
(2002) 06 BOM CK 0030

In the Bombay High Court

Case No : Criminal Appeal No. 3 of 1987

Sayed Mohammed Owais

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 20-06-2002

Acts Referred:

Evidence Act, 1872 — Section 9

Citation : (2003) BomCR(Cri) 588 : (2003) 1 BOMLR 513 : (2002) CriLJ 303 : (2003) 3 MhLj 261

Hon'ble Judges : J.G. Chitre, J

Bench : Single Bench

Advocate : Rachita Dhuru, for the Appellant; A.S. Gadkari, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

J.G. Chitre, J.

1.The appellant is hereby assailing correctness, propriety and legality of the order of conviction and sentences passed against him by the Additional Sessions Judge, Greater Bombay, in Sessions Case No. 260/1974, whereby he convicted the appellant for committing the offences punishable under Sections 120B, 395, 120B read with Section 398, 120B read with Sections 395 and 397, Section 394 read with Sections 120B and 34, 120B read with Section 367 of Indian Penal Code. The appellant has been sentenced to undergo rigorous imprisonment for 10 years for the offence punishable u/s 120B read with Section 395 of Indian Penal Code, rigorous imprisonment for 7 years for offence punishable u/s 120B read with Section 398 of Indian Penal Code, rigorous imprisonment for 10 years for offence punishable u/s 120B read with Sections 395 and 397 of Indian Penal Code and rigorous imprisonment of 10 years for offence punishable u/s 120B and Section 34 of Indian Penal Code, rigorous imprisonment of 10 years for offence punishable u/s 120B read with Section 367 of Indian Penal Code. The learned Additional Sessions Judge has directed that the substantive sentences are to run

concurrently. No sentence of fine has been imposed on the appellant.

2. The prosecution case in brief is that in the night between 25-4-1973 to 26-4-1973, the appellant with other co-accused, who were alleged to have been his associates, conspired together to commit the offences of dacoity, voluntarily causing hurt with dangerous weapons in the course of committing the offence of dacoity, conspired for committing the dacoity armed with deadly weapons such as knives etc. conspired for committing the offence of abduction in order to subject the victims to grievous hurt or knowing that they are likely to be subjected to grievous hurt. The prosecution alleged that on 26-4-1973 at 9 a.m. near bus stand of route No. 130 in Fort Market vicinity, the appellant and his associates made entry in car bearing No. MRX 5924, -- looted prosecution witnesses Pannalal Amirchand Jain, Babulal Chatmal Jain, Ghisulal Hemchand and Rameshchandra Lalchand -- driver and snatched away from them some ornaments and cash by using deadly weapons like knives. The prosecution further alleged that the appellant and his associates abducted those prosecution witnesses and took them in the said car, which was belonging to Mangilal Dhanraji, to a lane at Jogeshwari.

3. The prosecution alleged that a Rampuri knife having length of about 14 cms. was recovered at the instance of this appellant, so also two golden rings. It is the case of the prosecution that the prosecution witnesses Pannalal and Ramchandra-driver had identified the appellant as one of those dacoits. Test identification parade was held at the instance of Special Executive Magistrate, Nanubhai Jhaveri, who was working at that time as Justice of Peace and Special Executive Magistrate in presence of panch witnesses Mohamed Ismail Bengali, Gulab Ghanshamdas Shabani.

4. The learned trial Judge accepted the prosecution evidence and after appreciating said evidence, concluded that the prosecution has proved that appellant was amongst those persons who committed the said acts of dacoity, robbery and abduction by entering into a conspiracy to commit those offences. He convicted the appellant for the offences mentioned above and passed different types of sentences against him as mentioned above. A challenge has been put to said order of conviction and sentence by this appeal by the appellant.

5. The learned Counsel Mrs. Rachita Dhuru appearing for the appellant criticised the prosecution evidence by pointing out the infirmities in it and submitted that the learned Court committed the error in accepting the said evidence and passing the order of conviction and sentence mentioned above.

