

(2015) 04 GUJ CK 0014
In the Gujarat High Court

Case No : Criminal Appeal Nos. 1435, 1661, 1713 of 2004, 1541 and 1546 of 2006

Sadikbhai Idrashbhai Khatri

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 24-04-2015

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 112, 154, 154(1), 155, 156
Evidence Act, 1872 — Section 10, 9
Penal Code, 1860 (IPC) — Section 114, 120B, 120-B, 149, 357

Citation : (2016) GLH 1 34 : (2015) 3 GLR 2163

Hon'ble Judges : R.R. Tripathi and Sonia Gokani, JJ.

Bench : Division Bench

Advocate : Prashant G. Desai, Sr. Advocate, for the Appellant; Chetna Shah, A.P.P., for the Respondent

Final Decision : Dismissed

Judgement

Sonia Gokani, J.—All these appeals arise from the judgment and order of the learned Additional Sessions Judge, 3rd Fast Track Court, Bharuch rendered in Sessions Case No. 148 of 2003 on 26th August, 2004, whereby, the original accused Nos. 1 to 3 (hereinafter to be referred to "A1 to A3") have been convicted under Secs. 392 and 394 read with Sec. 114 of the Indian Penal Code ("I.P.C." for short) and sentenced to serve rigorous imprisonment for a period of four years and pay fine of Rs. 2,000/- each; and in default of payment of fine, to undergo further imprisonment for a period of six months. Although, all these accused have been given benefit of doubt and have been acquitted of the offences punishable under Secs. 397 and 120B I.P.C. Whereas, accused No. 4 has been given benefit of doubt of all the offences viz., Secs. 392 , 394 read with Sec. 114 , 397 and 120B I.P.C. and sub-sec. (1) of Sec. 135 of the Bombay Police Act. Aggrieved accused have preferred Criminal Appeal under Sec. 374 Cr.P.C. challenging the judgment and order of conviction passed by the Court

where Criminal Appeal Nos. 1435, 1661 and 1713 of 2004 are respectively preferred by A1, A2 and A3. Whereas, the State of Gujarat has preferred two appeals, being Criminal Appeal No. 1541 of 2006 challenging the judgment and order of acquittal of all of the offences punishable under Secs. 392 and 394 read with Sec. 120B I.P.C., whereas, Criminal Appeal No. 1546 of 2006 has been preferred for enhancement of sentence imposed by the trial Court for the offences punishable under Secs. 392 , 394 read with Sec. 114 I.P.C.

2. In the present appeals, for the sake of convenience, the State of Gujarat shall be referred to as "the appellant". Respondent-accused shall be referred to as A1 to A3 the brief facts of the prosecution leading to these appeals require a brief mention, at the outset.

3. The complainant-Narendra Bhagwandas Fulchandani was carrying on his business in the name and style of Rajesh Masala Bhandar at Narmadanagar, Bharuch. He was regularly supplying spices to traders at Ankleshwar and would maintain their accounts in his account books. He would approach all of them at the end of the month with the collection book to receive the money for the goods supplied to them on a regular basis.

4. On the fateful day i.e., 26th February, 2003 at about 11-00 a.m., the complainant left his house on his Hero Honda Motor-cycle No. GJ-16-J-6589 for collection of the outstanding amount from his 50 to 60 customers. At around 7-30 p.m., three persons followed his motor-cycle and after intercepting him, the two pillion-riders approached him and one of them threw chilly powder in the eyes and when he tried to run away, one of them caught hold of him and the other person inflicted a knife blow on the back of the complainant and took away his bag containing money and they all fled away on their motor-cycle towards Ankleshwar.

5. Complaint came to be lodged at Ankleshwar City Police Station being I-C.R. No. 140 of 2003 for the offences punishable under Secs. 392 , 394 , 397 , 114 , 120B I.P.C. and Sec. 135 of the Bombay Police Act. On due completion of investigation, charge-sheet came to be filed for the offences punishable under Secs. 394 , 397 , 114 , 120B I.P.C. and Sec. 135 of the Bombay Police Act. On committal of the matter to the Court of Sessions, the same was registered as Sessions Case No. 140 of 2003 where the accused pleaded not guilty to the charges framed against them. Prosecution, therefore, led evidences by examining in all twenty/eight witnesses to substantiate the charges and also produced documentary evidences in support thereof.

6. The Court after giving due opportunity of explaining all incriminating evidences to the accused under Sec. 313 Cr.P.C., heard both the sides at length and delivered judgment by holding A1 to A3 guilty of the offences punishable under Secs. 392 and 394 I.P.C. read with Sec. 114 of the Indian Penal Code, however, had acquitted these accused for the offences punishable under Secs. 397 and 120B I.P.C. Therefore, both the sides are aggrieved and the same has

resulted into preferring of all these appeals.

7. Shri Prashant Desai, learned Senior Counsel appearing for the appellant-A1 emphasised essentially on three aspects viz., (a) absence of complaint of robbery; (b) serious loopholes in conduct of T.I. parade and (c) non-describing of role played by each of the accused in the evidence of prosecution witnesses.

8. On the first ground, it is urged by the learned Counsel that robbery is alleged to be pre-planned. However, in complete absence of any evidence with regard to the charge of planning, the very case of prosecution is hollow. He further contended that no eye-witness is examined; except complainant, who also has not even named the accused nor has he mentioned anything with regard to vehicle and the reference of vehicle comes for the first time before the Doctor who examined him. He also urged further that incident when has taken place in winter at around 7-30 to 7-45 p.m., and the accused have been arrested on 16th August, 2003 - after about six months. In what manner the yadi was sent to the complainant is not clear from the record. Moreover, all the requirements and precautions or safe-guards to be maintained while conducting T.I. parade are completely absent, and therefore, any identification done should have no value in the eyes of law. He also has urged that it was impossible for the complainant to see even the faces of these persons as the chilly powder was sprinkled on his face. With regard to the third issue, it has been urged that when the offence under Sec. 120B I.P.C. has not been proved, Sec. 10 of the Evidence Act comes to the rescue of prosecution, and therefore, the role of each person shall have to be specified by the witness and unless that is done, conviction based on such scanty evidence shall have to be quashed. He has placed reliance upon the following authorities to substantiate these submissions, which are as under:

- (a) Anil Sute and Another Vs. State of Maharashtra, ;
- (b) Musheer Khan @ Badshah Khan and Another Vs. State of Madhya Pradesh, ;
- (c) Pramod Mandal Vs. State of Bihar, ;
- (d) State of Gujarat Vs. Ratansingh @ Chinubhai Anopsinh Chauhan, ;
- (e) State of Gujarat Vs. Mahmad @ Munno Usmanbhai Chauhan, ;
- (f) Abbas Hasam Ghanchi v. State of Gujarat, , 1993 (1) GLH 33 ; and
- (g) Subash and Shiv Shankar Vs. State of U.P., .

9. For and on behalf of A2, learned Advocate Shri N.K. Majmudar has fervently made his submissions urging inter alia that in the complaint, accused are shown to be unknown persons. The main informant has not identified the accused neither in the complaint nor in the T.I. parade. Moreover, three persons are alleged to have committed an offence by an active role and except one chit, there is no evidence. It was a pitch dark in the evening, considering the month of February, and therefore, it is urged that the version of the prosecution witness is not believable. Moreover, A2 has no criminal antecedents at his discredit.

