just passing from the said road where he witnessed the incident occurred. Defence also could not establish any connection of this independent witness with complainant or his brother.

24. Learned Counsel for the appellant-Complainant, relied on the citation ***Subodh Nath & anr. vs. State of Tripura***, (supra), wherein the Hon'ble Apex Court held in para 16 thus:

“16. While appreciating evidence, discrepancies are relevant only if those are material. Normal discrepancies due to normal error of observation, loss of memory, mental disposition of the witnesses and the like are immaterial. Court will not discard evidence of witnesses unless discrepancies are material discrepancies so as to create a reasonable doubt about creditability of witnesses.”

25. It is also argued by Counsel for respondent nos.3

(Accused no.2), that Pw.8 was recalled on the point of identification of recovered articles. It appears from the paper book that opportunity was granted to the accused to re-cross examine as his Advocate was absent. However, subsequently, on application of Advocate for accused no.2, he was recalled but prosecution could not secure his presence and, therefore, evidence of Pw.8 was closed. It is submitted by Advocate for respondent no.2, that the witness did not submit himself for cross examination and, therefore, his testimony has to be discarded. The learned Trial Court found substance in the submission of the learned Advocate and observed that as witness has shyed away from the Court for the reasons, best known to him, his evidence cannot be considered. The Trial Court observed that in view of the discrepancies, it raises a serious doubt on the veracity of the testimony of this witness.

26. While discarding total evidence of Pw.8 on this count is erroneous. It is a matter of record that Counsel for accused no.2, so also accused no.3, were substantially cross

examined Pw.8. Thereafter, learned Public Prosecutor re-examined this witness only on identification of recovered properties. A1 and A3, re-cross examined this witness. Earlier Advocate for accused no.3 cross examined this witness on behalf of Advocate for accused no.2 also. However, at the time of re-cross examination, Counsel for accused no.3 declined to cross examine on behalf of A-2. As such, it is not the case that there was no opportunity granted to the accused no.2 at all to cross examine. Only after re-examination to the extent of identification of muddemal properties and after re-cross examination by Counsel for A-1 and A-3, prosecution could not secure the presence of Pw.8. For that reason, total evidence cannot be discarded where record shows accused nos.1 to 3 sufficiently cross examined Pw.8.

27. Now let us turn to the deposition of Pw.1. It appears from the evidence of Pw.1 that he was knowing two of the accused persons whose name he mentioned in the complaint itself. He has also described the weapon used for assault

and how he was restrained from proceeding. The learned Trial Judge elaborately discussed that how TI parade was not as per the guidelines and as per the provisions laid down in the Criminal Manual and, therefore, it cannot be believed. True it is that if the proper procedure is not followed while conducting TI parade, it has no evidentiary value. However, learned Trial Judge failed to appreciate this fact that out of three persons, two persons were known to the accused and, therefore, there was no question of his identifying those two accused persons in T.I. Parade. It appears that the learned Trial Court totally ignored this aspect and on the ground that the Test Identification Parade was not carried out as per the procedure laid down in the Criminal Manual discarded total evidence of the prosecution witnesses.

28. The learned Counsel for appellants relied on the citation in the case of *Mulla & anr. Vs. State of Uttar Pradesh & Ors.*, (supra) wherein Hon'ble Apex Court held that identification test do not constitute a substantive

evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right line. The identification can only be used as corroboration of the statement in Court.

29. The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The main object of holding identification parade during the investigation stage is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye witness of the crime. In the present matter, two of the accused persons were named in the complaint itself. Therefore, there was no question of identification of complainant with regard to these two accused persons i.e. accused no.1 and 3.

30. So far as citations relied upon by Mr. D' Costa, learned Counsel for the respondent no.3, on the point of

identification parade (supra) is concerned, the facts and circumstances involved in the said citations are totally different. There are cases of robbery, dacoity, dacoity with rape and offence committed in the night time by unknown persons, whereas, in the present matter, two of the accused were known to the complainant and their names were also mentioned in the complaint itself. In the case of **Arjun Sandbhor** (supra) relied on by Counsel for respondent no. 3 and 4, it is held thus:

“When accused were paraded for identification which was against guidelines prescribed under Criminal Manual could not be considered as incriminating piece of evidence against accused. It is further held that no accused can be convicted unless he has been properly identified by following prescribed procedure of law.”