6. She submitted that the evidence of Special Executive Magistrate Nanubhai Jhaveri and panch Witness Mohammed Ismail Bengali and Investigating Officer was not proving that the said identification parade was a legal one as contemplated by rules made for holding such identification parade by the High Court and the judicial view indicated by various legal precedents. She submitted that when three witnesses were to be put to identification parade, the dummies

should have been appropriate in number and it was not proper on the part of the Special Executive Magistrate to put 4 suspects together in identification parade. She further submitted that the identification parade has been conducted in the office of C.I.D., Crime Branch, Mumbai and that is also not keeping consistency with the precautions which were to be taken while conducting the identification parade. Mrs. Dhuru submitted that the witnesses who were to identify the suspects were already sitting in the office of Crime Branch, which was very near to the lockup where the appellant and other suspects were detained before holding the identification parade. It is her submission that the witnesses who were to identify the appellant and other suspects were standing at a place, from where they could have seen the appellant and his associates before they were taken to said lockup. She submitted that by any means the strong possibility of appellant and his associates being shown to the identifying witnesses could not have been ruled out.

7. While repelling the criticism levelled by Mrs. Rachita Dhuru on the prosecution evidence on these aspects of the case, Shri Gadkari, the learned A.P.P. for prosecution submitted that the evidence of Nanubhai Jhaveri, Mohammed Ismail Bengali, Investigating Officer shows that all necessary precautions were taken for the purpose of avoiding the possibility of identifying witnesses seeing the appellant and other suspects before identification parade. He submitted that it is pertinent to note that before starting the identification parade Nanubhai Jhaveri asked the Police Personnel to obliterate themselves from the room where identification parade was to be held. He submitted that the spot where the identifying witnesses were standing before they were called for identification was a public place and at a considerable distance from the room where the identification parade was held. He submitted that from that spot these witnesses could not have seen the appellant and other suspects. Shri Gadkari submitted that the number of dummies which were put up for identification parade was proper and there is no violation of rules prescribed for identification parade. He submitted that the sum and substance of the evidence adduced by the prosecution is that the identification parade was very much proper and legal.

8. This High Court has incorporated the procedure which has been indicated by Government of Maharashtra, Home Department bearing No. PRO-2460/16653/IX, dated 16-84963. This Court finds it necessary to mention it in this judgment for the purpose of avoiding the possibility of commission of any error in future by the Investigating Officers, because the offence of robbery and dacoity are offences detrimental to the social security and are on increasing trend. It should not happen that on account of mistakes committed by the investigating Agency in conducting the identification parade, the real culprits should escape at the prejudice of social security as a whole and the safety of common man. The Judiciary is watchful of seeing that none should be deprived of his personal liberty except by due process established by law and for that, it would be vigilant to see that there is a legal evidence for sustaining a conviction resulting into a sentence eclipsing the fundamental right of a citizen who has been indicted for

the offence and put to a trial. In that process the Courts would be examining watchfully the procedure adopted by the Investigating Agency during the course of investigation and procedure adopted by the prosecuting agency while putting the accused for trial and the procedure adopted by the Courts before heralding the verdict either of guilty or of innocence.

9. The procedure for holding identification parade needs to be enumerated as indicated hereunder :

"(i) An Executive Magistrate/Honorary Magistrate, if called upon for the purpose of holding an Identification parade, should remember that he is the person who conducts the parade; he will be in full and sole charge of the entire proceedings.

(ii) The Executive Magistrate/Honorary Magistrate should first acquaint himself, very briefly, with the facts of the case and find out who is to be put in the parade for identification and who are the witnesses to be called up for identification.

(iii) Two independent respectable persons (not being persons connected with the police) should be first called up. The Police themselves will have normally arranged to call up such person; but the Executive Magistrate/Honorary Magistrate will question them and satisfy himself that they are independent and fairly intelligent persons. In order that they may follow the proceedings intelligently, the Executive Magistrate/Honorary Magistrate should acquaint them, briefly, with the facts of the case and as to who is sought to be identified and who are to come for identification.

(iv) The parade should then be arranged in a room or a place which is such that the identifying witnesses, as well as the persons connected with the Police, should not be able to look into it.