10. Learned Advocate Mr. M.M. Tirmizi appearing for A3 has also supported the version put forth by the learned Advocate appearing for A1 and A2 to submit that after four months of the alleged incident, T.I. parade has taken place with nothing to mention of the role attributed to any of the accused persons. Mere presence of a person would be insufficient and it would be completely unsafe to convict a person under Sec. 149 read with 114 I.P.C. As far as submissions made by learned Advocate Ms. Lopa M. Bhatt appearing for A4, who has been acquitted by the trial Court, according to her, the prosecution case P.Ws. 5, 6, 7, 15 and 16 have deposed against this appellant. Only a sum of Rs. 17,000/- is averred to have been recovered from him, however, since none of the witnesses has supported the case of prosecution, involvement of this appellant being only for the purpose of alleged conspiracy. According learned Advocate, the prosecution has failed to prove any of the ingredients, and hence, no interference is desirable as far as A1 is concerned.

11. Ms. Chetna Shah, learned A.P.P. has urged that the complainant being a businessman, had a dealing with various traders. One of the accused is son of the trader to whom goods were being supplied. It was not difficult for them to know the schedule followed by the complainant every time. It was, therefore, easy for them to conspire and commit robbery, the day on which he had received payment from various traders. She also urged that the prosecution witnesses have spoken of the amount paid towards spices supplied by the complainant and of collection being made once a week. It was A4, who is son of P.W. 21 who is alleged to have master-minded the entire incident. It is unfortunate that he had been given acquittal for want of sufficient evidence. However, according to her, there is voluminous evidence to indicate involvement of all the four of them. Moreover, in the T.I. parade, A1, A2 and A3 have been identified and before the Court of law also, they have been identified as accused. According to learned A.P.P., the Executive Magistrate (P.W. 13) has followed the mandatory procedure and no material anomalies could be noticed in his deposition. She has relied upon the following authorities to substantiate her version, which are-

- (a) Vahaji Ravaji Thakore Vs. State of Gujarat, ;
- (b) Harivadan Babubhai Patel Vs. State of Gujarat, ;
- (c) Shyamal Ghosh Vs. State of West Bengal, ;
- (d) Rumi Bora Dutta Vs. State of Assam, ;
- (e) Bipin Shantilal Panchal v. State of Gujarat, reported in 2004 (1) GLR 2024.

Having thus heard both the sides and on duly considering the material on the record, at the outset the complainant's ocular version is required to be considered.

12. Complainant-Narendrakumar B. Fulchandani has been examined as P.W. 14, who deals in spices in the name and style of Rajesh Masala Bandar at Bharuch Narmada Market. On regular basis, he used to supply spices to various traders at

Ankleshwar and this business of supplying the goods is going on since past thirteen years. After his regular supply to different traders, he used to go for collection of money every week. On the fateful day i.e., 26th February, 2003 at about 11-00 a.m., he left his house on Hero Honda make Motor-cycle bearing registration No. GJ-16-J-6589 for collection of outstanding amount around 50 to 60 traders to whom goods were earlier supplied by him and collected approximately a sum of Rs. 65,000/- to 70,000/-. While he was returning home at around 7-30 p.m. in the evening, near Gadkhol Patiya, he found three persons following him on a motor-cycle. First they overtook his motor-cycle and stopped the vehicle and one of them sprinkled chilly powder from a distance of about three-four feet and another pillion-rider caught hold of the complainant and gave a knife blow on his back. He also snatched his bag. They all were aged 25 to 30 years, single bodied wearing pant-shirt. One person who was driving the vehicle had kept the bike ready and two persons were pillion-riders. He, however, could not see the number of the motor-cycle but chased it for about two kilometers. A police jeep patrolling near the Petrol Pump was informed of the incident, however, since no heed was paid, he went further in injured condition and reached Bharuch at his brother's residence from where he was taken in a maruti car to Civil Hospital. After taking primary treatment, he was referred for further treatment at Vadodara where the complainant preferred to take private treatment at Dr. Gautam Patel's clinic, where his complaint came to be recorded by the police wherein loot of approximately Rs. 65,000/- was described.

13. In the examination-in-chief, he is very clear that when the accused overtook him. He saw them and had seen them from close quarter. For T.I. parade, after the arrest of the accused, he was called at Mamlatdar's Office and he went to Ankleshwar at around 4-00 O'clock where identification parade was carried out and he identified three persons. He also identified them before the Court of law so also the muddamal.

14. In the extensive cross-examination of this person, he denied the suggestion that on sprinkling of chilly powder his eyes were closed. He had alighted from the motor-cycle and started running. He empathetically answered that since the head-lights of the motorbike were on, he could clearly see the accused. He also denied the suggestion that on 19th August, 2003, some police persons had asked him to remain present at Mamlatdar's Office and prior to visiting the said office, he had gone to Ankleshwar Police Station where he was shown the accused. He also has been suggested that on the date of incident, there was a cricket final match between India and Australia and hardly any vehicle was found on the road. Complaint Exh. 40, if is looked at, it is on the same line as given on 26th February, 2003 at Dr. Gautam Patel's Hospital, Bharuch. In the cross-examination, as rightly held by the trial Court, the complainant has specifically replied that he could notice a motor bike chasing him, and thereafter, intercepting him. It was not much dark, and therefore, he could notice the persons riding the same. Moreover, he also had been specific that the head light of the vehicle was on, he was able to see the faces of the assailants.

15. This witness is a businessman for the past thirty years. His was a private business which he was carrying on with the help of his two major sons. His collection of money towards the amount of consideration for the spices sold to the different traders at Ankleshwar G.I.D.C. was towards his personal business. He would have no cause to concoct a story of such a loot. It is not even the case of defence that the entire version is concocted. The main thrust of arguments is that in absence of any opportunity to identify the accused and late conduct of Test Identification Parade would have prevailed with the trial Court in giving benefit of doubt to A1 to A3.

16. Yet another aspect that requires consideration is as to whether this complaint given at Dr. Gautam Patel's Hospital, Bharuch can be treated as an F.I.R. As the Court below has considered Yadi given by the Police as F.I.R. and not this complaint, which has been treated as statement recorded by the Police under Sec. 161 Cr.P.C.

17. P.W. 18 P.S.O.-Prakashbhai Somabhai More in his deposition has stated that when he was present at Ankleshwar Police Station at around 21-30 Hrs., he received information in the form of a Yadi received by P.S.I.-Sursinh Narsinhbhai, through attendant constable at Bharuch Civil Hospital, about a knife injury sustained by one Narendra Bhagwandas, aged 50 years, resident of 25, Manasnagar Society, Bharuch and of snatching of bag containing cash by three persons near Chapra Patiya. This Yadi was given to P.S.I. Shri S.S. Patel who has deposed as P.W. 27. It was an intimation to the P.S.I. to record a complaint of the injured which was admitted at Civil Hospital, Bharuch. He first visited Bharuch Civil Hospital and thereafter at Dr. Gautam Patel's Hospital where the patient was admitted and a complaint Exh. 48 had been recorded. Exh. 46 is a telephonic Vardi which says that the injured Narendrabhai aged about 50 years, resident of 25, Manasnagar Society, Bharuch when was returning home on his motorbike after collection of money was chased by three persons and near Chapra Patiya, three unknown persons aged about 25-30 years had intercepted him and one of them gave a knife blow on the back and looted his bag and such an incident has happened at around 19-30 hours on 26th February, 2003.

18. Chapter XII under the heading, "Information to the Police and their Powers to investigate" contains Sec. 154 which relates to "information in cognizable cases" and provides that every information relating to the commission of a cognizable offence, if given orally to an officer-in-charge of a police station, shall be reduced in writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. The trial Court, after discussing some of the authorities on this issue has treated the yadi given by the duty constable attending the Civil Hospital at Bharuch has treated the same as an F.I.R. For the following reasons, this approach is not finding favour with the Court.

19. In case of *Ravishwar Manjhi and Others Vs. State of Jharkhand*, it is held that mere information received on phone by a police officer without any details as against the identity of the accused or the nature of injuries caused as well as the names of the culprits may not be treated as a First Information Report.

