

(2013) 01 GAU CK 0047
In the Gauhati High Court
Case No : Criminal Appeal No. 75 of 2007

Jayanta Kalai and Others

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 31-01-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 164, 164(5), 288
Evidence Act, 1872 — Section 114, 118, 9
Penal Code, 1860 (IPC) — Section 120B, 376, 376(2)(g)

Citation : (2013) 2 GLD 419 : (2013) 2 GLT 450

Hon'ble Judges : Utpalendu Bikas Saha, J; Subhasis Talapatra, J

Bench : Division Bench

Advocate : P.K. Biswas and Mr. P. Mazumder, for the Appellant; A. Ghosh, Addl. PP, for the Respondent

Judgement

Subhasis Talapatra, J.—This appeal u/s 374 of the Code of Criminal Procedure, 1973 ("Cr.P.C." in short) is directed against the judgment of conviction and order of sentence dated 03.07.2007 as passed by the Sessions Judge, South Tripura, Udaipur in S.T. No. 65(ST/A)/2004, convicting and sentencing the appellants to suffer R.I. for life and to pay a fine of Rs. 5,000/- each, and in default of payment of fine to suffer further R.I. for one year for the offence u/s 376(2)(g) of the IPC. We have heard Mr. P.K. Biswas, learned counsel appearing for the appellants as well as Mr. A. Ghosh, learned Additional P.P. appearing for the respondent-State.

2. For appreciation of the challenge, the essential facts may be noticed briefly.

One Braja Debbarma, son of Shir Bikram Debbarma of village-Taichakma, P.S. Taidu, South Tripura filed a complaint stating that on 20.06.2003 (Friday) at about 08-30 O'clock in the morning on coming to Taidu police station and identifying the police officer in-charge he lodged one ejahar to disclose that on 19.06.2003, Thursday, at about 6 O'clock in the evening, he went to Ompi from Taichakma for visiting the "Anandamela" (the village fair). After visiting the

Anandamela he started for home from Ompi at about 09-30 pm. His close relatives, the prosecutrix (P.W.5) (name concealed) of Tuichakma village and the other prosecutrix (P.W.2) (name concealed) of the said village also accompanied him for visiting the fair and took the journey with him. As the night became deep, he entered the house of Santi Laxmi Malsom of Ompi. At about 11-30 O'clock at night, five tribal youths entered that house. Out of them, three entered the room and the remaining two moved around the courtyard. He knew one of the three youths who entered the room. His name was Biswamani Jamatia, S/o. Bilabhadra Jamatia of village Haripur. Thereafter, on asking their names and addresses, they told them to go home and they would accompany them. They took them to the school field of Haripur Molsom Para. Two of them entered a room in the school with the prosecutrix (P.W.5) and the two others entered another room with the prosecutrix (P.W.2). The remaining one was outside to keep vigil. For almost an hour, the aforesaid five youths committed gang rape upon both the prosecutrix (P.W.5 and P.W.2) and thereafter they left that place. Later on, P.W.5 and P.W.2 came to him and informed about the incident of rape. It was about 12 O'clock of that night when the rape was committed. He stated therein that he would be able to identify the miscreants, if he saw their faces.

3. On the face of the said FIR, Taidu PS. Case No. 07/2003 u/s 376(2)(g) of the IPC was registered and entrusted for investigation. After investigation, the appellants were charge-sheeted on finding prima facie materials against them. On taking cognizance of the offence u/s 376(2)(g) of the IPC, since the offence was exclusively triable by the Court of Sessions, the case was committed to the Court of the learned Sessions Judge, South Tripura, Udiapur. On such commitment, the case was registered as S.T. No. 65(ST/A)/2004 and the charge was framed against all the appellants u/s 376(2)(g) of the IPC for committing gang rape on the survivors (name concealed) on 19.06.2003 at around 2400 hours at Haripur Malsom Para School, South Tripura under Taidu P.S. All the appellants pleaded not guilty against the charge and claimed to be tried.

4. The prosecution thereafter examined 16 witnesses to drive home the charge as stated and also admitted some documents including the statement of the prosecutrix, as recorded u/s 164(5) of the Cr.P.C., the statement recorded at the time of Test Identification Parade ("T.I.Parade" in short), laboratory report, medical examination report, hand sketch map etc.

5. In defence, however, no evidence was adduced and from trend of cross-examination it appears that the defence case is of total denial to the charge.

6. The informant, Sri Braja Debbarma, was examined as P.W.1 and after some examination in chief, he was declared hostile and cross-examined by the prosecution. In examination in chief he stated that the occurrence took place about three years ago. He and both the survivors/prosecutrix went to Ompi to enjoy "Anandamela". After enjoying Mela they were returning to their house at Tuichakma. On the way they went to the house of his brother's wife, Santi Laxmi

Malsom. But they were not present in the house. Finding none in that house, they were returning back. On the way they met Santi Laxmi Malsam. She told them to stay in her house. They went there, but they did not stay. Two children were with them. He drank water there and at that time five persons entered into that house. They asked their names, father's name, house etc. and noted it in a paper. They asked all of them to go to the police station. He and others raised objection but they threatened them. They took them but not towards the police station but towards a tilla in Haripur where a school was situated. He stated that he could not identify any of them during that time. On the way two persons took the prosecutrix (P.W.5) towards one and rest two persons took the prosecutrix (P.W.2) on the other way. They took them in the school. The fifth person took him in another side of the school. After one and half hours they released them. Both the prosecutrix came to him and reported to him that they were raped by those persons. The person, who guarded him, was not continuously standing near him. They were changing one after another in the matter of guarding him. Thereafter they came out and stood on the road and again they went to the house of Santi Laxmi Malsom. On query he reported to Santi Laxmi that the miscreants raped both the prosecutrix. Santi Laxmi took them towards the Ompi P.S. and thereafter to Taidu P.S. He narrated the matter to the police officer, who wrote it and he put his signature in the said statement. He identified the FIR, marked as Exbt.-1 and his signature in the FIR, marked as Exbt.-1/1. He further stated that they were taken to Ompi hospital. He went to jail for three times to identify the miscreants but he could not identify any one in the jail. However, he identified his signature in the report of the T.I. Parade, marked as Exbt.-2/1. He also identified his signatures in other two T.I. Parade statements, marked as Exbt.-3/1 and Exbt.-4/1.

At that point of time, he was declared hostile and he was put to cross-examine by the prosecution, when he stated that He had seen the miscreants in the hut of Santi Laxmi Malsom. He had also seen the man who guarded him there near the school. He had also seen the miscreants when after committing the rape they came out from the school. He also admitted that one Magistrate was there in the Jail and he had identified the three miscreants in three days and accordingly that was recorded in the paper and he put his signature. He had not stated the name of Biswamani Jamatia in the FIR. When attention was drawn, such statement was found in the FIR and the same was admitted in the evidence, which was marked as Exbt.-5 for confirmation of the Investigating Officer.

For the accused persons he was also cross-examined. He stated that when they went to the house of Santi Laxmi Malsom, her husband Pushral Debbarma was also present. However, no statement to the effect that the miscreants asked all of them to go to the P.S. was made available to the previous statement of this witness as recorded by the I/O u/s 161 of the Cr.P.C.

In the cross-examination by one of the appellants he further stated that the prosecutrices are his sisters, i.e., the daughters of his uncle. When they first

went to the house of Santi Laxmi she was in the hospital to attend her sister. When five persons entered into the house of Santi Laxmi, she was in the hospital. During that time Pushrai was present in the house. The prosecutrix (P.W.5) was also the niece of Pushrai.

7. One of the prosecutrix was examined by the prosecution as P.W.2. She deposed to the police officer in her mother's tongue "Kakbarak" as during that time she could not learn Bengali properly. She stated before the Court that the occurrence took place about three years and one year ago, meaning that three years one month ago as explained to the Court. She stated that she along with another prosecutrix (P.W.5), P.W.1 and two other small girls went to enjoy Anandamela at Ompi. At the time of returning home they entered into the hut of Santi Laxmi Malsom and she was not found. When they were returning, on the way they found Santi Laxmi and they went to her house. At that time three persons entered into the hut. Two persons were standing outside. They took and noted their names, father's name and addresses. They were also asked to go to the police station. One miscreant assaulted P.W.5 in the hut of Santi Laxmi. They took them through a road and not to the P.S. They took them to a school on a tilla. P.W.5 was taken inside the room. She was outside at that time. She stated that the miscreants committed rape on her. She could not say what they had done with the P.W.5 inside the room. Five miscreants committed rape on her. Later, P.W.5 reported her that she was also raped by the miscreants. They were not in a position to walk properly. Thereafter they came out to a road and Santi Laxmi was found. They went to the house of Santi Laxmi at dawn. When they were approaching to their house, they met Santi Laxmi. They had stated the incident to Santi Laxmi, who took them to the police station. Initially they were taken to Ompi P.S. and thereafter they were taken to Taidu P.S. From the police station they were taken to hospital, where the medical examination was carried out. The police officer took their wearing garments by preparing a seizure list and she put her signature in the seizure list. She identified her signature in the seizure list of panty, bra etc. and marked Exbt.-6/1. She also identified the clothes, which were exhibited and marked M.O.1 series. Thereafter she was taken to the Court, where she made her statement. She identified the statement and her signature, marked Exbt.7 and 7/1 respectively. She categorically stated that she was taken to Jail where she could identify three miscreants. She identified her signature on the report of the T.I.Parade. She also identified four miscreants in the Court. When she was asked to identify the three miscreants in the dock whom she identified in the Jail during T.I.parade to which she stated that she did not like to look at them again. In cross-examination, she stated that Jayanta and Nirmal were known to her from childhood was not true. She denied all the suggestions about her age. She stated that in the Anandamela they enjoyed one cinema. She further stated that Santi Laxmi had a son and a daughter and they were Ananta and Sabita. They were present in the hut when they went there. There was one hut in the house of Santi Laxmi. They all used to reside in the same hut. They got Santi Laxmi and her husband on the way to