In the said matter before Hon’ble Apex Court, the incident took place in the night and Pw.17 was the only eye witness and was not knowing accused persons. Moreover, police shown accused persons to said witness in police station

before going to the identification parade. No proper procedure as prescribed under Criminal Manual was followed. On this count, conviction was set aside.

31. In our considered opinion, only accused no.2, at the most, can be entitled to get the benefit of doubt on the count of non-compliance of procedure laid down in Criminal Manual but not the accused nos.1 and 3.

32. In the present matter, after the said incident, complainant, his wife alongwith his brother directly went to Verna Police Station and lodged the complaint which is at exhibit 20 (paper book page 97). If the said complaint is perused, the complainant gave names of two accused persons as Diago Pereira and one Bruno e Braz Fernandes with one unknown person as an assailant. In the said complaint itself, he has given that earlier also he has lodged complaints against Diago Pereira but police failed to take any action. It appears that his wife also signed the said complaint. Thereafter, both of them were referred to Cansaulim Health Centre and after

giving First Aid, they were referred to Hospicio Hospital, Margao.

33. The concerned Doctor is examined as Pw.7. As per his deposition, patient was brought by Verna Police PC 6408. He observed seven injuries on the person of the complainant out of which injuries at serial nos.1 to 3 and 6 were simple in nature and injuries at serial nos. 4, 5 and 7, opinion was reserved. The history was given by the patient himself of assault and history of loss of consciousness for sometime. On the same date, he also examined one Sedwina Pereira who was also brought by same police constable with history of assault. There were three injuries. Patient was complaining of giddiness, nausea and blurred vision. He has opined that duration of the injuries is less than six hours as they were fresh and bleeding. There was suggestion given to this witness that such injuries could be caused if person falls from a moving vehicle and slides over hard and rough surface or over the road.

34. If deposition of Pw.1 and Pw.8 are considered together, the assault on legs, elbow and back, is supported by the medical evidence. Admittedly, prosecution has not examined wife of complainant. There were injuries on legs as well as left leg i.e. injuries nos. 1 to 5 to right elbow which is at serial nos. 6. Injury no.7 shows tenderness on right elbow on the chest anteriorly and posteriorly both side and abdominal right side. From the deposition of Doctor it is also evident that wife of complainant was also examined by the Doctor who were brought by the same PC of Verna Police Station.

35. The learned Trial Judge on the basis of suggestions put to Doctors that such injuries can be possible, if a person falls from a moving vehicle and slides over hard and rough surface over the road, held that possibility of complainant and his wife meeting with an accident on the road can therefore not be negatived.

36. It is a matter of record that Dw.1 examined one Bruno

Rodrigues in his defence. He deposed that when he reached near the crowd, he was asked to stop the vehicle and request him to drop Jervasio to his home on his motorcycle. Accordingly he dropped him at his house and he did not see anything abnormal on the body of Jervasio. It is totally contrary to the medical evidence brought on record. Therefore, in fact, the defence witness is not at all reliable and was a good witness. If there would be an accident, there was no reason for complainant-victim to go to the police station directly. Even, there is no sign of any accident on the road. Even Pw.8, who was an independent witness, has no reason to depose that he saw three persons attacking the victim with rod, hockey stick and crow bar.

37. Counsel for respondents vehemently argued that PW8 speaks about an attempt to dodge the accused person by complainant. However, complainant did not depose so. PW8 was looking at the incidence from a distance of 10 to 15 metres and he may have perceived the holding of handle of

motorcycle in that way. There is hardly any material discrepancy in the evidence of Pw.1 and Pw.8 on material point. In our considered opinion, only on basis of suggestions to the Doctors that such injuries could be caused due to fall is not sufficient to hold possibility of accident unless there are some circumstances leading to conclude that possibility of accident. Even learned Trial Court failed to appreciate the evidence of PW8 who specifically denied suggestion that injured would fall if he was riding heavy vehicle like bullet. He deposed that injured was pushed by the accused and therefore he fell at a distance of about one metre. On the contrary learned Trial Court not even considered the spot of incident which is near to the house of accused No.1 Diago. There were no mark or evidence supporting the possibility of accident. Thus, in our considered opinion, if evidence in its totality is considered there is no other possible view other than assault by accused. Approach of the lower Court vitiated by manifest illegalities and conclusion arrival at would not be arrived at by any

reasonable person. In this backdrop, following citation relied on by learned Counsel for respondent nos. 2 and 3, is of no avail. ***Rajiv Singh vs. State of Bihar & Ors. 2015 (1) Scale 901***, wherein the Hon'ble Apex Court held that:

“Two views from one and the same set of evidence acceptability held if two views are possible on the evidence adduced in the case then view which is favourable to the accused should be adopted”.

