

(2011) 11 KAR CK 0077

In the Karnataka High Court

Case No : Criminal Appeal No. 1440 of 2004 C/W Criminal Appeal No. 1559 of 2004

Sri. Rathan Shiva @ Shivanna

APPELLANT

Vs

State
 Rasheed Khan, Ashu @ Ashwak, Jabi @ Jabiulla
and Abdul Jabbar Vs State of Karnataka

RESPONDENT

Date of Decision : 09-11-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 120 B, 354, 376 (2) (g), 511

Citation : (2011) 11 KAR CK 0077

Hon'ble Judges : Subhash B. Adi, J

Bench : Single Bench

Advocate : G.S. Balagangadhar, in Criminal A. 1440/2004 and Sri. Hashmath Pasha, in Criminal A. 1559/2004, for the Appellant; G.H. Srinivasa Reddy, HCGP, for the Respondent

Final Decision : Allowed

Judgement

Subhash B. Adi

1. These two appeals are against the judgment of conviction in S.C.No.33/2001 dated 30th August 2004 on the file of the Principal Sessions Judge, Tumkur.
2. Criminal. Appeal No. 1440/2004 is by the accused No.5. Criminal Appeal No. 1559/2004 is by the accused Nos.1 to 4.
3. All the accused were charge-sheeted and tried for the offences punishable under Sections 120B, 376(2) clause (g) and 511 of the Indian Penal Code.
4. Case of the prosecution was that, PW-3, the daughter of PW-2 had married to one Rajanna and she was pregnant of six months. PW-1, the victim was PW-3's maternal aunt. PWs-1 and 2 were the residents of Siddalingappana Chowki in Hospet taluk. PW-3 had come to the house of PW-2. PWs-1 and 2 in order to send her back to her husband's house at Agali village in Madakashara taluk, on 30th November 2000 at about 12.30 p.m., they reached Sira and boarded the

bus to reach Madhugiri. By the time they reached Madhugiri, it was 9 p.m., they enquired about the bus to Agali village, someone told them that there is no bus till next day morning to Agali village. PWs-1 to 3 went to a nearby hotel where PW-4, the cook was present. They requested him to permit them to stay in the hotel during the night. Since it: was winter weather was chilled. PW-4 gave two gunny bags to PWs-1 to 3 and asked them to sleep by the side of the hotel. The hotel had a gate. Thereafter PW-4 went inside to sleep. Four persons (accused Nos. 1 to 4) came and asked the PW-4 to send PWs-1 to 3 with them, they threatened. PW-4. PW-4 being afraid of the same, told PWs- 1 to 3 to go out of the hotel premises. Accused-1 to 4 compelled PWs-1 to 3 to follow them. They took PWs-1 to 3 to a room near lavatory inside the bus stand. All the four accused tried to outrage the modesty of PW-3, however, PW-2 told accused Nos. 1 to 4 that, PW-3 is pregnant and do not harm her. Accused-1 to 4 pushed PWs-2 and 3 in one room and dragged PW-1, when she tried to scream, they gagged her mouth, held her and committed rape one after another. At that time, accused No.5 also came. He tried to outrage the modesty of PW-3. The incident took place at about 00:00 hours i.e., night between 30.11/1.12.2000, all the PW-1 to PW-3 came near the hotel of PW-4, at about 6 a.m., PW-22 -Police Officer came and enquired and took them to Police Station. PW-1 narrated the incident, her statement was recorded and a case was registered in Crime No, 193/2000. PW-22 made arrangement to send PW-1 for medical examination. PW-20 examined PW-1 at about 11.15 a.m. on 1.12.2000 and she gave a report as per Ex.P19. Part of the investigation was conducted by PW-22 and the remaining part of the investigation was conducted by PW-23. PW-23 after completion of the investigation filed charge sheet.

5. On committal, the learned trial Judge, securing the presence of the accused framed the following charges:

1. That you accused No.1 to 5 on 30.11.2000 at about 12-30 mid-night, having found three women Durgamma, Tulasamma and Gowramma (CWs. 1 to 3), in front of the hotel near bus-stand, Madhugiri, agreed amongst yourselves and conspired to commit gong rape upon them and in pursuance of your common intention and criminal conspiracy, took three women by force to a vacant room near Lavatory in the. Government bus-stand, Madhugiri, and committed gang rape and thereby committed an offence punishable under Sec. 120B of the I.P.C and within the cognizance of this court.