their return from their house when they found that they were absent from the house. Thereafter they went to the house of Santi Laxmi. Santi Laxmi was an employee. Santi Laxmi's husband was not a Government employee but he was the collector of latex. When the miscreants entered into the hut, Santi Laxmi, her husband, son and daughter were present in the hut. She had stated to the police as well as to the Magistrate about the existence of two minor children with them. When attention was drawn to such statement recorded by the I/O u/s 161 of the Cr.P.C., no such statement was found therein. She had also stated that she stated to the police that the prosecutrix (P.W.5) was assaulted by one of the miscreants. When attention was drawn, no such statement was found available in the previous statement recorded by the I/O u/s 161 of the Cr.P.C. She denied the suggestion that she had deposed falsely. She further stated that at about 7 am they went to the P.S. They went to Ompi P.S. at about 6 am. They narrated the story to the police officer. The police officer took it into writing. She denied the suggestion that she had not stated to the police officer that five miscreants took them from the house of Santi Laxmi and raped them in the school. Other prosecutrix (P.W.5) and she were taken to Agartala by the Women Commission on the next day of the occurrence. She had her elder brother and sister. Her brother was a cultivator and they had their own paddy land. Other prosecutrix's family had land and farm. She denied the suggestion that the police told them what had to be stated before the Magistrate. In her cross-examination she stated that:

I have seen the accused persons in the P.S. I have shown those persons in the Jail.

However, she denied the suggestion that the police officer had shown and identified the miscreants, who committed rape on them. She, however, confirmed that they had been shown the miscreants in the Jail according to the showing of the police officer in the P.S. At that time the other prosecutrix (P.W.5) was with her and on all such dates when she went to P.S. the other prosecutrix was with her. When she was asked about the seizure of their wearing apparels, she stated that she had "Pachra" in her wearing, but that was not seized by the police. She stated that at the time of committing rape her panty was pulled down to the thigh and she stated the same to the Magistrate. She further stated that there were four persons in the dock and none else. When one of the miscreants assaulted the prosecutrix (P.W.5) there was some light in the hut.

8. Smt. Santi Laxmi Malsom was examined in camera as P.W.3. She stated that the occurrence took place at about 3 years ago. At night she went to hospital for some works. At the time of her returning to home, she found both the prosecutrices (P.W.5 and P.W.2) and Braja on the way. She told them not to proceed during the night because some mishap might happen. Accordingly, she took them to her residence. At that time she found three persons entered into their hut. They asked them to go along to the P.S. Accordingly, they were taken by the miscreants. At dawn they returned back to her house and reported that

the said miscreants had done "Attachar" on them. She explained that "Attachar" means rape. Both the prosecutrices were my sisters through a maternal uncle. She did not know the miscreants. She took both the prosecutrices (P.W.5 and P.W.2) to the Ompi P.S. Thereafter they were sent to Taidu P.S. and from there they were taken to hospital for medical examination. The police officer kept the panties of both the prosecutrices by preparing seizure list and she put her signature in the seizure list, marked as Exbt-6/2.

At this stage, this witness was declared hostile and subjected to cross-examine by the prosecution, where she stated that out of the three persons, two persons were known to her, one was Secretary of Ompi Block, but she did not know his name but his house was at Khowai, Kalyanpur and he resided as a tenant at Haripur. The name of another person was Biswamani Jamatia and his father's name was Bilabhadra Jamatia of Haripur and another person was not known to her. But she could identify if saw again. P.W.3 stated that she did not make such statements, but when the attention was drawn to the previous statement recorded by the I/O, such statements were found and those were marked as Exbt.-9, subject to confirmation by the I/O. She stated that Biswamani and the Panchayat Secretary of Ompi Block were previously known to her. They were present in the court. She further stated that Jayanta Kalai was the brother of my officer where she had been serving. She identified Jayanta Kalai in the dock. She stated that she had not stated to the police officer that about two hours after herself and her husband went to the house of Biswamani and found that five persons including Biswamani in the hut and then she asked them whereabouts of the two girls (prosecutrices). They told them that they escorted the prosecutrices and Braja till Jantranaghat. When attention was drawn, such statement was found there, though she denied that she made such statement to the police officer. She stated that she knew Nirmal for longtime.

9. P.W.4, the husband of the P.W.3, was also examined by the prosecution, but he was declared hostile and he was put to cross-examine. He denied to make any statement to the police officer. What had been recorded in the previous statement u/s 161 of the Cr.P.C. was not his statement, but which portion of the statement was read over to P.W.4 had not been reflected in the deposition. However, he admitted that he came alone today to the Court. Yesterday his wife came with the accused persons to depose and stayed at Amarpur, but deposed today.

10. The other prosecutrix was examined as P.W.5. She also could not say Bengali properly at that time. She stated in "Kakbarak" having been translated by the translator as engaged by the Sessions Judge. She stated that the occurrence took place about three years back. Braja, the other prosecutrix (P.W.2) and she went to enjoy a mela (the village fair) at Ompi. They went at night. When they were returning at about 10 pm, at that time they went to the house of Santi Laxmi but she was not found in the house. When she returned from the hospital, she prevented them from going to their house as it was night and risky. When

they were in the house of Santi Laxmi, the accused persons went there. They asked their names and father's name and they told them that they would take to the police station. Thereafter they took them along but they did not go to the P.S., they took them to Haripur School. They kept the other prosecutrix (P.W.2) out of a room and took her inside and she was raped. They were five. She had talked to the prosecutrix (P.W.2) and she told her that she was raped by the miscreants. She stated that she was told by the other prosecutrix (P.W.2) that she was also raped. At dawn they went to the house of Santi Laxmi and told her what had happened in the last night. They went to Ompi P.S. and thereafter to Taidu P.S. She further stated that her panty was taken by police by preparing a document. She identified her signature in the seizure list, marked as Exbt-3. She further stated that they were examined by the medical officer. They were taken to Jail thrice and they identified the miscreants. The Officer prepared the documents and she put her signatures on those documents, and on identification, her signatures were marked as Exbt.-12/1, 13/1 and 14/1. Out of the five persons, four were present in the court. She identified them in the dock. The persons who were identified by her in the Jail, two of them are present and other was not present in the dock (who was absconding at the time of investigation). She made statement to the Magistrate. The witness identified her signature in the statement as recorded u/s 164(5) of the Cr.P.C. In the cross-examination she admitted that she and other prosecutrices were taken to Agartala and they were residing together there. She also admitted that the other prosecutrix (P.W.2) also visited with her on the day when she was taken to the police station. But she denied that they went to the P.S. for 4/5 days and the persons who were identified by her in the Jail were shown to her by the police officer in the P.S. She denied the fact that they identified the persons in the Jail as per direction of the police. She also denied that there had been tutoring by the police.

11. One Bishnu Debbarma, the father of the P.W.5, was examined by the prosecution as P.W.6. He stated that his daughter, P.W.5 (prosecutrix) told him that she was raped by some miscreants while the other prosecutrix (P.W.2) and Braja were with her.

12. One Lenin Debbarma was examined by the prosecution as he was the witness to a seizure. He identified his signature in the seizure list and also the seized materials (saari). Nothing was elicited from his cross-examination by the defence.

13. One Manu Kumar Debbarma was examined as P.W.8. He was also a seizure witness. He identified his signature in the seizure list, which was exhibited and marked 16/2. He also identified M.O.2.

14. Dr. Subhankar Nath, a Senior Scientific Officer at S.F.S.L., Agartala was examined as P.W.9. He stated among other things that he had examined the contents and found that a black colour panty, an orange red colour panty and one small colour vial containing nail scraping of the prosecutrix (P.W.5) and one

small gall vial containing nail scraping of the other prosecutrix (P.W.2). On examination against item No. 1 found positive for semen of human origin. So far item No. 2 is concerned, it was found positive for semen of human origin and item No. 3 negative for blood and semen. Similarly item No. 4 was found negative for blood and semen. He admitted the report and his signature, which were exhibited and marked as Exbt. 17 and 17/1 respectively.

15. Dr. Ashok Majumder, who was the medical officer, was examined as P.W. 10. He examined the prosecutrix, P.W.5, as per requisition of the Taidu P.S. in connection with Taidu P.S. Case No. 7/2003 u/s 376(2)(g) of the IPC. He examined the prosecutrix to determine the age and he found from the radiological test that she would be in between 17 to 19 years old. His report Exbt. 18 was admitted at his instance. He stated that he also examined other prosecutrix (P.W.2) and it was found that her age would be 16 to 18 years. His report Exbt. 19 was admitted at his instance.

16. One Smti. Gangapati Kalai, sweeper, working in the police department was examined as P.W.11. She only stated that as per direction of the police officer she took both the prosecutrices to the bathroom and took their under garments by drawing them from their wearing and on being handed over, the police seized those under garments by preparing a seizure list. She identified her signature and marked as Exbt.6/4.

17. P.W.12, Sri Sajal Sharma, at the relevant time was posted as the Officer-in-charge at Taidu P.S. He stated that on receipt of the FIR, he endorsed the same. His signature was identified by him and marked as Exbt.1/2. The police case being Taidu P.S. Case No. 7/03 was registered at his instance u/s 376(2)(g) of the IPC against Biswamani Jamatia and four others. On his identification the FIR registration from with his signature, was marked as Exbt.-20 and 20/1 respectively.