38. So far as non examination of wife is concerned, learned Counsel for the appellant relied on citation ***Dinkar Deoram Kamble*** (supra), wherein it was held at para 13 thus :

“13. The time-honoured principle, namely that evidence has to be weighed and not counted is contained in section 134 of the Indian Evidence Act which provides "no particular number of witnesses shall in any case be required for the proof of any fact". Since in my view, the evidence of the victim is implicitly reliable; is corroborated by medical evidence; and assurance is lent to it by some other circumstances also, by itself alone it is

a very safe and sound basis for confirming the conviction of the appellant. Plurality of evidence is only a rule of prudence; necessary in a given case because of its peculiar features and not an inflexible requirement of law having universal application and in the present case there is certainly no necessity for the same. As I see it the learned trial Judge was wholly justified in convicting the appellant under section 324 I.P.C.”

39. In our considered opinion, non-examination of wife will not wipe out evidence of Pw.1, medical evidence and other evidence on record. He has admitted that his wife and children are presently residing with his in laws. However, denied that there was any divorce proceeding pending.

RECOVERY

40. So far as recovery of weapons are concerned, learned Counsel for the respondent nos.2 to 4 submitted that recovery is after a period of one month of the incident and it is not reliable. The weapons are recovered from open space and therefore accessible for one. Learned Counsel for

respondents relied on citations in the case of ***Sudhir Kanulna*** (supra) and ***Salim Akhtar @ Mota vs. State of UP*** (supra). So far as ***Sudhir Kanulna*** (supra) is concerned, the recovery was from a place open and accessible to one and all. Whereas ***Salim Akhtar's matter***, the case was under TADA and recovery was disbelieved as material recovered was not sealed.

41. So far as recovery of articles are concerned, learned Counsel for the appellant, relied on ***State of Himachal Pradesh vs. Jeet Singh*** (supra), wherein Hon'ble Apex Court held thus :

“There is nothing in Section 27 which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is “open or accessible to others”. It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main

roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.”

42. It is pointed out that incident took place on 03.06.2008 and accused were arrested on 09.07.2008. On the same day, recovery panchanama was carried out on disclosure by the accused persons. Therefore, there is no delay on the part of investigation to carry out recovery after the arrest of accused persons. It is submitted that if evidence of Pw.5, panch witness is perused, he has specifically mentioned that Diago removed a hockey stick and an iron rod from the bushes and handed over to PSI and those were

not visible when they were to the spot. His evidence is not shaken in cross examination also. He denied suggestion that hockey stick was new and was having shining. He was specifically asked colour of rod after showing the same. He answered that it is rusted rod. If CFSL reports are perused, which is at exhibit 134 (page 276 of paper book). Exhibit 4 received by the CFSL is a rustic iron rod. However, in judgment, it is observed by learned Trial Court that in rainy season how the hockey stick could be new and shining. In our considered opinion, panch witness denied this fact that hockey stick was new and shining. Moreover, description of rod also matches with the articles sent to CFSL as deposed by panch witness that it was rustic rod. Thus, we do not see any reason to disbelieve the recovery of rod and hockey stick at the instance of accused no.1. The slipper recovered from the spot was having blood stain and CFSL report supports it.

43. So far as recovery of knife is concerned, it does not appear to have been used in committing offence. Therefore,

we do not see any reason to discuss it at length. As earlier observed by us that at the most non-compliance of mandatory provisions while carrying out identification parade, the benefit of doubt can be extended to accused no.2 only.

44. So far as offence under Section 341 of IPC is concerned, evidence of Pw.1 and Pw.8, if read together, along with complaint filed by Pw.1, it is evident that the accused nos.1 and 2 and one unknown person stopped the vehicle of accused. Suggestions in cross to PW1 and answer to it that *“I was stopped on the left hand side of the road proceeding from Margao to Vasco. I was stopped in front of the house of A1 Diago Pereira”*, which clearly establishes that the complainant was wrongfully restrained by the accused nos.1 and 3 and one unknown person. PW8 also deposed specifically that all the three accused blocked Jervasio.