20. In case of *Patai @ Krishna Kumar Vs. State of U.P.*, the Apex Court held and observed that in order for a message or communication to be qualified to be a First Information Report, there must be something in the nature of a complaint or accusation or at least some information of the crime given with the object of setting the police or criminal law into motion. The Court further observed that a First Information Report need not contain the minutest details as to how the offence had taken place nor it is required to contain the names of the offenders or the witnesses but the same must contain at least some information about the crime committed as also some information about the manner in which the cognizable offence has been committed. A cryptic message recording an occurrence cannot be termed as a First Information Report. The Bench in Paragraph 15 of the judgment, held thus-

"15. Considering the contents of the said message, it cannot be said that there was any possibility of recording a First Information Report on the basis of the message sent to the R.P. by the Assistant Station Master. There is no concrete evidence to indicate that any such information was in fact sent and received at the police station. In order for a message or communication to be qualified to be a First Information Report, there must be something in the nature of a complaint or accusation or at least some information of the crime given with the object of setting the police or criminal law into motion. It is true that a First Information Report need not contain the minutest details as to how the offence had taken place nor it is required to contain the names of the offenders or the witnesses. But it must at least contain some information about the crime committed as also some information about the manner in which the cognizable offence has been committed. A cryptic message recording an occurrence cannot be termed as a First Information Report."

21. In case of *Ramsinh Bavaji Jadeja Vs. State of Gujarat*, the Apex Court while dealing with the issue as to when the investigation commences, made certain observations in relation to the cryptic nature of message, thus-

"7.If the telephonic message is cryptic in nature and the officer-in-charge, proceeds to the place of occurrence on the basis of that information to find out the details of the nature of the offence itself, then it cannot be said that the information which had been received by him on telephone, shall be deemed to be First Information Report. The object and purpose of giving such telephonic message is not to lodge the first information report, but to request the officer-in-charge of the police station to reach the place of occurrence. On the other hand, if the information given on telephone is not cryptic and on basis of that information, the officer-in-charge, is prima facie satisfied about the commission of a cognizable offence and he proceeds from the police station after recording

such information, to investigate such offence then any statement made by any person in respect of the said offence including about the participants, shall be deemed to be a statement made by a person to the police officer "in the course of investigation", covered by Sec. 162 of the Code. That statement cannot be treated as First Information Report. But any telephonic information about commission of a cognizable offence irrespective of the nature and details of such information cannot be treated as First Information Report.....".

22. As observed by the Apex Court, ordinarily, a telephonic message is sent at the behest of Medical Officer or otherwise is not for the purpose of lodging a first information report, but to request the officer-in-charge of police station to move to the place of occurrence. Such telephonic information cannot be treated as a first information report, irrespective of the nature and details of such information. If the telephonic message is not cryptic and on receipt of such information, the police officer is satisfied about the cognizable offence and proceeds from the police station, after recording the information for the purpose of investigation, any subsequent recordance of details would amount to recording statement under Sec. 161 of the Code. In the instant case, telephonic information about commission of a cognizable offence being cryptic, irrespective of the nature and details of such information, the same cannot be treated as F.I.R. It was a call to the officer to rush to the place of occurrence or to a place where the injured was, to find out as to whether cognizable offence in fact had been committed.

23. As could be noticed from the Yadi, it does reveal the name of the complainant and his motor-cycle and an injury on his back with knife blow. It is too cryptic to be treated as a first information report. As against that, the F.I.R. given by the complainant, as noted hereinabove, give complete details of the manner in which the incident had occurred, the amount looted by the accused and the nature of injury sustained by him clearly reveal all the details which could be said to have satisfied about the commission of a cognizable offence, and therefore, the complaint given by the complainant P.W. 18 requires to be treated as F.I.R. and not the statement under Sec. 161 Cr.P.C., as held by the trial Court. Recently, such question had arisen before the Apex Court in case of Lalita Kumari Vs. Govt. of U.P. and Others, , wherein, the issue which had arisen for consideration was whether a police officer is bound to register a First Information Report upon receiving any information relation to commission of a cognizable offence under Sec. 154 Cr.P.C., or the Police Officer has the power to conduct a "preliminary inquiry" in order to test the veracity of such information before registering a complaint. Before the Apex Court, a grievance was made in a writ petition that though a written report was submitted by the petitioner before the officer-in-charge of the police station concerned who did not take any action on the same, and thereafter, when the Superintendent of Police was moved, an F.I.R. was registered. Even thereafter, no steps were taken either for apprehending the accused or for recovery of the minor girl. On making a reference of the judgment rendered by a Bench of three-Hon'ble Judges of the

Apex Court in *Lalita Kumari Vs. Govt. of U.P. and Others*, , the matter was referred to the Constitution Bench to consider whether under Sec. 154 Cr.P.C., a Police Officer is bound to register an F.I.R. when a cognizable offence is made out or the police officer has an option, discretion or latitude of conducting some kind of preliminary inquiry before registering the F.I.R. The Constitution Bench was constituted which concerned itself to the interpretation of Sec. 154 Cr.P.C. It would be profitable to reproduce at this stage some of the relevant discussions and finding so also the observations of the Apex Court. These are-

"23. The F.I.R. is a pertinent document in the criminal law procedure of our country and its main object from the point of view of the informant is to set the criminal law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps to trace and to bring to book the guilt.

24. Historical experience has thrown up cases from both the sides where the grievance of the victim/informant of non-registration of valid F.I.Rs. as well as that of the accused of being unnecessarily harassed and investigated upon false charges have been found to be correct.

XXX XXX XXX

30. The precursor to the present Code of 1973 is the Code of 1898 wherein substantial changes were made in the powers and procedure of the police to investigate. The starting point of the powers of police was changed from the power of the officer-in-charge of a police station to investigate into a cognizable offence without the order of a Magistrate, to the reduction of the first information regarding commission of a cognizable offence, whether received orally or in writing, into writing and into the book separately prescribed by the Provincial Government for recording such first information.

31. As such, a significant change that took place by way of the 1898 Code was with respect to the placement of Sec. 154 , i.e., the provision imposing requirement of recording the first information regarding commission of a cognizable offence in the special book prior to Sec. 156 , i.e., the provision empowering the police officer to investigate a cognizable offence. As such, the objective of such placement of provisions was clear which was to ensure that the recording of the first information should be the starting point of any investigation by the police. In the interest of expediency of investigation since there was no safeguard of obtaining permission from the Magistrate to commence an investigation, the said procedure of recording first information in their books along with the signature/seal of the informant, would act as an "extremely valuable safeguard", against the excessive, mala fide and illegal exercise of investigative powers by the police.

36. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. All that we have to see at the very outset is what does the

provision say? As a result, the language employed in Sec. 154 is the determinative factor of the legislative intent. A plain reading of Sec. 154(1) of the Code provides that any information relating to the commission of a cognizable offence if given orally to an officer-in-charge of a police station shall be reduced into writing by him or under his direction. There is no ambiguity in the language of Sec. 154(1) of the Code.

37. At this juncture, it is apposite to refer to the following observations of this Court in *M/s. Hiralal Rattanlal* (supra) which are as under:

"22.In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intention is not clear..."

The above decision was followed by this Court in *B. Premanand* (supra) and after referring the above said observations in the case of *Hiralal Rattanlal* (supra), this Court observed as under:

"9. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation, etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide *Swedish Match AB and Another Vs. Securities and Exchange Board, India and Another*, . The language of Sec. 154(1) , therefore, admits of no other construction but the literal construction."

38. The legislative intent of Sec. 154 is vividly elaborated in *Bhajan Lal* (supra) which is as under:

"30. The legal mandate enshrined in Sec. 154(1) is that every information relating to the commission of a "cognizable offence" (as defined Under Sec. 2(c) of the Code) if given orally (in which case it is to be reduced into writing) or in writing to "an officer-in-charge of a police station" (within the meaning of Sec. 2(o) of the Code) and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "First Information Report" and which act of entering the information in the said form is known as registration of a crime or a case.