18. Another Dr. Debasis Roy was examined by the prosecution as P.W. 13, who examined the prosecutrices in the district hospital at Udaipur. On 21.06.2003 he examined vaginal swab and urine of the prosecutrix (P.W.2). The sample was collected by Dr. P.N. Chakraborty of Taidu Rural hospital. On examination no spermatozoa was detected. His report with his signature was admitted at his instance and marked as Exbt.21. On that day he also examined vaginal swab and urine of the other prosecutrix (P.W.5). The sample was collected by Dr. P.N. Chakraborty of Taidu Rural hospital. On examination no spermatozoa was detected. He admitted his report with his signature and on identification marked as Exbt.-22.

19. Dr. P.N. Chakraborty (in short) was examined as P.W. 14, who stated that at the instance of one Jayanta Karmakar, S.I. of police, the prosecutrix, P.W.5, in connection with Taidu P.S. Case No. 07/03, u/s 376(2)(g) of the IPC, was produced for medical examination. The points for opinion sought by I/O were (1) whether the prosecutrix, P.W.5, was raped; (2) whether there were any mark of

injury on her vagina and other parts of her body; (3) whether her hymen was ruptured; (4) whether there was any foreign particles like pubic hair, semen in her vagina and (5) whether spermatozoa was present in vaginal swab. On examination, the prosecutrix was found in depressed mood. Her clothing was intact with no sign of tear, mud. No foreign body was detected. There was nail scratch mark on medial aspect of both the breasts. No other external injury was detected. On further examination all other systems were found within normal index. On examination of her private parts her labia minora were intact. Hymen showed sign of recent tear. No other external injury over the private part detected. No meting of public hair seen. Articles collected by him were vaginal swab, nails scraping and urine samples, collected and stored in sterile vial. The aforesaid specimens were then handed over to the I/O of the case in presence of one Anil paul, GDA. The report (Exbt.23) was admitted in evidence at his instance. On that day he also examined another prosecutrix, P.W.2, in connection with the aforesaid case. The points for investigation were also same as the previous one. On examination, the prosecutrix was found in depressed mood and co-operative. Gait was found normal, no other signs in the external aspects were detected. On systemic examination, all systems were found to be normal, a bruish mark 3cm x 4cm was found on right posterior aspect of the chest over 10th and 12th rib. On examination of private parts no external injury was appreciated, no meetings of pubic hair or seminal stains were appreciated. Lebia majora and minora were found intact Hymen showed sign of recent injury. Clothing was intact. No sign of tear was found in the garments. No foreign body or blood stains were appreciated in the clothings. Articles collected by him were vaginal swab, nails scraping and urine samples, collected and stored in sterile vial. The aforesaid specimens were then handed over to the I/O of the case in presence of one Anil Paul, GDA. The report (Exbt.24) was admitted in evidence at his instance. He denied the suggestion as made by the defence.

20. One Judicial Magistrate, namely, Sri T.C. Roy Bhowmik, as he was then, was examined as P.W.15. He stated that on 16.12.2003 he was posted as SDJM at Amarpur. On that day he had conducted the T.I. Parade for identification of the offenders by the prosecutrices and one Braja Debbarma in respect of accused Sona Ram Debbarma. The T.I.Parade was held inside the Amarpur Sub-Jail. He had recorded the proceeding of T.I.Parade in the prescribed form and had also taken the signature of the identified accused and the respective witnesses. This is the printed form of T.I.Parade of accused Sona Ram Debbarma in respect of P.W.5. He identified his signature in the T.I.Parade form marked Exbt. 14/2. One Nirmal identified the suspected accused Sona Ram Debbarma. The prescribed form of T.I.Parade in respect of witness Braja Debbarma marked Exbt.-3 and his signature thereon marked Exbt-3/2 was identified by him. Another form of the proceeding of T.I.Parade was written by him, marked Exbt.-8 was brought in the evidence on admission and that was in respect of P.W.2 in regard to accused Sona Ram Debbarma. On 03.07.2003 he also conducted the T.I. Parade of accused Jayanta Kalai by the P.W.5 and Braja Debbarma. The statement of P.W.5

as recorded in the proceeding of T.I.Parade was admitted in the evidence as Exbt.-12 and his signature as Exbt. 12/2 and the recorded statement of the proceeding in respect of witness Braja Debbarma as Exbt.-2 and his signature as Exbt-2/2 was as well admitted in the evidence.

On 16.10.2003 he had also conducted T.I.Parade of accused Nirmal Kalai by P.W.2, P.W.5 and Braja Debbarma inside the Amarpur Sub-Jail. The statement of the proceeding of the T.I.Parade Exbt.-8 with his signature was identified by him and the statement of proceeding of the T.I.Parade (Exbt.-13) in respect of P.W.5 was also identified by him with his signature. The statement of the proceeding of the T.I.Parade in respect of witness Braja Debbarma (Exbt.-4) with his signature was also identified by him. He stated that he had recorded the statement of the P.W.5 on 23.0.6.2003 in his chamber being produced by the I/O in "Kakbarak". After recording the statement he had stated to her the contents, when she admitted the same to have correctly recorded. The statement as recorded in "Kakbarak" was identified by him and marked as Exbt-15 and his signature marked as Exbt. 15/2 and those were admitted in the evidence following the due process of law. He vouched that he made verbatim translation of the said statement in English. On that day he had also recorded the statement of the P.W.2 in Kakbarak (Exbt.-7) and the same was admitted in the evidence by him. He stated that he put his certificate with signature in respect of recording the statement Exbt.-7/2. He also exhibited the statement of P.W.2 with her signature as Exbt.-25. He, however, admitted that he did not mention in his order sheet dated 3.7.2003 regarding the circumstances of identification of the suspect by the witnesses though he had mentioned it in the printed T.I.Parade form. He also admitted that by a notification of the Government Debbarma, Halarn, Tripuri and other communities are declared Scheduled Tribe communities. He admitted that Debbarma, Halarn, Kalai are separate communities. He denied the suggestion that he did not bring any person from Kalai community to mix up with the suspect before conducting the T.I.Parade. He admitted that on every occasion, it was not possible to bring persons of Kalai community to mix up with the suspects. He further denied the suggestion that he conducted the T.I.Parade without applying judicial mind.

21. One Sri Jayanta Karmakar, S.I. of police, who was entrusted with the investigation of the case, was examined as P.W.16. He stated that on 20.06.2003 he was entrusted by the Officer-in-charge, namely, Sajal Sharma, to conduct the investigation of Taidu P.S. Case No. 07/03 u/s 376(2)(g) of the IPC. On getting the case docket, he visited the P.O. and recorded the statement of the witnesses u/s 161 of Cr.P.C. He also prepared the hand sketch map of the P.O. along with the index. He identified the hand sketch map (Exbt.-27) and also the index (Exbt.28). He stated that he arrested the accused Jayanta Kalai and produced before the SDJM, Amarpur and prayed for police remand. He also produced both the prosecutrices before the SDJM, Amarpur for recording their statement u/s 164(5) of the Cr.P.C. He also filed a prayer before the SDJM, Amarpur for conducting T.I.Parade. The learned Court did not allow the prayer for police

remand of the arrested accused persons. He further stated that T.I.Parade was held on 20.06.2003. He seized the wearing apparels of the prosecutrices after preparing seizure list. He seized black colour panty of P.W.2. He had also seized one white colour torn bra from the P.W.5. He identified the seizure list, marked as Exbt.6 and his signature Exbt.6/5. He also stated that he seized one saari of the P.W.5 by which the accused tied the hands of her before commission of the offence. The seizure list was admitted in evidence as Exbt.16 with his signature. Thereafter he stated that both the prosecutrices were sent to Ompi Rural hospital for their medical examination. The medical officer collected the vaginal swab, nail scraping etc. as samples and sent those sample to the forensic laboratory for examination. He stated that he arrested three accused persons and produced them before the SDJM, Amarapur. One of the accused surrendered before the court. All the accused persons were produced before the SDJM with a prayer for T.I.Parade and accordingly the Court allowed the prayer. He also received the report from the M.O. regarding the vaginal swab, nail scrapings etc. He stated that he recorded statement of witness Braja Debbarma u/s 161 of Cr.P.C. and he identified Exbt.-5. He also examined witness Santi Laxmi, P.W.3, and recorded her statement u/s 161 of Cr.P.C. and he confirmed Exbt-9 and 10. He also confirmed Exbt.-11 from the previous statement of P.W.4, Paushrai Debbarma. He stated that he sent both the prosecutrices for the radiological test to ascertain their age. He received the report from the medical officer. He also sent the accused persons to the medical officer to examine whether they were sexually able to commit rape. He received the report from the medical officer. The accused persons were present before the court and he identified. He further stated that after recording the statements of witnesses and obtaining various reports he found prima facie case against the accused persons and he filed charge-sheet against them u/s 376(2)(g) of the IPC. At the time of filing charge sheet, accused Anup Debbarma was absconding.

In the cross he did not deviate whatever he had stated in the examination-in-chief. When he was asked whether the police officer of Ompi P.S. was examined, he categorically stated that he did not examine and as such he was not produced before the Court. He denied the suggestion that the imaginary statements of witness Santi Laxmi and Pushrai Debbarma were recorded. He denied the suggestion that he recorded Exbt.9, 10 and 11 according to his purpose. He also denied the suggestion that he had shown the accused persons to the witnesses of the T.I.Parade before holding the T.I.Parade by the SDJM, Amarapur at the police station. He denied the suggestion that he had shown the accused to the witnesses before holding the T.I.Parade.