2. Secondly, that on 30.11.2000 at 12:30 mid-night, you accused No.1 to 5, in furtherance of your common intention and criminal conspiracy, committed gang rape upon C.W.1 Durgamma, despite her resistance and without her consent, and thereby committed an offence punishable under the provisions of Sec. 376(2) (g) of the I.P.C. and within the cognizance of this Court.

3. Thirdly, that on the above said date, time and place you accused No.5, removed, the petticoat of C.W.3 Gowramma and attempted to commit rape upon her against her will and without her consent and thereby committed an offence

punishable under Sec. 375 read with Sec. 511 of the I.P.C. and within the cognizance of this Court.

6. The prosecution in order to prove the charges examined PWs-1 to 24, marked Exs.P1 to P41 and produced M.Os. 1 to 24. On the defence side, the portion of statement of PWs-2 and 3 were marked as Exs.D1 and D2. Portion of the register-Ex.P24 was marked as Ex.D3, portion of FSL report Ex.P18 was marked as Ex.D4 and the requisition issued by PSI to the Medical Officer was marked as Ex.D5.

7. The trial court on appreciation of the evidence and relying on the evidence of PW-1, victim and evidence of PWs-2 and 3, eye-witnesses and the evidence of PW-20 - Doctor held that the prosecution has proved the charge of offence punishable u/s 120B, 376(2) clause (g) of IPC as against accused Nos. 1 to 4 and it also held that the prosecution has proved the charge of offence punishable u/s 354 of IPC against accused No.5. Accused Nos. 1 to 4 were sentenced with 10 years" R.I. and fine of Rs. 20,000/- each. in default to undergo S.I. for a period of eight months for an offence punishable u/s 376(2)(g) of IPC. They were also sentenced with 10 years R.I. and Rs. 10,000/- fine in default to undergo S.I. for four months for the offence punishable u/s 120B of IPC. Accused No.5 was sentenced with six months R.I. with Rs. 5,000/- fine, in default to undergo S.I. for a further period of two months for the offence punishable u/s 354 of IPC. However, the sentences for the offence punishable under Sections 376(2)(g) and 120B of IPC were held to run concurrently." It is against the judgment of conviction, two appeals are filed, one by accused Nos.1 to 4 and another by accused No.5.

8. Heard Sri.Hashmath Pasha, learned Counsel for accused Nos.1 to 4, Sri.Balagangadhar, learned Counsel for accused No.5 and Government Pleader for the State.

9. Sri.Hashmath Pasha, learned Counsel submitted that, the presence of the accused has not been proved by the prosecution by leading cogent and reliable evidence. He relied on Ex.P1 - complaint and submitted that, in the complaint, PW-1. the victim has stated that, unknown four persons committed rape on her. In the complaint, there is no description of the physical appearance of the accused except stating that, if accused are shown to PW1, she will identify. He submitted that, according to the complaint, complainant has stated that, accused came to the hotel where they were sitting, threatened PW-4 and also PWs-1 to 3 and accused told PWs-1 to 3 to follow them. Accordingly, PWs-1 to 3 followed the accused and they took PWs-1 to 3 to public toilet, near the bus stand and committed rape.

10. In the evidence, PW-1 states that, accused enquired as to the purpose of the visit of PWs-1 to 3 and they told PWs-1 to 3 that they will take them to the Police Station. Thereafter, they took them in a small room instead of taking them to the Police Station. Initially they dragged Gowramma-PW-3, when PW-2 begged and requested the accused not to harm PW-3, as she was pregnant, then they left