(v) If there is only one accused person to be identified, there should be atleast half a dozen persons placed in the parade, If two accused persons are to be identified, then there should be about 10 or 12 persons in the parade. Not more than two accused should be placed in any single identification parade. Normally, the Police themselves will have called up the persons to be put in the parade; but the Executive Magistrate/Honorary Magistrate should see that they are persons of more or less the same physical appearance, and approximately of the same age, as the person to be identified. It is desirable that innocent persons to be mixed should be different for each parade.

(vi) No person, other than the persons in the parade, and the two respectable persons, should be allowed to remain in the room where the identification proceedings are being held. In particular, all police officers and constables should be asked to withdraw themselves completely from the room. There is no objection to any of them remaining outside the room or otherwise at hand, ready to be called up in case the accused creates trouble, or in case of emergency. They should, however, not be visible from the room or the place where the parade is being held.

(vii) After the parade is arranged, one of the two respectable persons should be sent up to bring the accused from the lockup. Care should be taken to see that when the accused is being brought from the lock up, the identifying witnesses do not have an opportunity of seeing him. They should be kept in quite a different room, out of sight of the lockup.

(viii) At this stage, the Executive Magistrate/Honorary Magistrate should commence to write the memorandum. It should include :--

(a) the place at which and the date on which, parade is being held and the time at which it was commenced;

(b) the names, ages, occupations and the full addresses of the two respectable persons;

(c) the names and the approximate ages of the persons standing in the parade, mentioning clearly, one below the other, in numerical order their positions in the parade (which positions they should not be allowed afterwards to alter)

(d) the fact that no persons, other than those, in the parade and the two respectable persons, were allowed to remain in the room and that all police officers and constables were asked to withdraw; and

(e) that respectable person so and so fetched the accused from the lockup, and that the identifying witnesses were in a different room so that they could not see him being brought from the lockup to the identification room.

(ix) When the accused is brought, the Executive Magistrate/Honorary Magistrate should ask him to take whatever place he likes in the parade. The place which he select should be noted in the memorandum. For example, he may select to stand between numbers 3 and 4 in the parade; and it should then be noted that he took his position between Nos. 3 and 4 in the parade. The original numbering of the persons in the parade should not be altered simply because the accused has now joined in. (x) The accused should then be asked if he wants to make any alteration in his dress. He may change his cap or coat, or he may decide to put on (or remove) a cap or a coat. He should be allowed to do this, and that fact should be noted in the memorandum. If he does not wish to change his dress, then that fact, too should be noted in the memorandum, (xi) The one of the respectable persons should be asked to fetch the first identifying witness from the room in which he may be sitting. When the witness arrives, the Executive Magistrate/Honorary Magistrate should question him and ascertain from him whether he had an opportunity to see the culprit at any time subsequent to the offence or after the arrest. He may either record the statement separately or make a reference to the statement in his memorandum. The witness should then be asked to view the parade carefully and see whether he would be able to identify the person, who, for instance; stabbed him or whom he saw firing a shot from a revolver, or whom he saw inside the flat in which a burglary may have been taken place, or, as the case may be. The identifying witness will then go up

and look closely at the parade. If he identifies any person, he should be asked to forward and touch that person, and not merely to point him out from a distance. This is necessary in order that there may be no doubt afterwards as to whom exactly he had identified. The fact that the identifying witness identified the accused, should be noted in the memorandum (along with the name of the accused) and, of course, also if he failed to identify him or identified a wrong person. It should further be noted whether the witness identified the accused straightway or after some hesitation or after first pointing out a wrong person and then correcting himself and pointing out the accused. When this is over the identifying witness should be asked to go away into a different room and not to contact the remaining identifying witnesses. He may even be asked to go away.

(xii) After he leaves the room the accused should be asked once again, whether he desires to change his place in the parade. If he changes his place, it should be noted in the memorandum, and also if he declines to do so, he should be asked, again, if he wants to change his dress; and if he does so, or if he declines to do so, that fact should also be noted in the memorandum.

(xiii) Then one of the respectable person should be asked to fetch the second identifying witness. In regard to the identification by him also, the same procedure should be gone through as in the case of the first identifying witness, the memorandum being also written up side by side, (xiv) This procedure should be followed for each subsequent identifying witness.