22. Mr. P.K. Biswas, learned counsel appearing for the appellants emphatically submitted that there is no legal evidence in record to the identification of the appellants or to involve them with the crime for which they were charged. Learned counsel for the appellants further contended that P.W. 1, Sri Braja Debbarma, stated in the cross-examination that he knew Jayanta, Biswamani and Nirmal from his childhood, but did not disclose the names of Jayanta and

Nirmal in the Ejahar. He only stated in the Ejahar (Exbt-1) that he knew one of the three youths, who entered the room and his name is Biswamani Jamatia, S/o. Bilbhadra Jamatia. He further stated that on asking their names and addresses that band of young person directed them to go home and that they would accompany them. Thereafter on taking them to the school field of Haripur in a tilla, they seated in the field, two of them entered a room of the school with the prosecutrix (P.W.5) and another two entered in another room with the prosecutrix (P.W.2), another one was on duty outside. But he categorically stated in the Ejahar that all the five youths committed gang rape on the prosecutrix and thereafter they went away. He was informed of that occurrence by both the prosecutrices.

23. Mr. Biswas, learned counsel for the appellants further pointed out that the T.I.Parade as conducted for establishing the identification of the offenders cannot be accepted as from the examination-in-chief of the prosecutrix (P.W.2) it appears that she stated that she had seen the accused persons in the police station and she had also shown the persons in the jail. She further admitted that "it is true that they had shown the miscreants in the jail according to the showing of the police officer in the police station and other prosecutrix (P.W.5) was with her on all the dates when she went to the police station." But in the examination-in-chief the prosecutrix (P.W.2) categorically stated that five miscreants committed rape on her. Mr. Biswas further stated that the T.I.Parade, as conducted, was full of flaws, in breach of the procedure guaranteeing assurance from the outcome of the T.I.Parade. Learned counsel drawing attention of this Court to the statement of the P.W.15, Sri T.C. Roy Bhowmik, Judicial Magistrate, who conducted the T.I. Parade, stated that the said witness had candidly admitted in the cross-examination that he had not mentioned in the order sheet dated 03.07.2003 as regards the circumstances of identification of the suspects by the witness though he had mentioned it in the printed T.I.Parade Form. He further admitted that he had not brought any person from koloi community to mix up the suspects of Kolo community before holding the T.I.parade. Mr. Biswas ultimately submitted that the judgment of conviction is liable to be interfered with for the reason that there is no legal evidence against the appellants and their identification as accepted by the Court is shrouded by serious doubt. As such the appellants are entitled to benefits.

24. On the other hand, Mr. A. Ghosh, learned Additional P.P. appearing for the State refuted the reasons as projected by the learned counsel for the appellants. He emphatically submitted that at the first instance P.W.1 disclosed the name of one of the appellants, namely, Biswamani Jamatia, S/o. Bilbhadra Jamatia and he narrated the circumstances briefly. P.W.2 and P.W.5 have corroborated substantially the statement of the P.W.1 except some insignificant discrepancies, which cannot take the wind from the prosecution case. While supporting the impugned judgment of conviction and order of sentence, Mr. Ghosh submitted that when P.W.2 and P.W.5 are the victim of gang rape and the prosecutrices have come forward, the incident of gang rape cannot be disputed. Apart that, the

statement of the P.W.13, P.W.14 and the medical reports have established that rape was committed on P.W.2 and P.W.5. The marks of violence on their persons were also marked by the doctor, who examined the P.W.2 and P.W.5 at the first instance.

25. Mr. Ghosh relied on a decision in State of Punjab Vs. Gurmit Singh and Others, to substantiate that faults in the investigation or for the reasons that the investigating agency did not conduct the investigation properly or was negligent cannot be the ground to discredit the testimony of the prosecutrix. For better appreciation, the following passage is excerpted below:

7. The grounds on which the trial court disbelieved the version of the prosecutrix are not at all sound. The findings recorded by the trial court rebel against realism and lose their sanctity and credibility. The court lost sight of the fact that the prosecutrix is a village girl. She was student of Xth Class. It was wholly irrelevant and immaterial whether she was ignorant of the difference between a Fiat, an Ambassador or a Master car. Again, the statement of the prosecutrix at the trial that she did not remember the colour of the car, though she had given the colour of the car in the FIR was of no material effect on the reliability of her testimony. No fault could also be found with the prosecution version on the ground that the prosecutrix had not raised an alarm while being abducted. The prosecutrix in her statement categorically asserted that as soon as she was pushed inside the car she was threatened by the accused to keep quiet and not to raise any alarm otherwise she would be killed. Under these circumstances to discredit the prosecutrix for not raising an alarm while the car was passing through the Bus Adda is travesty of justice. The court over-looked the situation in which a poor helpless minor girl had found herself in the company of three desperated young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver of the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. Trial Court fell in error for discrediting the testimony of the prosecutrix on that account. In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. The prosecution has explained that as soon as Trilok Singh PW 6, father of the prosecutrix came to know from his wife, PW 7 about the incident he went to the village sarpanch and complained to him. The sarpanch of the village also got in touch with the

sarpanch of village Pakhowal, where in the tube well kotha of Ranjit Singh rape was committed, and an effort was made by the panchayats of the two villages to sit together and settle the matter. It was only when the Panchayats failed to provide any relief or render any justice to the prosecutrix, that she and her family decided to report the matter to the police and before doing that naturally the father and mother of the prosecutrix discussed whether or not to lodge a report with the police in view of the repercussions it might have on the reputation and future prospects of the marriage etc. of their daughter. Trilok Singh PW 6 truthfully admitted that he entered into consultation with his wife as to whether to lodge a report or not and the trial court appears to have misunderstood the reasons and justification for the consultation between Trilok Singh and his wife when it found that the said circumstance had rendered the version of the prosecutrix doubtful. Her statement about the manner in which she was abducted and again left near the school in the early hours of next morning has a ring of truth. It appears that the trial court searched for contradictions and variations in the statement of the prosecutrix microscopically, so as to disbelieve her version. The observations of the trial court that the story of the prosecutrix that she was left near the examination center next morning at about 6 a.m. was "not believable" as the accused would be the last persons to extend sympathy to the prosecutrix" are not at all intelligible. The accused were not showing "any sympathy" to the prosecutrix while driving her at 6.00 a.m. next morning to the place from where she had been abducted but on the other hand were removing her from the kotha of Ranjit Singh and leaving her near the examination center so as to avoid being detected. The criticism by the trial court of the evidence of the prosecutrix as to why she did not complain to the lady teachers or to other girl students when she appeared for the examination at the center and waited till she went home and narrated the occurrence to her mother is unjustified. The conduct of the prosecutrix in this regard appears to us to be most natural. The trial court over looked that a girl, in a tradition bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination center under the circumstances cannot detract from her reliability. In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others overpowered by a feeling of shame and her natural inclination would be to avoid talking about it to any one, lest the family name and honour is brought into controversy. Therefore her informing to her mother only on return to the parental house and no one else at the examination center prior thereto is an accord with the natural human conduct of a female. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self respecting woman would come forward in a court just to make a humiliating" statement against her honour such as is involved in the commission of rape on her. In cases involving sexual

molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In *State of Maharashtra Vs. Chandraprakash Kewalchand Jain, Ahmadi, J.* (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words:

A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness u/s 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same

degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality and the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

26. Apart that in Gurmit Singh (*supra*), the Apex Court also held that:

the testimony of victim in cases of sexual offence is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an

accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.

27. While appreciating the rival contention as advanced by the learned counsel for the parties and scrutinizing the evidence as led by the prosecution, it is imperative to examine in the context of the case whether the identification as established by the witnesses can be accepted legally or whether the statement of the prosecutrix have formed the basis of the conviction of the appellants or not as well as whether the incident of rape/gang rape has been established on record or the appellants are liable to be held as the perpetrator of the heinous crime as alleged. The Judicial Magistrate (P.W.15), who conducted the T.I.Parade, stated that he conducted the T.I.Parade by the witnesses, viz. P.W.2, P.W.5 and P.W.1 as regards one of the appellants, namely, Sonaram Debbarma, on 16.12.2003 and Jayanta Koloi on 03.07.2003, when the P.W.2 was not the witness to the parade. On 16.10.2003, he further conducted the T.I.Parade of accused Nirmal Koloi by the witnesses, namely, P.W.1, P.W.2 and P.W.5 inside the Amarpur Sub-Jail. He also identified the statement of the respective witness during the T.I.Parade. As stated earlier he admitted that he did not mix up the said three appellants, namely, Jayanta Koloi, Nirmal Koloi and Sonaram Debbarma with the people from Koloi community or from Debbarma community at the time of the parade. However, there was no endeavour for identification of the appellants Biswamani Debbarma and Sri Anup Debbarma. Perhaps for the reason that Biswamani was identified by P.W.1 at the first instance at the place of occurrence and Anup surrendered before the trial court for facing the trial. It will be apparent from the decision of the Apex Court that the T.I.Parade is not a substantive piece of evidence and moreover to generate assurance to accept such evidence such parade for purpose of identification has to be conducted with a greater amount of caution to exclude all probabilities of tutoring or previous projection or showing of the accused as well as mixing the accused persons with the physical identification marks as disclosed either in the FIR or any other previous statement.