PW-3 and caught hold of. PW-1 and took her in a small room and committed rape. He relied on the examination-in-chief and submitted that PW-1 states that three persons committed rape and one person was holding PWs-2 and 3. After the incident, PWs-1 to 3 came back to the hotel of PW-4. PWs-1 to 3 have consistently stated that PW-22, the Police Sub-Inspector came at 3 a.m. and enquired as to why PWs-1 to 3 were sitting near the hotel. PW-1 states that, when Police Officer came at 3 a.m., she did not disclose the incident. She has also stated that. PW-22 informed them that he would come back in the morning and directed PWs-1 to 3 not to go without seeing him. At 6 a.m., he came again and took PWs-1 to 3 to the Police Station. PW-1 also admitted that when the accused were speaking to each other, she heard the names of the accused as Shiva, Jaffar and Gokarn. In the cross-examination, she has stated that. Police while recording her statement also recorded the names of the accused, whereas PW-2 in her evidence in the examination-in-chief itself has stated that, Police came at 3 a.m. and he enquired as to why PWs-1 to 3 were sitting near the hotel. They informed that, they wanted to go to PW-3's husband's house. PW-2 states that, they narrated about the incident, but the Police Officer told them to remain in the said place till he comes back, whereas PW-2 in her cross-examination denies the same. PW-3 also admits that, at 3 a.m. Police came, but she denies of informing the Police about the incident. She states that, Police Officer had come to the spot at 3 a.m. and it is consistent in the evidence of PWs-1 to 3. It is also consistent that, Police Officer came at 6 a.m. and took PWs-1 to 3. However, the FIR is registered according to PW-22 at 8.30 a.m. on 1.12.2000.

11. Further in the complaint, PW-1 has stated that, they came to Madhugiri Bus Stand at 9 p.m. and from there, they wanted to go to Agali village. However, PWs-1, 2 and 3 have stated that, PW-3's husband's place is in Honnarahalli and they enquired the bus to Honnarahalli. PW-1 has admitted that, she had not asked or enquired at Sira, as to whether there is any bus to Honnarahalli. She denied that, the place of PW-3's husband is Agali village. PW-2 also in her evidence stated that, she had not stated before the Police that. Rajanna, husband of PW-3 resides in Agali village in Madhugiri taluk and stated that, Rajanna is. from Honnarahalli.

12. By referring to the evidence of PWs-1 to 3, learned Counsel submitted that, it creates serious doubt as to whether PWs-1 to 3 were proceeding to Honnarahalli or Agali village. In the complaint - Ex.P1, it is clearly mentioned that, all the PWs-1 to 3 were proceeding to Agali village, i.e., the place of husband of PW-3. To support this, he also relied on the evidence of PWs-1 and 2. PWs-1 and 2 were not knowing who is Rajanna, they had not attended any marriage or there was any marriage between PW-3 and the said Rajanna. PW-2 has stated that, her daughter PW-3 had ran away with Rajanna and she was missing for six months, she had stayed with Rajanna and when she became pregnant she came to the house of PW-2. Since the said Rajanna had not taken her back, they were going to leave her to her husband's place. If really PW-3 was married to Rajanna and PW-2 being a mother and PW-1 being a maternal aunt of PW-3, they should be

definite of the place where they were going. PW-1 has admitted that, they had not made any enquiry at Sira, as to whether there is any bus to Honnarahalli from Sira. To prove that the evidence of PWs-1 to 3 as natural witnesses to show that, they really reached Madhugiri at 9 p.m. to get bus at Honnarahalli and the bus was not available, the prosecution has not adduced any evidence to show that one has to reach Madhugiri to go to Honnarahalli.

13. Further, PWs-1 to 3 have stated that, four persons came to the hotel of PW-4 and threatened PW-4 and asked PWs-1 to 3 to follow them, but in the evidence, all the three witnesses state that, the accused told PWs-1 to 3 to follow them to the Police Station.

14. PW-1 in her cross-examination has admitted that, the place where she was raped by accused Nos.1 to 4, it was dark. PW-4, the cook though admits that two persons came to the hotel and enquired about PWs-1 to 3, he had denied of accused coming to the hotel. He had also not identified accused Nos.1 to 4. Learned Counsel submitted that, the entire case of the prosecution is dependent on the identity of the accused, as in the complaint. PW-1 has stated that, the accused were strangers. Even in the evidence. PWs-1 to 3 have stated that the accused were not known to them as PW-1 to PW-3 were not from the said village, hence, the burden is on the prosecution to prove that the PWs-1 to 3 have identified the accused.