(xv) After all the identifying witnesses have thus been exhausted one after the other, the memorandum should be wound up by stating the time at which it was concluded. Then the memorandum should be read over and explained to the respectable persons in language which they understand. If the respectable persons know English well, then they should be asked in addition, to read over the memorandum for themselves.

(xvi) After the memorandum is completed, the Executive Magistrate/Honorary Magistrate should make the following endorsement at the end ;--

"Identification parade was conducted by me personally with the help of two respectable witnesses, namely Shriand Shri whose signatures have been obtained in token of what transpired in their presence, and shall sign below this endorsement and put the date below his signature".

There shall be another endorsement to the following effect.

"We read above memorandum (or it was explained to us) and it depicts the correct state of affairs as stated in the memorandum, and he shall obtain the signature of the two respectable persons with whose help he held the identification parade".

(xvii) The Executive Magistrate/Honorary Magistrate himself should also sign every sheet of the memorandum.

(xviii) All corrections and interlineations in the memorandum should be initialed by the Executive Magistrate/Honorary Magistrate.

(xix) The memorandum should then be handed over to the police officer concerned.

(xx) Care should be taken to see that at no stage of the proceedings police officer or any police constable comes into the room in which the parade is being held. The police should not be allowed to interfere with the proceedings, which are entirely to be conducted by the Executive Magistrate/honorary Magistrate. It will be advisable to note in the memorandum itself that no police officer or constable was present at any time during the entire proceedings of the identification parade.

(xxi) The most important part of the memorandum will be the statements made by the identifying witnesses. These should be very carefully recorded along with the questions asked to the identifying witnesses. (This recording need not be in the question and answer form). For example, an identifying witness may be asked if he is able to identify any one in the parade as the person who fired shot, and the identifying witness may point out the accused and may add that it was not the accused who actually fired, but that the accused was standing by the side of the man who had fired the shot. In that case, whatever the identifying witness states, should be carefully noted, as far as possible in his words (translated into English).

(xxii) If more than one accused are placed in parade, then in the memorandum they should not be referred to as "Accused No. 1", "Accused No. 2" etc., but they should be referred by their full names.

(xxiii) The memorandum should be written in the language of the Court.

(xxiv) At the hearing of the case, the Executive Magistrate/Honorary Magistrate who held the parade and wrote out the memorandum may be called upon to give evidence. In that case, he should state exactly what happened. He has a right to refresh his memory by referring to the memorandum which he had himself prepared."

10. For necessary guidance the Executive Magistrate/Honorary Magistrate should refer to the ideal form given in Criminal Manual.

11. The evidence in respect of the identification parade is quite important in a criminal trial, because now a days, unfortunately, on account of increasing number of crimes and the resultant prosecutions, the witnesses who identify the suspects who come before the Court in the shape of accused, are examined in the Court after lapse of number of days, months, and some years also. In majority of cases the dacoits or culprits are strangers to the victims. When they are examined in the Court on oath, they are required to identify the dacoits or culprits after lapse days, of months and years. Not only that, they are required to face barrage of questions asked to them in cross-examination by experts in law.

They are also required to face such barrage of questions asked to them in such unequal battles of wits. Some witnesses who are clever enough, apt enough, make a request for refreshing their memory by reading respective identification parade memorandum but unfortunately on many occasions they do not even know that they have such a right to refresh their memory. In number of cases the person who conduct the examination-in-chief forget to refresh their memory. In number of cases it happens that such witnesses do not make a request to refresh their memory during the examination-in-chief and face the barrage of questions asked in cross-examination with such shaken of memory. The test identification parade memorandum is the document which establishes a nexus between the act done by him before some months or some years and the fact which is required to be deposed in the Court in the examination-in-chief or cross-examination. It has to be kept in mind always that in majority cases, those witnesses are not well versed with niceties of Court procedure. In majority of cases the panch witnesses are from lower strata of the society like farmers, workers, workmen and other common persons and they are required to face expert in law, as defence Counsel in such battles of unequals in education.