28. In Budhsen and Another Vs. State of U.P., , the Apex Court considered the aspect of the evidentiary value of the T.I.Parade and conviction based solely on identification of the witnesses by T.I.Parade. In Budhsen (Supra) the Apex Court enunciated as under:

7. Now, facts which establish the identity of an accused person are relevant u/s 9 of the Indian Evidence Act. As a general rule, the substantive evidence of a witness is a statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily

clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses and also to furnish evidence to corroborate their testimony in court. Identification proceedings in their legal effect amount simply to this: that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence. These parades are essentially governed by Section 162, Criminal Procedure Code. It is for this reason that the identification parades in this case seem to have been held under the supervision of a Magistrate. Keeping in view the purpose of identification parades the Magistrates holding them are expected to take all possible precautions to eliminate any suspicion of unfairness and to reduce the chance of testimonial error. They must, therefore, take intelligent interest in the proceedings, bearing in mind two considerations: (i) that the life and liberty of an accused may depend on their vigilance and caution and (ii) that justice should be done in the identification. Those proceedings should not make it impossible for the identifiers who, after all, have, as a rule, only fleeting glimpses of the person they are supposed to identify. Generally speaking, the Magistrate must make a note of every objection raised by an accused at the time of identification and the steps taken by them to ensure fairness to the accused, so that the court which is to judge the value of the identification evidence may take them into consideration in the appreciation of that evidence. The power to identify, it may be kept in view, varies according to the power of observation and memory of the person identifying and each case depends on its own facts, but there are two factors which seems to be of basic importance in the evaluation of identification. The persons required to identify an accused should have had no opportunity of seeing him after the commission of the crime and before identification and secondly that no mistakes are made by them or the mistakes made are negligible. The identification to be of value should also be held without much delay. The number of persons mixed up with the accused should be reasonably large and their bearing and general appearance not glaringly dissimilar. The evidence as to identification deserves, therefore, to be subjected to a close and careful scrutiny

by the Court. Shri Pratap Singh, Magistrate, who conducted the identification, has appeared at the trial as P.W. 20. The identification memo in respect of Naubat, appellant, is Ex. Ka 20 dated October 21, 1967 and in respect of Budhsen is Ex. Ka 21, dated October 28, 1967.

29. The Apex Court also criticized the Court to have proceeded on the erroneous legal assumption that the identification as founded solely on T.I.Parade is a substantive piece of evidence and that on the basis of that evidence alone the conviction can be sustained. And then that Court also ignored the important evidence on the record in regard to the manner in which the test identification parades were held, and other connected circumstances suggesting that they were held more or less in a mechanical way without the necessary precautions being taken to eliminate unfairness. The Apex Court stated that this is clearly an erroneous way of dealing with the test identification parades and has caused failure of justice. And finally the Apex Court observed that:

the evidence in regard to identification having been discarded by us as legally infirm and which does not connect the appellants with the alleged offence it cannot by itself sustain the conviction of the appellants. Non-disclosure on the record as to how and when the Investigating Officer learnt about the appellants' complicity further adds to the lacuna in the prosecution case.

30. In Sheikh Hasib alias Tabarak Vs. The State of Bihar, , the Apex Court, while approving the earlier decision on the evidentiary value of the identification in the T.I.Parade, in Vaikuntam Chandrappa and Others Vs. State of Andhra Pradesh, , held that the substantive evidence is the statement of a witness in the Court and the purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in the Court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding. If there is no substantive evidence then the T.I. Parade cannot be of any assistance to the prosecution. The passage, which elaborately discussed the issue in that context of the case, is excerpted hereunder:

7. But otherwise too the identification proceedings in the present case do not inspire confidence. It appears that several test identification parades were held for identifying the accused persons. So far as the present appellant is concerned P.W. 10 appears to have identified him on February 14, 1963 though the appellant had been arrested as early as January 29, 1963 at about 4.15 a.m. Now, identification parades are ordinarily held at the instance of the investigating Officer for the purpose of enabling the witnesses to identify either the properties which are the subject-matter of alleged offence or the persons who are alleged to have been concerned in the offence. Such tests or parades belong to the investigation stage and they serve to provide the investigating authority with material to assure themselves if the investigation is proceeding on right lines. It is accordingly desirable that such test parades are held at the earliest possible opportunity. Early opportunity to identify also tends to minimize the chances of

the memory of the identifying witnesses fading away by reason of long lapse of time. But much more vital factor in determining the value of such identification parades is the effectiveness of the precautions taken by those responsible for holding them against the identifying witnesses having an opportunity of seeing the persons to be identified by them before they are paraded with other persons and also against the identifying witnesses being provided by the investigating authority with other unfair aid or assistance so as to facilitate the identification of the accused concerned. In the present case the first identification parade was held on February 6, 1963 when several accused persons were included for identification in the parade. The present appellant was not included in the parade on that day. The identification parade with respect to him was held on February 14, 1963, the reason given for this delay being that P.W. 10 was till then in the hospital. According to his own evidence in the trial Court, however, P.W. 10 admits to have been discharged from the hospital on February 9, 1963. In his statement before the committing magistrate (which was read as evidence by the trial Court u/s 288 Criminal P.C.) he had stated that he had come out of the hospital 7 or 8 days after his admission. It may be recalled that he was admitted in the hospital on January 28, 1963, the night of the occurrence. This would mean that he was out of the hospital on February, 6, 1963. But even if he was discharged on February 9, 1963 it is wrong to say that the test identification parade could not be held before February 14, 1963 by reason of P.W. 10 being in the hospital till then. But this apart, it is not shown that this witness even though in the hospital for treatment of his injuries to his hand and face was not in a position to be taken from the hospital for identification as soon as the appellant was arrested or at least on February 6, 1963 when identification of a number of accused persons was held. We are also not satisfied about the fairness of the identification proceedings. It may be recalled that the first identification parade was held on February 6, 1963. It, however, appears that because the result of this parade was not considered satisfactory by the investigating agency an application was made to the Court of the magistrate stating that the identifying witnesses had got confused and, therefore, a fresh test identification parade should be held. Thereafter several identification parades were held on 14th, 21st and 28th February, 1963. This procedure only serves to give rise to grave suspicion about the bona fides of the investigating agency. And then we find from the evidence of Jhari Lal Mahto, Sub Deputy Magistrate (P.W. 13) who had held the T.I. parade on February 14, 1963 that two identification parades were held on that day within half an hour of each other; one at 5 p.m. and the other at 5.30 p.m. At both these parades P.W. 10 was present. In the first parade the appellant is stated not to have been included in the suspects to be identified. No reason is shown for his non-inclusion in that parade. It may be recalled that both the parades were held in the sub-jail in which all the accused persons were lodged. The evidence of P.W. 13 is also somewhat unsatisfactory and we are far from impressed by his testimony with respect to the precautions taken by him for fair test identification parades. In his cross-examination a suggestion was thrown that there was some kind of interpolation in his report of the first T.I. parade held

at 5 p.m. from which it could be suspected that the appellant was present in that parade but was not identified by P.W. 10. Whether or not the appellant was included in the suspects to be identified at 5 p.m. in either case we are unable to attach much value to his identification parade.

31. Similarly in *Ramanathan Vs. The State of Tamil Nadu*, , the Apex Court while dilating on the aspect of the identification parade held that identification parades are held for the object of placing a suspect along with others for identification to find out whether he is the perpetrator of the crime. It is necessary where the name of the offender is not mentioned by the eyewitnesses and they claim to be able to identify him, even though they had not known him before the happening of the incident, on sighting them. Such a parade is as much in the interest of the prosecution as the accused, for, while it enables the investigating officer to ascertain the correctness or otherwise of the claim of the eyewitnesses to the occurrence and thereby fill the gap in the investigation regarding the identity of the culprit, it saves the accused from the sudden risk of being identified in the dock by the witness during trial. The Apex Court further observed as under:

18. Identification parades have been in common use for a very long time, for the object of placing a suspect in a line-up with other persons for identification is to find out whether he is the perpetrator of the crime. This is all the more necessary where the name of the offender is not mentioned by those who claim to be eyewitnesses of the incident but they claim that although they did not know him earlier, they could recall his features in sufficient details and would be able to identify him if and when they happened to see him. The holding of a test identification in such cases is as much in the interest of the investigating agency or the prosecution as in the interest of the suspect or the accused. For while it enables the investigating officer to ascertain the correctness or otherwise of the claim of those witnesses who claim to have seen the perpetrator of the crime and their capacity to identify him and thereby fill the gap in the investigation regarding the identity of the culprit, it saves the suspect or the accused from the sudden risk of being identified in the dock by the selfsame witnesses during the course of the trial. The line-up of the suspect in a test identification parade is therefore a workable way of testing the memory and veracity of witnesses in such cases and has worked well in actual practice.

32. The Apex Court in *Somappa Vamanappa Madar and Shankarappa Ravanappa Kaddi Vs. State of Mysore*, has further examined the aspect of some defects in proceeding relating to identification parade and held as under:

13. The learned Counsel challenged the identification parade held by P.W. 31, Taluka Magistrate, as being unreliable. The trial court was of the view that it cannot be said from the evidence on record that the witnesses had no opportunity to see the accused till they identified them in the identification parade held in the jail. There is no evidence worth the name adduced by the prosecution to show that precautions were taken and if at all any precaution was taken to see that the witnesses either did not see the accused or they had no

opportunity to see them before the identification parade. The learned Counsel was justified in his comment that the second accused was arrested a few days earlier and that he was in police custody and that he was produced before the Magistrate for remand and that there is nothing in the Panchnama prepared by the Taluka Magistrate to show that either he questioned the accused if he was shown to the witnesses or he himself questioned the witnesses if they had seen the accused. The High Court rejected the evidence regarding identification of A-3. Considering all the circumstances we think much reliance cannot be placed on the identification parade regarding the establishment of the identity of the third accused. As far as A-1 and A-2 are concerned it is clear that both of them were apprehended and the witnesses had ample opportunity to note their features at that time and identify them. The proceeding in the identification parade discloses that A-2 was identified by most of the eyewitnesses. Because of some defects in proceedings relating to the identification parade, we will not be justified in rejecting the evidence of the witnesses regarding the participation of A-2.