45. After taking into consideration all the evidence on record, we are of the considered opinion that the prosecution

has proved beyond reasonable doubt that accused nos.1 and 3 committed an offence punishable under Section 324 read with Section 34 and 341 read with Section 34 of IPC. Some discrepancies which are not material at all or some lapses in investigations should not be the reason to discard other material evidence which loudly speak of guilt of the accused. The Judgment of the learned Trial Court is liable to be set aside being perverse, illegal and unjustified. However, as discussed earlier judgment to the extent of acquittal of accused no. 2 required to be maintained. As such, accused nos. 1 and 3 liable to be convicted for having committed offence under Section 324 read with Section 34 and 341 read with Section 34 of I.P.C.

46. Here we pause to hear the learned Counsel for the accused nos.1 and 3 on the quantum of sentence.

SMT. M. S. JAWALKAR, J. M. S. SONAK, J.

mv / arp/*

24th September, 2020

Judgment Continued

47. Heard learned Advocate Mr. D'Costa, for the accused No.1 and learned Advocate Mr. Ryan Menezes for the accused no.3 on the point of sentence.

48. Learned Advocate for the accused no.1 submitted that there is no conviction prior to this. The incident is of 2008. Now accused is about 56 years of age and suffered two strokes. He is the only earning member in the family. In view thereof, lenient view be taken. It is further submitted that in this peculiar Covid Pandemic situation instead of putting him in jail directing him to pay the compensation will be reasonable and appropriate. However, nothing is placed on record about health issues in respect of the accused no.1.

49. The learned Advocate for the accused no.3 submitted that there are no criminal antecedent and the accused is the only earning member in the family. He prayed for release

him as per provisions of Probation of Offenders Act or as per Section 360 of Code of Criminal Procedure. He has also submitted that the accused be directed to pay heavy compensation. However, it will be reasonable not to put him in jail in this Covid Pandemic situation. His period of detention be treated as sentence of imprisonment.

50. The learned Additional Public Prosecutor Shri Mahesh Amonkar submitted that the accused is not entitled for any leniency otherwise there will not be any deterrence at all.

51. The learned Advocate for the appellant Shri G. Teles submitted to the orders of the Court as 12years has been passed to the said incident. He submitted that in these years victim has suffered a lot.

52. We have considered arguments advanced by the respective counsels. We are also of the opinion that in such Covid Pandemic situation it would be difficult to put them in jail. However, by treating their detention period as a

substantive sentence of imprisonment, heavy fine would meet the ends of justice. Accordingly, we proceed to pass the following :

ORDER

1. The appeal is partly allowed.
2. The accused Mr. Diago Pereira and Mr. Bruno @ Braz Fernandes are hereby convicted for having committed an offence punishable under Section 324 read with Section 34 of the Indian Penal Code and their detention is treated as substantive sentence of imprisonment. They shall pay in addition to it a fine of ₹1,10,000/-(Rupees One Lakh Ten Thousand only) each within a period of one month. In default, they shall require to suffer rigorous imprisonment of 6 months.
3. The accused Mr. Diago Pereira and Mr. Bruno @ Braz Fernandes are hereby convicted for having committed an offence punishable under Section 341

read with Section 34 of the Indian Penal Code and their detention is treated as substantive sentence of imprisonment. They shall pay in addition to it a fine of ₹500/-(Rupees Five Hundred only) each within a period of one month. In default, they shall suffer simple imprisonment of 15 days.

4. The accused no.2 is hereby acquitted from the charge of having committed an offence under Section 324 and 341 read with Section 34 of the Indian Penal Code.

5. On deposit of the fine amount, ₹2,00,000/- (Rupees Two Lakhs only) is hereby directed to be paid to the victim-appellant and the remaining fine amount will be deposited with the State.

6. The convicted accused will have to file proof of payment of fine within five weeks from today before the Trial Court and if the same is not filed, the Trial

Court to take steps/issue arrest warrant so that convicted accused serves the in-default sentence.

7. Muddemal property be destroyed after the expiry of appeal period.

8. Appeal is disposed off in the aforesaid terms.

There shall be no orders as to costs.

SMT. M. S. JAWALKAR, J. M. S. SONAK, J.

mv

ANDREZA
PEREIRA

 Digitally signed by
ANDREZA PEREIRA
Date: 2020.09.25 10:55:15
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