12. The evidence in respect of identification parade comes in the shape of corroborative evidence to corroborate substantive evidence which such witnesses gives in the Court on oath at the time of identifying an accused as such dacoit or a culprit. Therefore, the identification parade is to be in accordance with the law and no go by to it or devise invented for dodging it should be permitted. The experience tells that on many occasions in the tempo of enthusiasm to get a conviction, persons engaged in investigation get tempted to show the suspects to identifying witnesses before the identification parade, before the arrival of Executive Magistrate/Honorary Magistrate or before the arrival of the panch witnesses. Therefore, all necessary precautions have to be taken in the interest of justice to see that the identifying witnesses should not get an opportunity to see the persons to be identified before identification parade is held. For that purpose it is necessary to hold the identification parades at a different place from police station buildings. If the identification parades are held in police station premises, there would be no assurance in the judicial mind that all precautions have been taken to avoid the possibility of the identifying witnesses seeing the persons to be identified before the identification parade takes place. Generally the dummies are collected by the persons from the police station where such identification parade is to be held, may be in a different room but in the same premises. In that case also there is no assurance to the judicial mind that all precautions have been taken to see that the identifying witnesses had no opportunity of seeing the dummies prior to identification parade. In the case of default in either of the points, there is likelihood of prejudice caused to the defence of the accused. The Courts have to keep it in mind that when the accused is put to a trial, he happens to be a sole man standing before a compact prosecution machinery. Therefore, the Courts should to be watchful in seeing that every aspect of trial is above board and truly consistent with legal procedure

established by the law. It is to be watchful in seeing that the said procedure has been truly implemented while putting the accused to trial for getting an adjudication in context of the charge framed against accused in the said trial. No go bye or adjustment or connivance is permissible, because such default go bye, adjustment and connivance would violate the fundamental right of such an accused guaranteed to him by Articles 20, 21 of Constitution of India.

13. The Magistrate recording the identification parade memorandum should record it normally in Marathi, which is the recognised language of this State. They have to keep in mind that Marathi is the original text of the evidence. They have to keep in mind that normally the panch witnesses come from the lower strata of the society and they are not even acquainted with English. Therefore identification parade, memorandum should be in the language which should be normally understood by the panch witnesses and by the accused too. In the present case the identification parade memorandum has been written in English. There is no evidence on record to show that Mohammed Ismail Bengali was knowing English. He happens to be a common man. It is true that there is a note that it was read over to him and explained in Hindi. Still for such exercise there are limitations. Therefore, it is always better to record the memorandum of such identification parade in the language which common persons knows. Now Marathi has been accepted to be the recognised language of the State and the original record of the evidence is to be in Marathi.

14. In the present case the identification parade has been held in the office of Crime Branch of Police, Mumbai. A room was made vacant for holding test identification parade but there is no evidence on record to show that the said room was totally isolated and was totally disconnected from routine working of police station in which police were participating. It being the premises of the Crime Branch of Mumbai Police, it must have been frequented by number of persons from the police department. The identifying witnesses were standing on a road at some distance from the said room. True that may be so, but there is no evidence adduced by the prosecution to show as to whether the appellant and his associates were kept aloof before they were transferred to said lockup. They must have been brought from some other place to said lockup. At the time of such transfer of the suspects put to identification parade, they should be always brought in veiled condition for avoiding the possibility of the identifying witnesses seeing them before the identification parade. The Government should as early as possible create, construct or reserve separate appropriate sized halls at different places in Mumbai and in other offside places for holding identification parades. Those halls should be totally disconnected from the police stations or the places which are under the control of police department or police personnel. On account of paucity of places the investigating machinery has no alternative but to hold the identification parades in the premises of the police station. The investigations are generally done by the police department or allied departments and it become duty of State Government or Government of India to provide such hails for holding identification parades. When the work of identification parade has been

entrusted to different departments not related to police department, or police personnel, such precautions have to be taken for the purpose of inspiring confidence in judicial mind about the flawless identification parade and resultant evidence adduced by the prosecution against the accused.

15. In the present case, the identification parade has been held in a room within the premises of Crime Branch of Police Mumbai. There is evidence on record to show that the police persons were asked to obliterate themselves from the said room but there is no evidence to show that precaution was taken to see that the witnesses who were to identify the suspects had no opportunity to see them before identification parade.