33. The two elements, those are sometimes entwined, require distinction: identification of a person in the test identification parade and thereafter in the Court at the time of trial and identification of a person by a witness for the first time in the Court without being tested by prior test identification parade. In *V.C. Shukla and Others Vs. State (Delhi Administration)*, , the Apex Court enunciated the law that:

thus, the existence of the only circumstance on the basis of which the witness could have identified Tripathi becomes doubtful and in view of the categorical statement of Tripathi that he never went to New Delhi Railway Station on, the 10th of November to receive the film, it is difficult to accept the evidence of PW 5 that Tripathi was the person present at the station. The possibility that the witness committed some mistake in identifying cannot be ruled out. Moreover, the identification of Tripathi by the witness for the first time in the court without being tested by a prior test identification parade was valueless. Besides, the witness admits that in the note Ext. PW 4/E-2 he did not mention Tripathi or any other person along with Ghose to have been present at the New Delhi Railway Station. Thus, even on the question of the arrival of the material of the film at New Delhi no direct connection with A-1 has been established by the prosecution. In fine, it is not proved by the prosecution that Tripathi was present at the Railway Station to receive the film and hence it cannot be said that A-1 took an unusual interest in seeing that the film is properly brought from Bombay to Delhi and placed in his custody.

34. As the Apex Court has pointed out that it is not safe to convict someone on the basis of identification that has been made first time in the Court and the risk related to such identification is well known in the Criminal Jurisprudence. Similar issue had again fallen for consideration of the Apex Court in *Mohd. Abdul Hafeez Vs. State of Andhra Pradesh*, , wherein the Apex Court in no uncertain term held

as under:

4. Turning to the first piece of evidence against the present appellant that he was identified by victim P.W. 1 S. Satyanarayana as the person who was sitting in the auto rickshaw driven by accused 4 when the auto rickshaw pulled near the spot where accused 2 and 3 had held Satyanarayana, it must be stated that this identification is innocuous and does not furnish any evidence against the present appellant. In Ext. P-1 the First Information Report, informant Satyanarayana did not give the name of the present appellant and for that matter of none of the accused. We would not have attached much importance to the omission of non-mentioning the names of the accused in the FIR Ext. P-1 because it is distinctly possible that the victim Satyanarayana was caught unawares and may not be knowing the accused prior to the date of the incident and, therefore, may not be able to give their names but he could have at least given some description of the persons who robbed him. At any rate, he could have given some description of the present appellant who was supposed to be sitting next to him and who thrust his hand in his pocket and removed Rs. 100/-. The total absence of any such description which would have provided a yardstick to evaluate the identification of the present appellant at a later date by victim Satyanarayana would render his later identification weak but that is not the only error. Ext. P/1 clearly shows that the victim Satyanarayana did not know the names of the persons who robbed him. In such a situation ordinarily after the accused were arrested the test identification parade should have been held. It is admitted that no such identification parade was held. It is only when the victim Satyanarayana came to give evidence in the Court and the four accused were sitting in the Court that he identified them as the miscreants. Incident occurred on December 9, 1978. Evidence of Satyanarayana was recorded in the Court on April 21, 1979. There was thus a lapse of more than four months during which period it is not possible to believe that victim Satyanarayana had no occasion to see the accused. Such identification in the circumstances of the case would hardly furnish any evidence against the present appellant.

35. In *Suraj Pal and Others Vs. State of Haryana*, , in a different circumstance the Apex Court held that when the accused decline to submit themselves for T.I.Parade, dock identification can be accepted, if otherwise found to be reliable. In *Suraj Pal* (supra), the Apex Court held as under:

It may be pointed out that the holding of identification parades has been in vogue since long in the past with a view to determine whether an unknown person accused of an offence is really the culprit or not to be identified as such by those who claimed to be the eye-witnesses of the occurrence so that they would be able to identify the culprit if produced before them by recalling the impressions of his features left on their mind. That being so, in the very nature of things, the identification parade in such cases serves a dual purpose. It enables the investigating agency to ascertain the correctness or otherwise of the claim of those witnesses who claimed to have seen the offender of the crime as

well as their capacity to identify him and on the other hand it saves the suspect from the sudden risk of being identified in the dock by such witnesses during the course of the trial. This practice of test identification as a mode of identifying an unknown person charged of an offence is an age-old method and it has worked well for the past several decades as a satisfactory mode and a well-founded method of criminal jurisprudence. It may also be noted that the substantive evidence for identifying witness is his evidence made in the Court but in cases where the accused person is not known to the witnesses from before who claimed to have seen the incident, in that event identification of the accused at the earliest possible opportunity after the occurrence by such witnesses is of vital importance with a view to avoid the chance of his memory fading away by the time he is examined in the Court after some lapse of time.

36. It has been further held in *Suraj Pal (supra)* that:

if the appellants in exercise of their own volition had chosen not to stand the test of identification without any reasonable cause, they did so on their own risk for which they cannot be heard to say that in the absence of test parade, dock identification was not proper and should not be accepted, if it was otherwise found to be reliable.

37. This is such an issue that the Apex Court dilated the issue time and again and also slightly modified the law with the change of time and in some point of time the Apex Court enunciated that sanctity of the T.I. Parade is of paramount importance and any deviation there-from might injure the right of the accused and in a fair trial such right has to be protected with utmost paramountcy. In *Vijayan @ Rajan Vs. State of Kerala*, , the Apex Court held as under:

6. To test the correctness of the rival submissions it would be necessary for us to examine the circumstances relied upon by the High Court and to find out whether on the materials on record it is possible to hold such circumstances have been established and then to find out whether all such circumstances taken together can be said to be complete which point to the guilt of the accused rather than their innocence. It is not in dispute that the deceased Majeendran was shot at by somebody in his own house during early hours of 9.10.1981 and on account of such gunshot injury he succumbed. PW3 was the maidservant of the deceased and according to her evidence during the early hours when somebody rang the call-bell she went out and found a man standing and who wanted her master to come but she replied that master got up late. Even thereafter when the man again rang the bell, she got up and opened the door and then called the master and shortly thereafter she heard the sound and when she went back she did not find the man who had earlier rung the bell and during her evidence in Court she identified the man to be accused Vijayan. Accused Vijayan having surrendered was arrested on 4.7.84 and the Test Identification Parade was held on 7.8.84. This Test Identification Parade was discarded by the learned Sessions Judge as it was apparent from the evidence of PW3 that the photograph of accused Vijayan was shown to her before the Test Identification

Parade and further just before she was entering the Sub-jail to identify the accused somebody had told her to identify the tallest man shown in the parade. The High Court also agreed with the conclusion of the learned Sessions Judge and did not rely upon the same but queerly enough the High Court relied upon the evidence of PW3 as she identified the accused in Court after so many years on the ground that corroboration to the same is available. This conclusion on the face of it is unsustainable. Since the accused Vijayan was not known to PW3 and the Test Identification Parade having been discarded, the substantive evidence of identification in the Court after so many years cannot be relied upon. Though Mr. Ramachandran, learned senior counsel appearing for the State initially had urged that the evidence of PW 3 so far as she identified accused Vijayan in the Court can be accepted even discarding the Test Identification Parade but ultimately could not support the said contention with any authority. As a matter of prudence it is highly unsafe to accept the identification of accused in Court many years after the occurrence when the Test Identification Parade made shortly after the occurrence has not been accepted. There are also several other reasons for discarding the evidence of PW3 since according to PW3 the person who rang the bell was not a tall man though height of Vijayan is more than 6 feet. For a person to just see his face while opening the door and then remember the same for the purpose of identification after five years of occurrence, in our considered opinion, is just impossible. The evidence of PW3 and the circumstances sought to be proved through her evidence by the prosecution cannot be relied upon and the High Court committed gross error in relying upon the same.

38. In Vijayan (supra) it has been further held as under:

7. The next circumstance sought to be relied upon by the prosecution and accepted by the High Court is through the evidence of PW 9 who on the date of occurrence was returning after supplying milk and then he saw accused Vijayan running away without any chappal and in a worried manner. The High Court relied upon his evidence essentially on the ground that he saw the accused being clad with a blue pant and shirt and was running without any footwear. We have gone through the evidence of PW9. It is indeed difficult for us to rely upon his evidence and it is highly improbable for a man to remember any person running on the street without chappals. That apart, his so called identification in the Test Identification Parade was rightly disbelieved by the Sessions Judge in as much as by the date the Test Identification Parade was conducted, not only the photograph of the accused had been shown to PW3 and in all probability must have been shown to PW9 but also in all the local newspapers the photograph had already been printed. In such circumstances the Sessions Judge in our view, rightly came to the conclusion that the Test Identification Parade is nothing but a farce and cannot be relied upon. The High Court on the other hand appears to have been persuaded by the fact that since aman was found to be running during the early hours without chappals on his foot and with blue pant and blue shirt it was possible for PW9 to identify him. With respect we would say the reasonings of the learned Judges of the High Court are totally unsustainable and having

gone through the evidence of PW9, we have no hesitation to come to a conclusion that his evidence cannot be relied upon by the prosecution.

8. Another circumstance sought to be established through the evidence of PW 4, a young girl living a few yards away from the house of deceased. According to her she heard the sound of somebody running and when she turned she saw accused Vijayan running away after crossing a water channel and was wearing a blue pant and blue shirt. It is no doubt true that she identified accused Vijayan in the Test Identification Parade but for the reasons already advanced while discussing the evidence of PWs 3 and 9, the identification of the accused in the Test Identification Parade cannot be relied upon. The High Court unfortunately appears to have taken a view that the identification of the accused by PW 4 in the Test Identification Parade should be relied upon. We are unable to agree with this conclusion particularly when it is apparent from the prosecution material that much before the holding of Test Identification Parade, the photograph of the accused Vijayan had been published in the newspaper and because of certain sensation in the locality it had a lot of publicity and there was sufficient opportunity for the witnesses being shown the accused person. In this view of the matter, in our considered opinion, the High Court erroneously interfered with the conclusion of the learned Session Judge in this regard and came to hold that the identification of Vijayan by PW4 could be relied upon. We have examined the evidence of said PW4 in great detail and we are unable to subscribe the view the High Court has taken on the evidence of the aforesaid witness. We also really fail to understand how a witness seeing an unknown man running away could be able to identify him at a later point of time. No special feature was also indicated by the witness, In our view, the evidence of PW4 is totally unworthy of credit and, as such, cannot be relied upon for bringing home the charge.