15. PW-1 has admitted that after five days of the incident, they were called to the Police Station and in the Police Station, the Police shown the accused-1 to 5 as the persons, who committed the offence and they identified and if PWs-1 to 3 were shown the accused in the Police Station as the accused and thereafter if PWs-1 to 3 had identified them in the court, such identification is fatal to the prosecution case. To support, his contention, he relied on the judgment of the Apex Court reported in Gudur Kishan Rao and Others Vs. Sutirtha Bhattacharya and Others, in the matter of Mohd.Iqbd M.Shaikh and Others -vs- State of Maharashtra.

16. Learned counsel for the accused Nos. 1 to 4 further submitted that, showing the accused in the police custody will not prove the identification of the accused and in this case there is no evidence of conducting test identification parade. In the absence of the same, when the accused have not been identified, holding the accused guilty only on the basis of the evidence of PW1 to PW3 does not prove that the accused committed an offence.

17. Sri. G.S. Balagangadhar, learned Counsel for the accused No.5 supported the agreement of the learned counsel for the accused Nos. 1 to 4 and further submitted that there is evidence as against accused No. 5. Accused No. 5's name is not mentioned in the Ex. P1 the complaint of PW1. Further PW3 who alleges that the accused No.5 tried to outrage her modesty and she suffered injury, she was not subjected to any medical examination and she has not identified the accused even then accused No. 5 has been convicted.

18. Learned Government Pleader, supporting the judgment of the trial Court submitted that PW1 is a victim, PW2 and PW3 are the eye-witnesses. PW1 had stated as to how the incident occurred had also stated that the accused Nos. 1 to 4 committed rape on her. Accused No. 5 tried to outrage the modest of the PW3. The evidence of PW1 is corroborated by the evidence of PW4. Though, he has turned hostile he supported the case of the prosecution to the extent that PW1 to PW3 had gone to hotel, two persons came and took PW1 to PW3. Though PW4 has turned hostile, the presence of PW1 to PW3 near his hotel on the midnight of 30.11/1.12.2000 is proved. PW20-Dr. Lakshmirajyam, who examined PW1 has also supported the prosecution case. Trial Court, on proper appreciation of the evidence has convicted the accused. He submitted that test identification parade is not necessary when PW1 to PW3 have seen accused in the hotel and they have also seen accused Nos.1 to 4. who committed the rape on PW1.

19. In the light of the submission made by the counsel on both side, the point that arises for consideration is:

Whether the judgment of conviction passed by the trial Court calls for interference?

20. It is a definite case of PW1 in Ex.PI that accused Nos. 1 to 4 came to the hotel of PW4 and threatened PW4 as well as PW1 to PW3. PW1 to PW3 followed accused Nos. 1 to 4. Accused Nos. 1 to 4 committed rape of PW1. It is also definite case that, PW1 to PW3 in the complaint states that accused are unknown to them, if they are shown they will identify the accused. Admittedly, PW1 in the complaint which was filed on 1.12.2000 at about 8.30 am has not referred to the presence of accused No. 5. The evidence of the PW1, PW2 and PW3 states that PW1 was examined by PW20 at 11.15 a.m. on 1.12.2000 and on the same evening they went to their village. It is also not the case of the prosecution that, PW1 to PW3 had given physical description of the accused. They were not present when the accused No.5 was arrested. However, PW23 in the cross-examination has stated CW5-Anjuman who has been examined as PW5 gave information and on the basis of the said information, PW23 deputed Shankarappa to arrest accused No. 5 Rathan Shiva. PW5 alleged to have given information that he had seen accused No. 2 Ashu, accused No. 3 Jabi @ Jabiulla and accused No. 4 Abdul Jabbar while they were taking three women to the public lavatory. PW5 statement was recorded as per Ex. P4 and as per the direction of PW23 accused No. 5 was produced before him on 1.12.2000. On 5.12.2000 P.C. 563 and P.C. 371 arrested accused by name Aashu, Zabiulla and Abdul Jabbar as per the report Ex. P27. It is the definite case of the prosecution that, on 1.12.2000 accused No. 5 was arrested, however, PW5 Anjuman has denied of having seen the accused moving with a woman on the night of 30.11.2000/1.12.2000, hence, as on 1.12.2000, PW23 - the Investigating Officer had only statement of PW1. PW1 had not even stated the presence of accused No.5 nor had given the description of any other accused.