31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Sec. 154(1) of the Code, the concerned police officer cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and

genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer-in-charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Sec. 156 of the Code to investigate, subject to the proviso to Sec. 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Secs. 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those Sections in extenso in the present context.) In case, an officer-in-charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported, and thereby, violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub-sec. (3) of Sec. 154 of the Code.

32. Be it noted that in Sec. 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Sec. 41(1)(a) or (g) of the Code wherein the expressions, "reasonable complaint" and "credible information" are used. Evidently, the non-qualification of the word "information" in Sec. 154(1) unlike in Sec. 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, "reasonableness" or "credibility" of the said information is not a condition precedent for registration of a case. A comparison of the present Sec. 154 with those of the earlier Codes will indicate that the Legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that "every complaint or information" preferred to an officer-in-charge of a police station should be reduced into writing which provision was subsequently modified by Sec. 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that "every complaint" preferred to an officer-in-charge of a police station shall be reduced in writing. The word "complaint" which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word "information" was used in the Codes of 1882 and 1898 which word is now used in Secs. 154, 155, 157 and 190(c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be information and that information must disclose a cognizable offence.

33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer-in-charge of a police station satisfying the requirements of Sec. 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

39. Consequently, the condition that is sine qua non for recording an F.I.R. under Sec. 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer-in-charge of the police station satisfying the requirement of Sec. 154(1) , the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of Sec. 154 of the Code is mandatory and the concerned officer is duty-bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Sec. 154(1) of the Code have to be given their literal meaning.

42. It is relevant to mention that the object of using the word "shall" in the context of Sec. 154(1) of the Code is to ensure that all information relating to all cognizable offences is promptly registered by the police and investigated in accordance with the provisions of law.

45. In view of the above, the use of the word "shall" coupled with the Scheme of the Act lead to the conclusion that the legislators intended that if an information relating to commission of a cognizable offence is given, then it would mandatorily be registered by the officer-in-charge of the police station. Reading "shall" as "may", as contended by some counsel, would be against the Scheme of the Code. Section 154 of the Code shall be strictly construed and the word "shall" should be given its natural meaning. The golden rule of interpretation can be given a go-bye only in cases where the language of the Section is ambiguous and/or leads to an absurdity.

73. In terms of the language used in Sec. 154 of the Code, the police is duty bound to proceed to conduct investigation into a cognizable offence even without receiving information (i.e. F.I.R.) about commission of such an offence, if the officer-in-charge of the police station otherwise suspects the commission of such an offence. The legislative intent is therefore quite clear, i.e., to ensure that every cognizable offence is promptly investigated in accordance with law. This being the legal position, there is no reason that there should be any discretion or option left with the police to register or not to register an F.I.R. when information is given about the commission of a cognizable offence. Every cognizable offence must be investigated promptly in accordance with law and all information provided under Sec. 154 of the Code about the commission of a cognizable offence must be registered as an F.I.R. so as to initiate an offence. The requirement of Sec. 154 of the Code is only that the report must disclose the commission of a cognizable offence and that is sufficient to set the investigating machinery into action.

74. The insertion of sub-sec. (3) of Sec. 154 , by way of an amendment, reveals the intention of the legislature to ensure that no information of commission of a cognizable offence must be ignored or not acted upon which would result in unjustified protection of the alleged offender/accused.

86. The underpinnings of compulsory registration of F.I.R. is not only to ensure transparency in the criminal justice delivery system but also to ensure "judicial oversight". Section 157(1) deploys the word "forthwith". Thus, any information received under Sec. 154(1) or otherwise has to be duly informed in the form of a report to the Magistrate. Thus, the commission of a cognizable offence is not only brought to the knowledge of the investigating agency, but also to the subordinate judiciary.

87. The Code contemplates two kinds of F.I.Rs. The duly signed F.I.R. under Sec. 154(1) is by the informant to the concerned officer at the police station. The second kind of F.I.R. could be which is registered by the police itself on any information received or other than by way of an informant [Sec. 157(1)] and even this information has to be duly recorded and the copy should be sent to the Magistrate forthwith.

88. The registration of F.I.R. either on the basis of the information furnished by the informant under Sec. 154(1) of the Code or otherwise under Sec. 157(1) of the Code is obligatory. The obligation to register F.I.R. has inherent advantages:

- (a) It is the first step to "access to justice" for a victim.
- (b) It upholds the "Rule of Law" inasmuch as the ordinary person brings forth the commission of a cognizable crime in the knowledge of the State.
- (c) It also facilitates swift investigation and sometimes even prevention of the crime. In both cases, it only effectuates the regime of law.
- (d) It leads to less manipulation in criminal cases and lessens incidents of "ante-dates" F.I.R. or deliberately delayed F.I.R.

24. Once again, referring to Tapan Kumar Singh's case, the Court held thus:

"110. Therefore, in view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an F.I.R. is mandatory. However, if no cognizable offence is made out in the information given, then the F.I.R. need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an F.I.R. forthwith. Other considerations are not relevant at the stage of registration of F.I.R., such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that

have to be verified during the investigation of the F.I.R. At the stage of registration of F.I.R., what is to be seen is merely whether the information given ex-facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false F.I.R. Conclusion/Directions:

111. In view of the aforesaid discussion, we hold:

(i) Registration of F.I.R. is mandatory under Sec. 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

(ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

(iii) If the inquiry discloses the commission of a cognizable offence, the F.I.R. must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

(iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the F.I.R. if information received by him discloses a cognizable offence.

(v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

(vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

(vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the general diary entry.

(viii) Since the general Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of F.I.R. or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned."

25. In light of this discussion, it can be said that information revealed from Station Diary so also from telephonic vardhi by Police Constable and other depositions, it can be surely considered that the complaint recorded by P.S.I. (Exh. 48) alone can be treated as F.I.R. and not the vardhi given by constable only. With this, if the contents of the complaint are appreciated along with the deposition of the complainant, it could be noticed that at the time of incident, there were no other eye-witnesses. However, for substantiating his version of collection of the amount from various traders, the prosecution has examined some of the witnesses whose depositions shall be discussed later in this judgment.

26. As far as complainant is concerned, his version appears to be truthful and unambiguous. He is specific about interception by three persons, plying on a motorbike-the number of motor-cycle understandably he could not see. But, he is clear about the role of each of them. The object of these three persons was amply clear of snatching the bag, after giving blow on the back of the complainant and the third person continued to be on the motorbike to flee away from the place of incident.

27. Much has been argued on the point of throwing of chilly powder in the eyes of the complainant. According to the defence, even if a person is dealing with spices viz., chilly powder, there is no question of his becoming immune from the effect of such powder, therefore, his reply to the question of his identifying these persons in wake of throwing of chilly powder is seriously questioned by the defence.

28. It is true that the effect of chilly powder would remain almost the same for one and all, but at the same time, the persons who day-in and day-out deal with the same may get little acquainted and more apt to tackle such hazards. Of course, he cannot claim to be immune. But, in the instant case, such debate may not take away the plausible evidence which has emerged on the record in respect of distance from which such powder has been thrown in the eyes. According to the complainant, at the distance of about three to four feet chilly powder had been thrown in his eyes by the accused and it though had irritated him, he immediately drove his motorcycle and chased them upto a distance of about two kilometers. This distance and his subsequent action also proves of his not being affected much less seriously on account of use of chilly powder by the accused. It is also to be noticed that he had met the police van on crossing a little ahead on the bridge, near Petrol Pump, which was totally callous in its attitude. Instead of helping the complainant and responding favourably to his call of either chasing the accused or removing this person to the hospital, who otherwise in his injured

condition was attempting to save money and catch hold of the accused persons, was asked to lodge his complaint at an appropriate police station. It is quite unpalatable and disheartening to note that even after noticing a person in an injured condition following the offenders on his motorbike, the Police which is otherwise the protector and guardian of the citizen, turned blind eyes to the request and advised him to go to the Police Station having jurisdiction. Such attitude by a few unfortunately gives disrespect to the force. Be that as it may, as revealed, this witness had not only identified the accused after they were arrested before the Executive Magistrate during the Test Identification Parade, but also before the Court of law. Hereinafter, evidence of T.I. parade conducted by the Executive Magistrate shall be at length considered as the prosecution has depended on the said evidence and the defence has attempted to assail the same by putting forth serious contention.