39. And ultimately, in Vijayan (supra), the Apex Court laid down the principles as under:

9. PW 7 was the person who saw the accused boarding an autorikshaw which was driven by PW2. Though PW7 also had identified accused in die Test Identification Parade which had been conducted by the Magistrate, PW61 but in the Court he could not identify the accused and, therefore, the so-called identification in Test Identification Parade loses its importance. That apart, the reasons for vitiating the Test Identification parade already indicated would apply so far as the identification by PW7 in the T.I. Parade is concerned. In this view of the matter we are of the considered opinion that the High Court erroneously relied upon the so-called identification of Vijayan by PW7 in the T.I.Parade even though in the Court he did not identify Vijayan. The autorikshaw driver PW2 stated in his evidence that he took the accused in the autorikshaw from Ideal Lodge to Veekshanam Office. According to him he had taken accused Vijayan during that morning and second accused came there through the cross-road and he also travelled in his autorikshaw and then alighted from the vehicle. His evidence has been relied upon by the High Court to bring home the charge of

conspiracy u/s 120B IPC. It may be seen that he was examined by the police on 8.10.1982 roughly one year after the occurrence. It has been elicited from him that he was compelled to say that both the accused travelled in his vehicle by the police. Prosecution re-examined him and brought out from him on re-examination that one Joseph had approached him and paid him Rs. 500/- for making such statement in the Court. We have examined the evidence of PW2 and in our opinion, he must be held to be an unreliable witness and no part of his evidence could be relied upon. The High Court in our view committed gross error in relying upon his evidence. Though the prosecution relied upon the latter, Exhibit P9 thereby trying to establish the offence of conspiracy between the two accused persons but the High Court excluded the same from consideration as is apparent from paragraph 30 of the impugned judgment, and in our view, rightly. But the further conclusion that it was the first accused who shot at Majeendran is wholly unsustainable in view of our discussion of evidence already made and the said conclusion has to be set aside. Though the accused alleged to have given recovery of some bullets and two bullets were also recovered from the house of accused No. 2 but there is no evidence to connect the bullets which were recovered from the body of the deceased are the same as those bullets alleged to have been recovered on the basis of statement made by the accused while in custody. In that view of the matter, it is not necessary to delve further into the said circumstance.

40. The Apex Court in *State of U.P. Vs. Ashok Dixit and Another*, re-examined the issue of the identification vis-a-vis test identification parade and dock identification and held as follows:

6. PW-2 has stated that accused-respondent Ashok was known to him and Dr. Dubey and used to visit frequently the house of Dr. Dubey. Accused-Chaman Lal was not known to him earlier. PW-2, Dr. Dubey, Manorama and Munnu Singh were taken to the hospital by PW-1 with the help of one Pandey through the ground floor. The accused persons after being arrested were kept in the ground floor. PW-2 did not mention in his statement u/s 161, Cr. P.C. that accused Ashok came along with other two accused to the first floor and fired at him and Manorama and also the fact that accused Ashok and other two accused were on the ground floor.

7. These are material omissions. Therefore, we are of the opinion that these omissions are fatal for the prosecution. More, particularly, when accused Ashok was related and regular visitor to the house of Dr. Dubey. We, therefore, hold that there was no identification by PW-2 of accused Ashok. Regarding accused Chaman Lal after the occurrence there was no test identification parade and for the first time PW-2 identified the accused Chaman Lal in the Court. This identification cannot be accepted.

41. In *Dana Yadav @ Dahu and Others Vs. State of Bihar*, the Apex Court held as under:

11. This question was subject matter of consideration before different High Courts as well as this Court. It is well settled that no test identification parade is called for and it would be waste of time to put him up for identification if the victim mentions name of the accused in the first information report or he is known to the prosecution witnesses from before. Reference may be made in this regard to the cases of *Dharamvir and Another Vs. The State of Madhya Pradesh*, and *Mehtab Singh and Others Vs. The State of Madhya Pradesh*, . In the case of AIR 1945 48 (Lahore) where the Court while examining the case in similar circumstances observed at page 50 thus:

If an accused person is already well-known to the witnesses, an identification parade would of course, be only a waste of time. If, however, the witnesses claim to have known the accused previously, while the accused himself denies this, it is difficult to see how the claim made by the witnesses can be used as reason for refusing to allow their claim to be put to the only practical test. Even if the denial of the accused is false, no harm is done, and the value of the evidence given by the witnesses may be increased. It is true that it is by no means uncommon for person who have been absconding for a long time to claim an identification parade in the hope that their appearance may have changed sufficiently for them to escape recognition. Even so, this is not in itself a good ground for refusing to allow any sort of test to be carried out. It may be that the witnesses may not be able to identify a person whom they know by sight owing to some change of appearance or even to weakness of memory, but this is only one of the facts along with many others, such as the length of time that has elapsed, which will have to be taken into consideration in determining whether the witnesses are telling the truth or not.

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

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

(b) In cases where according to the prosecution the accused is known to the prosecution witnesses from before, but the said fact is denied by him and he challenges his identity by the prosecution witnesses by filing a petition for holding test identification parade, a court while dealing with such a prayer, should consider without holding a mini inquiry as to whether the denial is bona fide or a mere pretence and/or made with an ulterior motive to delay the investigation. In case court comes to the conclusion that the 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 value to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) 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.

42. In *Umesh Kamat Vs. State of Bihar*, , further the Apex Court noted as under:

9. We now turn our attention to the most crucial aspect of the case in regard to the identification of the appellant. The High Court relied on the evidence of PWs 1, 3 and 4. Neither PW5--the informant nor PW2 (who identified three other accused) identify the appellant. Hence, their evidence need not detain us. How far the two Courts were justified in acting on their testimony on the point of identification is the question. The appellant, as already noticed, is not a person known to the prosecution witnesses. As far as PW 3 is concerned, she did not identify the appellant in the Court as he was not present. Though the trial Court and the High Court proceeded on the basis that the four accused including the appellant were identified in the Court by PW3, in fact there was no such identification, as is clear from her deposition at Para 6. As pointed out in *Malkhansingh and Others Vs. State of Madhya Pradesh*, the identification parades belong to the stage of investigation and they do not constitute substantive evidence. The substantive evidence is the evidence of identification in Court because the facts which establish the identity of the accused persons are relevant u/s 9 of the Evidence Act. This Court further observed that failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. Thus, in the absence of identification in the Court at the time of tendering evidence the results of test identification parade will be of little value. With reference to the evidence of PW3, the High Court committed another factual error in observing that PW3 gave a description of the general appearance of the appellant. Therefore the testimony of PW3 does not advance the prosecution case.

43. In *Siddanki Ram Reddy Vs. State of Andhra Pradesh*, , the Apex Court held as under:

19. The last eye-witness on whom the High Court has relied upon is PW-6. His evidence is that on 28.02.2005 he came to court by 10.30 a.m. and attended the J.F.C.M., East and North, and at about 11.00 a.m. he went to the section of 2nd A.D.J, court on some work and was returning when he saw a person armed with an axe coming from the main entrance side towards the 2nd A.D.J. Court Hall and he hacked the person whom he was chasing with the axe on his neck. The victim collapsed to the ground and he and a civilian by the name Kumar tried to catch hold of the assailant, but the assailant by ringing the axe around terrorised everyone and created fear in the mind of the people. The further evidence of PW-6 is that when the assailant gave a blow he bent to the side and then the assailant went through the main entrance. He was summoned to Cherlapally Jail for the Test Identification Parade in which he identified the accused No. 1 (the appellant) as the assailant. It is difficult to believe the evidence of PW-6 regarding the identification of the appellant as the assailant because in the Test Identification Parade he has stated that the suspect has injury mark on his right cheek and the Magistrate (PW-34) conducting the Test Identification Parade has stated in his evidence that according to his Report (Ex. P64) none of the two suspects had injury mark on the right cheek.

20. This Court has held in *Daya Singh Vs. State of Haryana*, cited by Mr. Reddy that the purpose of test identification is to have corroboration to the evidence of the eye witnesses in the form of earlier identification and that the substantive evidence of a witness is the evidence in the Court and if that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. In the facts of the present case, a mob attacked the deceased in the crowded corridors of the court of the 2nd Additional District Judge and PW-1, PW-5 and PW-6 in their evidence in the court claim to have seen the accused No. 1 (appellant) chasing the deceased with an axe and assaulting the deceased with axe on his neck. All these three eye witnesses have also stated that soon after the assault the appellant ran away from the court premises. The three eye witnesses thus saw the assailant for a very short time when he assaulted the deceased with the axe and thereafter when he made his escape from the court premises. When an attack is made on the assailant by a mob in a crowded place and the eye witnesses had little time to see the accused, the substantive evidence should be sufficiently corroborated by a test identification parade held soon after the occurrence and any delay in holding the test identification parade may be held to be fatal to the prosecution case. In *Lal Singh and Others Vs. State of Uttar Pradesh*, this Court has held that where the witness had only a fleeting glimpse of the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously.