21. The case of PW1 in the complaint was that, there were only four accused.

There is no explanation by investigating officer as to on what basis accused No. 5 was arrested. Complaint does not disclose the identity of any of the accused. Complaint also does not implicate the 5th accused but on 1.12.2000 itself the 5th accused had been arrested on the basis of information stated to have been given by PW5. PW5 has denied the same and has been treated as hostile. PW23 in his cross-examination has stated that he secured PW3 and PW2 who identified the accused No. 5. However, PW1 in her examination chief has stated that after lodging a complaint, she went back to village and after 8 days of the incident the police came to Hospet and told them that they have arrested some persons and asked them to go to Madhugiri and identify them. PW2 in her examination chief has stated that after 5 to 6 days after incident they were summoned to Madhugiri. PW2 and PW1 visited Madhugiri Police Station. PW23 showed the accused Nos. 1 to 4 and they identified the accused Nos. 1 to 4. PW3 in her examination chief stated that, after giving complaint and after preparing spot mahazar Ex. P2, the police took them to police station and they remained in police station. At that time, accused No. 5 was brought to the police station and they identified him and also accused Nos. 1 to 4 in the police station. The evidence of PW1 and PW2 discloses that they were brought to police station after 5 to 6 days of the incident, whereas PW3 states that PW1 to PW3 were kept in the police station and they identified accused Nos. 1 to 5. As on 1.12.2000 accused Nos. 1 to 4 were not arrested and PW23 admits that accused Nos. 1 to 4 were arrested after 5 days of the incident. There was no identity of the accused. There is no reference to accused No. 5 in the complaint who was first arrested, there was no material as to the involvement of the accused No. 5 and PW5, who alleged to have seen the accused with PW1 to PW2, has not supported the case of the prosecution. In the absence of any evidence to show as to how accused No. 5 was identified and arrested and how accused Nos. 1 to 4 were identified and arrested after 5 days of the incident. In turn the evidence of PW1 in her examination chief states that after 5 to 6 days of the incident, Police people came to Hospet and told them that they have arrested some persons and asked them to go to Madhugiri accordingly they went to Madhugiri Police Station. Police men showed them the accused and asked whether they are the persons responsible for the crime and PW1 identified the accused in the police station. PW2 also states that in police station, inspector showed accused Nos. 1 to 4 they identified accused Nos. 1 to 4 and accused No. 5. There is no evidence to establish that police had definite information as to the identity of the accused Nos. 1 to 5 as the same persons, who committed an offence. The only witness who gave the information was PW5. PW5 has denied of having given any such information. The arrest of the accused No. 5 on 1.12.2000 creates serious doubt as to how PW23 arrested accused No. 5.

22. PW1 is the complainant. She has not disclosed the names of accused in the complaint. In turn PW1 refers to four persons came to the hotel and took them to a public lavatory and committed rape. She has not given identity or the names of the accused. PW1 though states that she heard that accused Nos. 1 to 4 were

speaking to each other she heard the names as "Shiva, Jafir, Gokarn" and she forgot another name. However, nothing is mentioned in the complaint as to the names of the accused. PW2 has stated that she gave the name of the accused No. 5. Admittedly, accused Nos. 1 to 5 were strangers to the PW1 to PW3, if they had the knowledge of the names of the accused, PW1 who had heard the names of the accused, they would have revealed the same in the complaint for the purpose of identity of the accused.

23. When the accused were strangers to PW1 to PW3, PW1 not referring the presence of accused No. 5 in the complaint, the police arrested accused No. 5 and thereafter arrested accused Nos. 1 to 4. All the accused shown to the PW1 to PW2 are the persons alleged to have committed rape in the police station. In such circumstances, if the complainant and witnesses were shown to the accused first in the police station and were asked to identify in the Court it creates serious doubt as to whether the police had induced complainant and others as to the identity of the accused and thereafter they were made to identify them in the court.