29. At present, version of some of the traders would be necessary to be considered at this juncture with regard to the proof of natural presence of the complainant with money.

29.1. P.W. 15 Altaf Kureshi, who otherwise has supported the case of prosecution in his statement under the Code has chosen not to support the same before the Court of law. He is one of the witnesses to prove the conspiracy allegedly done by the accused but had decided to commit the offence of robbery as one trader regularly visited G.I.D.C. area for the purpose of collecting the money.

29.2. P.W. 19 Ibrahimbhai Dosubhai Boiwalla owns and run a hotel in the name of Sapna Hotel, situated opp. Ankleshwar Bus Depot. On 26th February, 2003, according to him, complainant-Narendrabhai had also visited his hotel and he had given outstanding amount of Rs. 450/- and in lieu thereof, a receipt was also issued by him. He also has further stated that the complainant runs the business in the name of Rajesh Masala Bandar and for years, all goods of his hotel were being purchased from him. His credentials could not be impeached in a brief cross-examination.

29.3. P.W. 20 Premjibhai M. Chaudhary submits that for the past two years, he has started his shop and he purchases spices from the complainant. This witness also supports the version of the complainant that he is carrying out business at Narmada Market, Bharuch. According to him, a sum of Rs. 18,055/- was given towards his outstanding dues to the complainant on the date of incident.

29.4. P.W. 21 Satishchandra Mohanlal Jani owns a restaurant, which is named as Jani Restaurant at Ankleshwar. He deposed that the goods are being sent by the complainant in a tempo, whereas every Wednesday, this person (viz., complainant) collects the money towards the goods supplied. According to this witness, he has two years relation with the complainant and his business account has also been seen during the course of investigation.

29.5. P.W. 22 Sabban Ali Barkatali Bhogani also supports the case of prosecution. On the date of incident, he had given a sum of Rs. 1,500/- to the complainant.

This witness further states that the complainant had stopped supplying goods on credit after the said incident. P.W. 24 Hasmukhbhai Mohanlal Gandhi also states of having given a sum of Rs. 1950/- towards his outstanding dues.

29.6. P.W. 24 also is having his retail shop of grocery at Mullavad Bazaar, Ankleshwar. He stated that every Wednesday, they used to book order for getting the spices and the complainant would be sending the goods in a Tempo and would be collecting the payment, the next week.

30. Thus, it clearly emerges from the evidence of these witnesses that the complainant, as stated by him, was having business relation with various traders in G.I.D.C. area, Ankleshwar. His visits were scheduled on every Wednesday and in the routine course, he was receiving the orders from the traders and also supplying the goods through a Tempo, and after giving credit of about one week, he would collect the outstanding dues. These depositions corroborate in a major way the version of the complainant, who has been very specific about the robbery of about Rs. 65,000/- by forcibly taking away his bag, after injuring him substantially. The version of the complainant, as noted hereinabove, is firm, unshaken and unimpeachable and with strong corroboration lent by those traders who had been working with him on regular basis for more than ten to twenty years, it could be said unhesitatingly that the prosecution had been able to prove the loot of a sum of Rs. 65,000/- on a fateful day from the complainant.

31. It is necessary to make a mention at this stage that whether the amount was Rs. 50,000/- or Rs. 65,000/- hardly would have much relevance. The complainant, who had collected the amount from different traders was on his way to home was not expected to keep the account ready of every single pie, particularly when there was hardly any time left for him to so do it.

32. In that view of the matter, the deposition of the Medical Officer who treated the complainant, soon after his admission and before whom he had given the history, would be of much importance.

32.1. P.W. 11 Dr. Vinaychandra Lallubhai Patel, Medical Officer was on duty on 26th February, 2003, when the complainant-Narendrabhai Bhagwandas visited the hospital at around 8-40 p.m. The history given was that of knife blow, after throwing chilly powder in the eyes. At 7-45 p.m., the incident had taken place and he visited the hospital without police yadi. The duty constable was intimated about the injuries found on the person of the complainant. Three injuries were found viz., two injuries were found on the back-side of the chest and there was abrasion on the wrist. Both the injuries Nos. 1 and 2 were possible with sharp-cutting weapon where as the third could be possible with hard and blunt substance, and the same can also be possible if the person is dragged. He admitted in the cross-examination that with the broken glass, injury Nos. 1 and 2 are possible. However, which looked like a screw-driver, the same cannot happen. This witness is specific that the same was muscle-deep as the same were examined with palpation.

32.2. Along with this, Exh. 33 if is looked at, which is the medical certificate issued by this witness, it substantiates fully the version of this witness.

32.3. P.W. 18 Prakashbhai Somabhai More has substantiated the version of P.W. 11 by stating that such Vardi was received by the police constable, through P.S.O. who was on duty at the hospital. As the discussion with regard to Vardi and the complaint recorded thereafter has elaborately taken place hereinbefore, his deposition does not require Any further dilation.

32.4. With this, it could be concluded that the complainant (P.W. 11) sustained injuries on 26th February, 2003, while he was returning home on his motor-bike after collecting money from the traders to whom goods were supplied by him. The injuries sustained by the complainant on his back, according to the Medical Officer, were possible due to sharp-cutting weapon. His specific version of three persons having assaulted him and committing loot of his money, books of account which he had carried in his bag also gets duly proved from this entire evidence.

33. Therefore, now the vital question which needs to be answered is as to whether the prosecution has succeeded in proving involvement of the accused in commission of the crime of loot and causing serious injuries with the sharp-cutting weapon. The prosecution has claimed to have done this through ocular evidence of the complainant and also from the T.I. parade that had been conducted, where the complainant had identified all the three accused. Before the Court of law also, the complainant has identified the accused. Though, the arrest was made after six months of the said incident, the T.I. parade conducted soon thereafter also clearly reveals identification on the part of the complainant of these persons.

34. According to the defence, firstly on the ground of this T.I. parade having been held six months after the date of incident, no reliance can be placed on the same for holding the persons guilty, and secondly, there are no other eye-witnesses, and therefore, relying solely on the evidence of the complainant would amount to causing serious prejudice to the rights of the accused as the criminal jurisprudence also would not permit basing conviction on such shaky foundation.

35. Before delving into factual aspect, the law on the T.I. parade would be necessary to be dealt with as both the sides have heavily relied upon various authorities to substantiate their rival versions.

36. Section 9 of the Evidence Act speaks of requirement or T.I. Parade, which reads as under:-

"9. Facts necessary to explain or introduce relevant facts:-Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebutt an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation

of parties by whom any such fact was transacted, are relevant insofar as they are necessary for that purpose."

Identification proceedings are meant for establishing the identity of the accused persons and are thus relevant. Such identification is relevant under Sec. 9 of the Evidence Act and the same can be proved by any of the modes of proof given under Chapter IV Part-II of the Evidence Act.