21. Further, the test identification parade in this case has not been fair to the appellant. Although eight suspects were arrested, only the appellant and one other were produced before the witnesses at the Test Identification Parade. This gives room for a lot of doubt on the case of the prosecution that none other than the appellant was the assailant. In *State of Maharashtra v. Suresh (supra)*, on which reliance was placed by Mr. Reddy, the Court found that the suspect was permitted to stand anywhere among seven persons and the witnesses were then asked to identify the person whom they saw on the crucial day and on these facts this Court held that the test identification parade was conducted in a reasonably foolproof manner. This is not what has been done in the present case and, therefore, the corroboration of the substantive evidence of PWs 1, 5 and 6 on the identification of the suspect by the test identification parade is not trustworthy.

44. Another aspect which requires this Court to determine what would be the consequence of the statement as made by the P.W.2 in her cross-examination that she was shown the accused persons in the police station if the police prior to holding the T.I.Parade had shown the accused persons to the witnesses, who would identify them in the T.I.Parade. The Apex Court in *Krishan Kumar Malik Vs. State of Haryana*, , while dwelling on such an issue held as under:

26. Admittedly, no identification parade was conducted to identify the Appellant as the description given by prosecutrix about the details did not match with his appearance. All through, she has been describing the Appellant as gitta (short

statured) man with beard, whereas a statement before the Bench has been made by learned Counsel for the Appellant, after verification from the Appellant's wife, that he is 5' 6" tall. This fact has been independently corroborated by the jailor's report on this specific query. Even though a man having height of 5' 6" cannot be said to be tall but by no stretch of imagination, could he be called a gitta (short statured) man. Admittedly she was already shown the Appellant and other accused at the Police Station, after they were arrested. Thus, her dock identification in Court had become meaningless.

45. Before drawing up the findings on considering the legality of the impugned judgment and order, it would be appropriate to reiterate the settled proposition of law regarding the testimony of the prosecutrix. As considered by this Court a catena of these judgments, one decision of the Apex Court in *Radhu Vs. State of Madhya Pradesh*, , where the Apex Court has held as under:

5. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a "rape", if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, wrists, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.

46. Thereafter in *Radhu* (supra), the Apex Court has further held as under:

15. The evidence of the prosecutrix when read as a whole, is full of discrepancies and does not inspire confidence. The gaps in the evidence, the several discrepancies in the evidence and other circumstances make it highly improbable that such an incident ever took place. The learned Counsel for the respondent submitted that defence had failed to prove that Mangilal, father of prosecutrix was indebted to Radhu's father Nathu and consequently, defence of false implication of accused should be rejected. Attention was invited to the denial by the mother and father of the prosecutrix, of the suggestion made on behalf of

the defence, that Sumanbai's father Mangilal was indebted to Radhu's father Nathu and because Nathu was demanding money, they had made the false charge of rape, to avoid repayment. The fact that the defence had failed to prove the indebtedness of Mangilal or any motive for false implication, does not have much relevance, as the prosecution miserably failed to prove the charges. We are satisfied that the evidence does not warrant a finding of guilt at all, and the Trial Court and High Court erred in returning a finding of guilt.

47. If the case in hand is appreciated in the perspective of the law as developed, so far it relates to returning the conviction solely relying on the testimony of the prosecutrix for commission of offence u/s 376 as well as on the question of identification by way of holding test identification parade, followed by identification in the dock or on identification for the first time in the dock, it has been crystalised that identification as made by the witnesses in the test identification parade is not substantive piece of evidence unless and until the identification made in the dock. So far the identification in the dock is concerned, it is a substantive piece of evidence relying on which the finding of conviction can be returned by any court unless the prosecution case is seriously impaired otherwise. But so far the identification in the dock is concerned, the Apex Court is in no uncertain words held that such identification after lapse of a long time would not be safe for reliance so as to return the finding of conviction.

48. In this case, as this Court has come across that the FIR (Exbt-1), out of the four culprits, who have been alleged to have committed rape on the prosecutrices (P.W.2 and P.W.5), the informant as a witness not of the rape but preceding to the incident of rape and identified the appellant No. 2, namely, Sri Biswamani Jamatia but in the dock he denied to identify the said Sri Biswamani Jamatia and as consequence thereof he declared hostile. However, in the cross-examination he stated that he knew Joyanta Kalai, Biswamani Jamatia and Nirmal Kalai from his childhood.

49. From the statement as recorded u/s 164 of Cr.P.C. of the prosecutrix (P.W.2) she stated without any hesitation that she could recognize Biswamani Jamatia and his house was at Haripur. The said statement as recorded u/s 164 of Cr.P.C. has been duly proved in the evidence as Exbt.-7. Apart that, P.W.3, namely, Santi Laxmi Malsom, who though was declared hostile but she had categorically corroborated a part of the prosecution case. She stated that:

the name of another person was Biswamani, whose father's name is Sri Bilbhadra Jamatia of Haripur and another one was known to me but I could identify him if I saw.

But surprisingly when the P.W.2 was asked to identify the three persons, who were identified in the Jail during test identification parade, she denied to look at them though she stated that four miscreants are present in the Court. It may be worthwhile to mention that test identification parade was conducted in presence of the P.W. 15, who was then the Sub-Divisional Judicial Magistrate, Amarapur and

test identification parade was conducted in respect of the appellants, namely, Sonaram Debbarma, Nirmal Kalai and Joyanta Kalai.

50. The procedure of conducting test identification parade, as questioned by the learned counsel appearing for the appellants, did not get any nourishment in the evidence except that the person of Kalai community was not mixed up when the appellants, namely, Nirmal Kalai and Joyanta Kalai were asked to appear in the test identification parade by the witnesses. Apart that, the witnesses to the T.I. Parade did not disclose any physical description of the offenders preceding the T.I. Parade.

51. In this case, the witnesses of the test identification parade, i.e. the P.W.1 and P.W.2 did not identify the appellants, who were identified by them in the test identification parade, in the dock. From cumulative reading of the oral testimony of P.W.9 and P.W. 14 along with Exbt-23, it would be apparent that the P.W.2 and P.W.5 were subjected to forcible rape as there were marks of violence over their chest and hymens were found torn with recent injury. If this medical opinion is read together with the statement of P.W.2 and P.W.5 as well as P.W.1 for the purpose of corroborating the statement and also the version reflected in the FIR, the incident of gang rape has been established by the prosecution without any shadow of doubt.

52. As regards the identification of the appellant Nos. 1, 3 and 4, the test identification parade was conducted by aid of P.W.1, P.W.2 and P.W.5 and those appellants were identified by the said witnesses in the test identification parade, but P.W. 1 and P.W.2 did not identify the appellant Nos. 1, 3 and 4 in the dock. However, P.W.5 has identified the four accused persons in the following manner:

"We are taken to Jail for three times, where we identified the miscreants. The officer prepared the document and I also put my signature. On identification her signature is exhibited and marked 12/1, 13/1 and 14/1 (signatures in three sheets of T.I.Parade). Out of these five persons, four are present in the court. Identified them in the dock. The persons who were identified by me in the Jail two of them are present, and the other is not present in the dock (Absconder).

Identification by that way would benefit the offenders who were not identified by the witness from their acquaintance.

53. P.W.2 also stated that four miscreants are present in the Court and identified. However, she denied to identify the three persons in the dock, who were identified during test identification parade. But she made a statement which is fatal for the prosecution case so far it relates to identification of the offenders. She stated in the cross-examination that "I have seen the accused persons in the P.S. and I have shown these persons in the Jail". Even though the statement has not been confirmed by P.W.5 and PW.16. But it generated two versions in the prosecution case. She further stated that it is true that we have shown the miscreants in the Jail according to showing of the police officer in the P.S. She further stated PW.5 accompanied her whenever she visited the police station. In

view of this, the purpose of test identification parade has been debased. Therefore, it would not be safe on the basis of such identification to affirm the finding of conviction against the appellant Nos. 1, 3 and 4 inasmuch as P.W. 16 did not disclose anything how and in what manner the appellant Nos. 1, 3 and 4 were arrested for their involvement in the offence. So far the appellant No. 5 is concerned, he was identified in the dock after lapse of about 3 years from the date of occurrence first time in the dock. Such identification as well cannot be made the basis of returning, the finding of conviction in consideration of time and place of occurrence.

54. In the result, the appellant Nos. 1, 3, 4 and 5 are entitled to benefit of doubt. Accordingly, the judgment of conviction and order of sentence as questioned in this appeal are interfered with and set aside. The appellant Nos. 1, 3, 4 and 5, for the reasons as discussed, are acquitted from the charge on benefit of doubt. However, so far the appellant No. 2, namely, Sri Biswamani Jamatia is concerned, the prosecution has proved the charge against him without any shred of reasonable doubt. Therefore, the judgment of conviction as returned against him is liable to be interfered with. Consequently, this Court also affirms the sentence to suffer R.I. for life and to pay a fine of Rs. 10,000/- and in default of payment of fine the appellant No. 2 shall have to suffer more two years R.I. for the commission of rape, as punishable u/s 376(2)(g) of the IPC, upon two prosecutrix (P.W.2 and P.W.5) along with other offenders.

55. For the reasons as discussed, the appeal is partly allowed. The appellant Nos. 1, 3, 4 and 5, namely, Sri Jayanta Kalai, Sri Nirmal Kalai, Sri Sonaram Debbarma and Sri Anup Debbarma respectively be released forthwith. As discussed already that the prosecution has succeeded to establish that both the prosecutrix were the victim of gang rape, this Court considers it apposite to direct the State Government to consider for providing compensation to the victim of the gang rape (P.W.2 and P.W.5) in terms of Section 357 of the Code of Criminal Procedure, 1973 within a period of two months from today. The compensation has not been quantified by this Court with expectation that a reasonable compensation would be determined by the Government of Tripura on humane consideration.

Lower Court records be returned forthwith.