16. Besides that, in the present case, in the said identification parade four suspects were put together for identification. That is also against the spirit of the rules made for holding identification parade. Had there been one or two suspects put for identification parade at one time, the prosecution would not have faced the criticism, as it has been levelled by the Counsel appearing for the appellant and there would not have been a dent, created to credibility of the said identification parade especially in view of the fact that the appellant and his associates were stranger to the persons who identified them and were examined as prosecution witnesses in this case.

17. In the matter of Ramkishan Mithanlal Sharma Vs. The State of Bombay, , the Supreme Court has made certain observations about the evidence in respect of identification. Allahabad High Court, Division Bench has observed on this point in the matter of Asharfi and Another Vs. The State, by pointing out that; "Every test identification of suspects should be held with only one suspect mixed up with nine or ten innocent persons, the innocent persons being changed every time a fresh suspect is put up for identification". In the present case the Executive Magistrate held only one identification parade in respect of four suspects and by asking all those 4 suspects to stand up in the same identification parade, innocent persons-dummies were not changed. When the identifying witnesses were changing, the dummies were the same and they were standing in insufficient number with those 4 suspects and one out of them, happens to be the appellant and the said identification parade was being held in the premises of Crime Branch of Police, Mumbai. In Asharfi's case (supra), the Division Bench of Allahabad High Court pointed out that it is necessary to conceal, prominent or noteworthy distinctive marks of the suspects, so as to ensure credibility of the identification parade. It further observed that if the suspects are already known to the identifier before the identification parade, the identification parade becomes futile. In the said judgment, Allahabad High Court, Division Bench has held that the Counsel of the accused and prosecution should also be permitted to remain present at test identification parade.

18. In the matter of Kanan and Others Vs. State of Kerala, , the Supreme Court has observed that:

"Where a witness identifies an accused who is not known to him for the first time, his evidence is absolutely valueless unless there has been a previous T. I. parade to test his powers of observations. The idea of holding T.I. Parade u/s 9 is to test the veracity of the witness on the question of capability to identify an unknown person whom the witness may have seen only once. If no T. I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court."

19. Therefore, keeping in view this important aspect of the evidence in respect of test identification parade, the holding of the identification parade should be totally consistent with legal requirements and it should be above board.

20. That leads me to another important aspect of the case and that relates to the evidentiary value of the evidence of prosecution witnesses, Pannalal and Ramchandra -- driver who had identified the present appellant as a person who boarded in the said car by holding a knife and asked Ramchandra driver to get aside from the wheel and drove his car himself from the spot which was near the bus route No. 130, near mint to a narrow lane at Jogeshwari. After considering the evidence in respect of test identification parade qua the appellant, this Court would now scrutinise the evidence of this prosecution witnesses which has been brought forth by the prosecution in this case as substantive piece of evidence and a trump card against this appellant. The evidence of Pannalal and Ramchandra shows that the said incident took place all of a sudden and as these dacoits boarded in the car, all the inmates of the car were frightened and in panic. So also they were frightened as those persons were armed with weapons. It has come in their evidence that one of those persons had put his knife on the neck of Ramchandra under threat and one of them took charge of the wheel and started driving the said car from the said spot near the mint towards Jogeshwari. While considering whether the identification by witnesses of the culprit, accused involves serious consideration on number of points:

- 1) Whether the witness was having the coolness of the mind at the time of happening of the incident in question?
- 2) Whether he was having sufficient light for observing the features of the culprits vividly?
- 3) Whether he was having coolness of the mind, suitability of the mind for storing the impression of the features of the culprits in his mind and brain?
- 4) Whether the witnesses had sufficient opportunity and time to observe the features of the culprit and was having stability of the mind to store the impression in his mind and brain.
- 5) Whether the culprit was previously known to him or was total stranger?
- 6) Whether the culprit was having the special features of distinctly marking his identity like squint eyes, limping legs, shortened hands or feet or scars of face, blindness of one of the eye, stammering style of speaking of different voices,

high pitched distinctive voices. A person can identify the culprit at the time of happening of the incident like dacoity, burglary, murder, assault or of pick pocketing by observing such features. At the time of commission of the rape there would be a different criteria, because of the nearness of the body and face of the culprit and the victim. There may be possibility of the culprit being a man of acquaintance, but in cases of dacoity and burglary, generally the persons are strangers and therefore, close scrutiny and caution is very much necessary at the time of examination of the evidence in respect of the legal identification parade.