37. The T.I. parade as such is not a substantive piece of evidence and such tests, as held by the Apex Court in case of *Musheer Khan @ Badshah Khan and Another Vs. State of Madhya Pradesh*, are meant for the purpose of helping investigating agency with an assurance that they are progressing in a right direction. The test identification parade is a part of the investigation and is very useful in a case where the accused are not known before hand to the witnesses to ensure reliability of witnesses and to test their veracity at the time of investigation, the same is used. It is used only to corroborate the evidence recorded in the Court, and therefore, it is held as not a substantive evidence. The actual evidence is what is given by the witnesses in the Court as laid down in case of *C. Muniappan and Others Vs. State of Tamil Nadu*, . There is no rule as to whether identification parade would be a must in every case. Depending on factual matrix of each case, the same is to be decided by the investigating agency. In case Identification parade is not conducted, the identification of the prosecution witnesses before the Court of law cannot be disbelieved and yet when the accused are arrested before a long time and are unknown to the witnesses, considering the fact that the trial would take place after considerable time-gap, ordinarily T.I. parade is being held even to ensure elimination of innocence.

38. This Court in case of *Abbas Hasam Ghanchi v. State of Gujarat*, reported in , 1993 (1) GLH 33 examined the provisions of the Gujarat Police Manual, 1975 and Sec. 9 of the Evidence Act and highlighted the necessity of such parade, without any detail, after arrest. Even the duty of the investigating agency in such matters has been indicated and detailed guidelines have been laid in this regard.

"10.3. Investigating Officer and test identification parade. To start with, we may once again invite the attention of the State Government to the exercise undertaken by this Court on the point of test identification parade to be held by the investigating agency in the case of the State v. Chhaganlal Mangaldas, reported in 1993 (1) GLR 15, wherein this aspects has been exhaustively dealt with in Paras 9, 9.1, 9.2, 10, 10.1 and 11. This was a case wherein the Investigating Officer did not hold the test identification parade of the accused. In order to maintain the continuity of the suggestions, relevant paras from the said judgment are usefully reproduced as under:-

"9.1. In context of the point under consideration at this juncture, it would be useful to refer to the relevant provisions in Vol. III of the Gujarat Police Manual, 1975, wherein in a chapter on "Detailed Procedure regarding Investigation" provisions are incorporated in Rule 137 to Rule 239 setting out exhaustive

guidelines as to how methodically and correctly the investigation of a crime is to be carried out by the Investigating Officer. Any Police Officer ignorant of any of the guidelines cannot be called an Investigating Officer who can ever be entrusted with the investigation and detention of the crime save and except at the cost of peril of public and fair name of the police. The relevant Rule 181 enlisting instructions as to how the test identification parade is to be held and carried out, reads as under:-

Rule 181:-Holding of Identification Parade:

(1) (a) Object of the identification parade of accused persons is to test the veracity of eye-witnesses when they have a genuine claim to have seen the culprit and to ensure reliability of the witnesses who pass the test.

(b) The statement made before Police Officers by witnesses, at the time of identification parades are statements to the police and as such are not by Sec. 162 of Criminal Procedure Code. In view of this, it is necessary that identification parades are not conducted in the presence of Police Officers and as such identification parades are held in the presence of the police are inadmissible in the Courts. The Police Officers concerned should obtain the help of Executive Magistrates to hold identification parades. When the presence of Executive Magistrate is not readily available, the only alternative is to hold the parade by the panch witnesses.

(c) The Police Officers should arrange for the identification parade in all cases in which the identity of the accused could not otherwise be established beyond doubt.

(d) The identification proceedings being in the nature of tests, no provision for holding them is to be found in the Code or even in the Indian Evidence Act. Proceedings are record of facts which establish the identity of any thing or person and which may be relevant under Sec. 9 , Evidence Act.

(e) The identification test is usually adopted during the investigation of crime by the police when the witnesses are interrogated and state that they had seen some persons committing the crime, but do not know their names and would be able to identify them.

(f) The identification parade is held during investigation only, only at the instance of investigation agency, to satisfy itself whether the particular suspect participated in the crime or not by putting him up before the witnesses who claim to have been present at the time the crime was committed.

(g) Since, the human memory is apt to get dulled with the passage of time, it is desirable both in the interests of the honest witness and of the suspect himself that the latter be put up for identification without delay. Test identification parade should be arranged early at any rate before the accused goes on bail. In fact, Courts ought to refuse bail if an identification parade is going to be and ought to beheld. So, not only the test identification parade has to be arranged at the

earliest possible opportunity, but bail will have to be opposed strenuously until the test identification parade is finished.

(h) Piecemeal identification parade are deprecated, at the same time delays mars its sanctity.

(i) The Police should continue the investigation and collect evidence even though the accused are identified in identification parades. Procedure for Identification Parade:

(2) (a) Before the Identification Parade :

(i) The accused or suspect at the time of his arrest to be told that he is to be put on test identification parade.

(ii) The Investigating Officer should screen the lock-up in which the suspect is kept before sending to jail.

(b) At the time of Parade and after :

(i) The number of persons to be mixed should not be too few or too many. It is better to have separate parades for not more than two at one time. However, it is advisable to mix the accused or suspect with other persons in the proportion of 1 to 9 and for every additional accused or suspect, the number of persons to be mixed should be increased by 5.

(ii) Police Officers should completely obliterate themselves after arranging the parade.

(iii) Witnesses to be kept away at a distance and called one by one.

(iv) After identification witnesses should be allowed to mix with other witnesses who are still to be forwarded.

(v) Any objection by the accused or suspect for the presence of any person at the parade should be given proper consideration.

(vi) In cases where an accused or suspect whose identification is necessary is lying in hospital, the identifying witnesses should be kept out of sight of the Ward in which he is lying and the accused or suspect should be shown to the panchas and given the option of having his cot changed if he so desires. The panchnama should show whether this was done or not and should also show how many patients and cots are there in the Ward, with their numbers, identifying witnesses should then be called and the procedure outlined above should be followed.

(vii) The attendance of witnesses at the Identification Parade is the sole responsibility of the Investigating Officer."

"10. It is sad to find the accused going unpunished on account of such sheer carelessness of the investigating agency in not holding the test identification

parade. If such carelessness is not attended to promptly and taken appropriate care, the same can as well mar far more serious offences like murder, dacoity, etc. The very foundation of justice in criminal cases is an honest, intelligent and efficient investigation. Having regard to the principles of criminal jurisprudence and the doctrine of benefit of doubt thereunder to which our judicial system is wedded to, a slight lapse here or there either by the investigating agency in conducting the investigation or by some witness in giving evidence before the Court, can result into the accused getting off of the prosecution hook."

39. It can be noticed that by and large, the guidelines set out are effectively to be followed and as would be discussed hereinafter, in the instant case, Investigating Agency took due care not to violate the guidelines.

40. The Apex Court in case of Pramod Mandal Vs. State of Bihar, held that there was no fix rule as to the period within which the T.I. parade must be held for identifying the number of witnesses. It is for the Court to decide on the facts and circumstances of each case whether to accept or reject the evidence of identification. In absence of any motive being made out for delay in holding the T.I. parade, the Court held that the delay of one month was not fatal to the case of prosecution in holding the T.I. parade. It would be apt to reproduce the relevant observations, which reads thus:

"20. It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the Courts of facts to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They, therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquitting because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the Courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification."

41. In case of Musheer Khan @ Badshah Khan and Another Vs. State of Madhya Pradesh, , on the question of reliability of the T.I. parade, the Apex Court found that the accused were kept in open police custody during intervening period. There were discrepancies discernible in his identification by P.W. 3 and there was vital contradiction between his version and person conducting the T.I. parade. Moreover, nearly after a month of his T.I. parade, no explanation has come forth

on this count. The Court held that the evidence of the T.I. parade cannot be depended upon.

42. This Court, in case of State of Gujarat Vs. Mahmad @ Munno Usmanbhai Chauhan, , did not find T.I. parade veracious and credible on the ground that the dummies of nearly the same age and physique of the accused were kept present in the parade and the Deputy Mamlatdar also did not ascertain the description of the accused so as to select almost similar dummies. Description of the persons selected in the parade was also not mentioned in the panchnama, but with a view to fill up the gaps that remained in the panchnama, the Deputy Mamlatdar has made rectifying statement at the time of his evidence. In this matter, of course essentially while considering the evidence of T.I. parade that has come on record, some of these aspects would be necessary to be taken into account.

43. In case of Subhash & Shiv Shankar v. State of Uttar Pradesh, 1987 (0) GLHEL-SC 30526 the Apex Court confirmed conviction in one appeal and dismissed another. It was a case of murder wherein the High Court confirmed the conviction of one appellant, and discharged another solely based with reference to his identification parade. Discussing the law on the subject, the Court set him free. Again this judgment is mainly based on facts and it is to be noted that the sole evidence for convicting the appellant under the charge of murder was T.I. parade. Therefore, of course, the T.I. parade had been conducted 4 months after the occurrence but before the Court, there was no substantive evidence for identifying the witness beyond the shadow of doubt.

44. Thus, from the discussion held hereinabove, what can be deduced is that the T.I. parade is a corroborative evidence and not a substantive evidence. The object of conducting T.I. parade is to test the veracity of the eye-witnesses as to whether he makes a claim with regard to the culprit. All precautions are necessary to be taken prior to conduct of the T.I. parade and during holding of such parade, predominantly keeping in mind, the human memory which may fade away with the lapse of time, the T.I. parade is being conducted by the investigating agency which would also like to be sure of the right direction of the investigation. However, the same cannot be used as a substantive evidence.

45. Late conduct of the T.I. parade is also frowned upon by the Courts. No sooner does the arrest is made, then the investigating agency is expected to conduct the T.I. parade in a case where the accused are unknown or in a case where there is doubt with regard to the identity of the culprit/s.

46. Going by these broad principles, the facts when are looked at in the instant case, the accused after the alleged loot and attempt to murder had been absconding and they were arrested after six months of the incident. Their arrest had been made on 16th August, 2003 and the T.I. parade was conducted on 19th August, 2003. Therefore, the main plank on the part of the submissions of the defence is I.T. parade having been conducted nearly six months of the incident

dated 26th February, 2003 that itself will question the very basis of the T.I. parade. It would be apt to note at this stage that there would be no occasion for the investigating agency to conduct the T.I. parade prior to the arrest. So naturally, it shall have to be after once the accused are arrested who were at large (absconding) for six months and hence, conducting T.I. parade within three days of their arrest would hardly be a ground to accept the version of the defence. The Court cannot be oblivious of the fact that it is a corroborative evidence and the prosecution has succeeded in proving by substantive evidence, the involvement of the accused by way of evidence of the complainant who had been categorical about not only the presence but also their role in committing the crime in question.

47. It is also to be noted that another angle of human memory is that it may not forget some of the occurrences life long. The law of course makes all provisions and takes precautions to bring on record the best proof on the premise that lapse of time may fade the human memory. It needs to be noted that the trial had been conducted in the year 2004 and the deposition of complainant was taken on 16th July, 2004. So, in about a period of one and half years, the complainant had an occasion to identify the accused persons. The first time, it was during the T.I. parade, and thereafter, within one and half years during the trial. It is very unlikely that a person who has been given stab wounds with knife and has lost his hard-earned money at the hands of the accused would not be in a position to identify the persons at whose hands he had suffered. There are no reasons for up holding the say of the defence that the memory of the complainant was not dependable even though not much time had elapsed in conducting the T.I. parade, so also the trial, in the instant case.

48. The complainant had been categorical that he was called at Mamlatdar Office on 19th August, 2003. He went there and was asked to stay in a separate room and after about 45 minutes, he was called through a peon and twelve persons were standing in a line and the Executive Magistrate was present. There were also two other panchs who were present. He was asked to identify those persons who had committed offence. He identified three of them viz. Faran @ Anna Imranantiwala; Jubber Sarvarbhai Kureshi and Sadik Idrishbhai Katri. They were also identified before the Court of law. He denied the suggestion that it was the police persons who had intimated him of T.I. parade. He also denied the suggestion that all papers were ready and he was merely to sign on it.

49. The deposition of the Executive Magistrate would be relevant at this stage, who had in detail submitted the manner in which the T.I. parade had been conducted. He also in the cross-examination has admitted that on sending the Yadi, the complainant was called. He produced a copy of the letters sent to the complainant calling him for T.I. parade. This beyond doubt proves that it was not through the police personnel that the complainant was called. The complainant first arrived at the office, followed by the panchas, and thereafter, accused came and he took all possible care to see that the complainant did not see or meet

them prior to identification process. He of course was not sure that the accused were brought there by the Police. He also made himself sure that the panchas were not earlier made panch witnesses in any T.I. parade, panchnama of the T.I. parade also specifies presence of both the panchas viz., Mohd. Abdul Ahim Shaikh & Prakash Bhikhabhai and hi. There are of course certain variations in the age of the dummy persons, who were called, but, no further discrepancy of these persons is found. The position of all the three accused also had been detailed and it also notes that the complainant had identified all the three accused persons. Panch witnesses-Mohammad Abdul A. Shaikh and Prakash Bhikhabhai and his are examined as P.W. 25 & P.W. 26 respectively. P.W. 25 has stated that he was called with other panchas at around 3-00 O'clock. This panch has chosen not to support the case of prosecution. He, however, agreed that the three persons accused of the offence, who were identified in T.I. parade, were present in the Court. This witness had agreed that other panch was a trader at G.I.D.C. Ankleshwar. He did not dispute his signature. P.W. 26 also has not supported the prosecution. He, however, does not dispute his signature. This man in no manner affect the veracity of the panchnama when the Executive Magistrate, who is also Mamlatdar, has in terms stated of the details of conducting the T.I. parade and contemporaneous record had been prepared by him in his official capacity, while discharging his duty. Two factual aspects which need consideration here is non-description of the witness and less number of dummy persons. Except the age and less number of dummy witnesses then what had been specified in one of the decisions of this Court in Abbas Hasan Ghanchi v. State of Gujarat, , 1993 (1) GLH 33 we need to note the fact that it would have been desirable that more number of persons as dummy persons could have been there as here the ratio is of 4:1. The Apex Court in case of Musheer Khan @ Badshah Khan and Another Vs. State of Madhya Pradesh, has held that there is no rule as to whether identification parade would be a must in every case, which depends upon factual matrix of each case and such proof may not be determinative of the validity of any T.I. parade per se. Moreover, this being a corroborative evidence, whereas, in the substantive evidence when the complainant has identified all the three persons specifically and categorically, on only one aspect of non description of those persons entire evidence cannot be discarded nor would be submissions by the defence on T.I. parade could be given such primacy to ignore other weighty evidence.

50. With this, the corroborative evidence in terms of the discovery panchnama of money that had been discovered at the instance of the accused and the discovery of the weapon require brief consideration to hold that the prosecution succeeded in proving beyond reasonable doubt the guilt of all the three accused.

51. P.W. 1 Mangubhai Devjibhai Patel is panch-witness to the scene of offence panchnama. He has stated that it was the complainant who has shown the place of incident. Nothing comes out in the cross-examination to disbelieve this witness. Exh. 11 also specifies the details of the distance between Harkhol Patia and G.I.D.C., Ankleshwar from the place of incident. The place of incident is

situated near Old Highway No. 8 which is about one and half kilometers away from Harkhol Patia towards Bharuch. Muddamal Hero Honda make motor-cycle was bearing the fake number plate. The original registration number being J-5-H-1825, whereas, the fake number used being J-1-H-5378. This vehicle was found from Juned @ Anna @ Kalio Gulam Akbar Mulla Gulam Ibrahim Mulla and Farhan @ Naag Akbar Shaikh, when they were unable to produce licence and other papers. P.W. 3 Jitubhai Naranbhai Patel has supported the case of prosecution. P.W. 4 Natwarsinh Chhatrasinh Rana has supported the case of prosecution and in the cross-examination, defence could not question his veracity. Of course, both these witnesses have also been made panchas in seizure of the motorcycle, which was allegedly used in the commission of the crime. It is to be noted that about 3 to 4 panch, Natwarsinh Chhatrasinh Rana had been made panch-witness. This witness has been examined as P.W. 4 and he has identified his signature made at the end of the panchnama. With regard to discovery of muddamal currency notes, he has not supported the version of prosecution. It has been much contended by the defence that this witness had been made a panch witness in three panchnamas. This is absolutely undesirable. Investigating agency even if is conducting the investigation where these panchnama is required to be carried out within a very short span, then also, calling the very same person as a panch witness in all proceedings is completely undesirable. It is a different matter that this panch witness has chosen not to support the piece of prosecution.