21. In the present case the evidence of the two witnesses mentioned above shows that they were frightened, the situation was panicky and the culprits were altogether strangers to them. This panic situation and frightened mind may shorten the ability to identify the culprits' impression, their features in the mind and brain becomes obscure. The capacity of witnesses to identify the culprit after the gap of some months when examined on oath in the Court depends on such factors and the conclusion is to be drawn in view of the facts and circumstances of each case.

22. In the present case the evidence adduced by the prosecution itself shows that the capacity of those witnesses identifying the culprits was Very much weak, keeping in view the panic situation created in their frightful mind. In addition to the things which were happening quickly. It is pertinent to note that these two witnesses were examined in the Court after lapse of some years after the incident. Therefore, according to this Court the identification of the appellant by these witnesses as culprit who participated in the said dacoity is not sufficient for basing the conviction in such a serious case wherein the sentence to be given has to be severe. Thus, conclusion of this Court gets strengthened by the observations made by the Supreme Court in the matter of Kanan and Others Vs. State of Kerala, and the observations made by the Division Bench of Allahabad High Court in Asharfi 's case (supra).

23. After discarding the evidence of identification by prosecution witnesses Pannalal and Ramchandra, this Court turns to another aspect of the case and that is the recovery of a knife from the possession of the appellant which has been identified by A.P.I. Gaud. This Test Identification parade has been held by the police officer and not by the Executive Magistrate. In view of the ratio of the judgment of the Supreme Court Ramkisan. Mithanlal Sharma's case (supra), the identification of this knife by A.P.I. Gaud comes under the category of his statement recorded by the Investigating Officer in view of the provisions of Section 162 of the Criminal Procedure Code, that cannot be admitted in evidence and that cannot be relied on for basing conviction. Apart from that, knife is a common article and it can be purchased by anybody from the market when that was not having special identification mark.

24. Two golden rings have been found in possession of the appellant. The F.I.R. lodged by P. W. Pannalal does not disclose that he mentioned any identification marks over articles lost in the said incident of looting. Coupled with that

statement made by the appellant when he was examined in view of the provisions of Section 313 of Criminal Procedure Code 1973. It makes it next to impossible to draw a conclusion that the appellant was found in possession of the stolen articles stolen in burglary or dacoity in the absence of any cogent evidence, to the contrary, a statement made by the accused when he happens to be examined under the provisions of Section 313 of Criminal Procedure Code 1973 has to be considered in his favour. He has claimed ownership of those rings.

25. The learned trial Judge unfortunately, has lost the sight of these things when he was appreciating the evidence adduced by the prosecution in view of the submissions advanced on behalf of both the prosecution and the defence. The learned trial Judge has committed the error by recording the finding of guilt against the appellant and that needs to be set aside. This Court finds it necessary to point out that the learned judge has committed the error of holding the appellant guilty of offence punishable u/s 120B as well as Section 34 of Indian Penal Code. Section 34 deals with the acts committed in furtherance of common intention. Section 120B has much more broader spectrum. When he thought of convicting the appellant for the offences punishable u/s 120B, conviction u/s 34 of Indian Penal Code was redundant. This Court also wants to point out that Sections 397 and 398 always revolve around the provisions of Section 395 of Indian Penal Code. The activities need to be more showing that the accused had deliberations chalking off a scheme, planning various activities, the goal of which was to achieve the last target which has to be achieved after completion of such conspiracy. In the present case there is no evidence at all brought forth by the prosecution for recording such a conviction.

26. As the judgment and order of conviction and sentence passed against the appellant by the learned trial Court happens to be improper, incorrect and illegal, this Court has no hesitation in setting it aside by allowing this appeal.

27. Thus, appeal stands allowed.

The order of conviction and sentence recorded against the appellant stands set aside and he stands acquitted. He be set free, if not required for any inquiry, investigation, proceeding or trial. No interference in respect of the disposal of the property passed by the learned trial Court.

The parties are directed to act upon the copy of this order duly authenticated by the Sheristadar of this Court.