52. Be that as it may, we would like to examine the deposition of P.W. 5 Mahendrabhai Ravjibhai Vasava who is also one of the panchas and in whose presence panchnama is drawn, where the currency notes have been discovered at the instance of the accused. The other witness has also not supported the case of prosecution that from the residential place of A4 who had been given acquittal that currency notes worth Rs. 17,000/- had been discovered. He also denied the factum of other accused having been shown the place of offence. Investigating Officer P.W. 28 in his deposition at Exh. 63 has stated that from the three accused persons viz., Raju @ Rizvan; Farhan Imran Shaikh and Sadik Khatri, a sum of Rs. 17,000/-; Rs. 17,000/- and Rs. 16,000/- respectively were recovered.

53. Neither of the panch-witnesses examined has supported the prosecution version with regard to discovery of currency at the instance of the accused. Of course, the Investigating Officer in his deposition has been categorical about such amount being recovered. This is an additional corroborative evidence given by the Investigating Officer. Sans this witness also, from the cumulative examination of the entire material, the prosecution had succeeded in proving the guilt of all the three persons who were present at the time of commission of the offence.

54. As noted hereinabove, it would not have been difficult for the complainant to see them at the time of occurrence. Firstly, they over-took him and then had

intercepted him and the motor-cycle light was on all the time and the light of the vehicle was bright enough for him to clearly recognize these persons. As noted hereinabove, the witness was bold enough to chase these accused persons on his motor-cycle even after the incident and had himself gone to receive medical treatment at Civil Hospital. His intimation to the Police Jeep he had met on his way, though, did not result into any fruitful action on the part of the police at the relevant time, nevertheless, this is indicative of his presence of mind as also of the factum of his being fit enough to recognize the perpetrators of the crime, and therefore, the trial Court was justified in convicting all these three accused persons for the guilt having been proved beyond reasonable doubt. Therefore, appeal preferred by A1, A2 and A3 against their conviction deserve dismissal, by upholding the verdict of the Court of convicting the accused under Secs. 392 and 394 of the I.P.C.

55. With regard to enhancement of the punishment, so also for acquittal under Sec. 397 and 120B of the Indian Penal Code, the thin evidence to connect A4 is the discovery of currency notes worth Rs. 17,000/- from his residence. He is stated to be one of the traders who was supplied the goods on regular basis on credit. The knowledge of his and that of others of regular visit of the complainant in the G.I.D.C. area for collecting the outstanding amount against the goods supplied to various traders also gets clearly established on record. However, all those witnesses who were said to have been examined for the purpose of proving the conspiracy under Sec. 120B I.P.C. have not supported the case of prosecution. It would, therefore, quite unsafe to hold the charge of conspiracy to have been proved beyond the reasonable doubt.

Section 391 defines Dacoity and reads thus:

"Where five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

56. Sections 396 and 397 I.P.C., if are taken into account, the same describes that if, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

57. It culls out from the record that on the backside of the chest of the complainant injuries were inflicted by the accused with a sharp-cutting weapon. However, since he was given a reference note, the complainant chose not to get admitted in the Civil Hospital, but, went to a private doctor where he has taken treatment for five days. Although, no certificate comes forth from the private hospital nor is the doctor examined and further it is not emerging from the record whether the injuries caused were so serious that could lead to the death

of a person. Therefore, in the facts situation, trial Court was right in holding that offence under Secs. 392 and 394 read with Sec. 114 I.P.C. are duly proved. Whereas, offence under Sec. 397 read with Sec. 120B I.P.C. and Sec. 135 of the Bombay Police Act since have not been proved beyond reasonable doubt, benefit of doubt has to be given.

58. With regard to enhancement of the punishment, it has been emphatically argued that the incident had happened after the sunset and before sunrise, and therefore, gravity of the offence would require enhancement of sentence. Accordingly, a request is made on the part of the prosecution to also consider such gravity and enhance the punishment awarded by the trial Court.

59. Learned Advocate appearing for the accused has urged that the Court has rightly considered the young age of the accused and punished them for a period of four years since there had been no past criminal antecedents of these persons and the nature of weapon that had been used for committing the offence also deserves consideration.

60. Punishment for making attempt to commit robbery is prescribed under Sec. 393 I.P.C. which says that whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine. This being a robbery committed on the highway between sunset and sunrise, the imprisonment which otherwise is extended to ten years and fine, can be extended to fourteen years. Whereas, for the offence punishable under Sec. 394 I.P.C. for voluntarily causing hurt in committing the robbery, the period of imprisonment prescribed is for life or rigorous imprisonment for a term which may extend to ten years and also amount of fine. It is undisputed fact that none of the persons accused of the offence has criminal antecedents. At the same time, it is to be noted that the manner in which the petitioners have committed the act of robbery and the modus adopted for intercepting the victim and so also of throwing the chilly powder in his eyes, and thereafter, of inflicting the knife blows on his back coupled with the fact that this has been committed on the highway between sunset and sunrise, this Court is of the opinion that for the offences punishable under Sec. 392 as well as under Sec. 394 I.P.C., the period of punishment should be enhanced.

61. Resultantly, Criminal Appeal Nos. 1435 of 2004; 1661 of 2004 and 1713 of 2004 preferred by the accused Nos. A1, A2 and A3 respectively against their conviction are hereby dismissed. Rule discharged.

62. Criminal Appeal No. 1541 of 2006 preferred by the State against the acquittal of A1 to A4 for the offence punishable under Sec. 397 read with Sec. 120-B I.P.C. is also dismissed. Whereas, Criminal Appeal No. 1546 of 2005 preferred by the State seeking enhancement of the punishment under Secs. 392 and 394 I.P.C. stands allowed. The accused Nos. A1, A2 and A3 shall undergo imprisonment of seven years with fine of Rs. 20,000/- each (Rs. 10,000/- for the

offence punishable under Sec. 392 I.P.C. and Rs. 10,000/- for the offence punishable under Sec. 394 I.P.C.); and in default of the fine, shall undergo further simple imprisonment for a term of six months. Rule is made absolute to the aforesaid extent. Out of the total amount of fine collected from the accused Nos. A1 to A3, the victim should be paid a sum of Rs. 50,000/- towards compensation under Sec. 357 of I.P.C. Respondents-accused Nos. A1, A2 and A3 shall undergo remaining portion of their imprisonment forthwith.

FURTHER ORDER:

Mr. N.K. Majmudar, learned Advocate for the appellant in Criminal Appeal No. 1661 of 2004 and learned Advocate for the appellant in Criminal Appeal No. 1713 of 2004, jointly pray for time for the accused to surrender.

Request is found reasonable. The time to surrender is granted for a period of eight weeks.

Further Order in Criminal Appeal No. 1546 of 2006:

Learned Advocate appearing for the respondents (accused) prays for stay of judgment and order of this Court, so as to approach the Hon''ble Apex Court. As time to surrender is already granted for a period of eight weeks, the stay is not required to be granted and it will be subject to the order passed by the Hon''ble Apex Court.