24. Apex Court in similar circumstances, in case of the identity of the accused has observed in the matter of Mohd. Iqbal M. Shaikh and Others vs. State of Maharashtra at Head Note-E as under:

If the witness knew the accused persons either by-name or by fact, the question of the police showing him the accused persons becomes irrelevant. If the witness did not know the accused persons by name but could only identify from their appearance then a test identification parade was necessary, so that, the substantive evidence in Court about the identification, which is held after a fairly long period, could get corroboration from the identification parade. But in this case the prosecution did not take any steps in that regard and no test identification parade had been held. Then again if the police shows the accused persons in the police lock-up to the identifying witness then the so-called identification loses its value, inasmuch as it is only because of the police showing the persons the witness is being able to identify the alleged accused. If the accused has been shown to him in the course of investigation then the so-called identification in Court is of no consequence and cannot form the basis of conviction. Therefore, if the witness was called to the police station while the accused persons were in police lock-up and the witness had been given the opportunity of seeing those persons in the police lock-up then the so-called identification made by the witness in Court is of no significance.

25. All the three witnesses have stated that they were called to the police station for identification of the accused and though there is inconsistent evidence of PW1 to PW3, no test identification parade "was conducted. If PW1 had known the names of the accused, the complaint should have revealed the same there was no need for the police to get the PW1 and PW2 for identification of the accused if they were known by names. In this case, the accused were strangers to the PW1 to PW3, accused were arrested and on arrest, they were shown to the PW1 to

PW3. It is very difficult to believe as to whether PW1 to PW3 have identified the accused without there being a test identification parade conducted.

26. Apart from this, the case of the complainant is that PW3 had married to one Raja. PW2 is the mother of PW3. PW3 was pregnant by six months and they were going to the house of Raja the husband of PW3. It is the definite case of the complainant in Ex. P1 that, PW1 to PW3 were proceeding to Agali village and for that they came to Sira and from Sira they went to Madhugiri where they did not get the bus to Agali village. Whereas. PW1 in her cross-examination has stated that they were proceeding to Agali village and further states as under:

I do not know whether to go to Agali Grama the short route is from Sira via Kotta, Madalur. Incorrect to suggest when we had asked persons in Sira, they told us to go directly from Sira to Agali Grama.

Correct to suggest to go to Agali Grama we may have to go to Madakasira, but we did not know I do not know whether we have to go via., Madakasira to Pavagada,

27. It is further admitted that, PW1 did not enquired anybody in Madhugiri about the buses to go to Agali Grama. They did not enquired location of Agali Grama. They only enquired about bus going to Honnarahalli. The case of the prosecution is that, PW1 to PW3 were proceeding to Agali village is not supported by the evidence of PW1 to PW3. PW1 though in complaint stated that they were proceeding to Agali village they were not knowing as to how to reach Agali village. In turn. PW1 admits that they were going to Honnarahalli. PW2. the mother of PW3 in her evidence has stated that they were going to the house of PW3's husband and they travel from Sira to Madhugiri, in the cross-examination she admits that she had not stated at any time before the police that Raja, the husband of PW3 was resident of Agali village, Sira taluk, and she has stated that the house of her son-in-law i.e., Raja is Honnarahalli. PW3 in her examination chief had stated that they reached Madhugiri by 9 p.m., and they tried to get the bus from Madhugiri to Madakasira and they were told that there is no bus till next day morning.

28. In the cross-examination, PW-3 has stated that her husband belongs to Honnarahanalli and she does not know the Taluka and she had told her mother PW-2 that she will show Honnarahanalli and had brought her mother and PW-1 - her aunt from Hospet. The evidence of PWs-1 to 3 that they were going to Agali village and that they came to Madhugiri to go to Agali village in Madakasira Taluk is not supported by these witnesses. PWs-1 to 3 were not definite as to which place they were proceeding. In Ex.P1, PW-3 admitted that they were going to Madakasira Taluk from Madhugiri, but in the cross-examination, all the three witnesses have stated that they were proceeding to Honnarahanalli. Neither PWs-1 to 3 nor the Investigating Officer have explained as to whether, to reach Honnarahanalli or Agali village, they have to reach Madhugiri and proceed.

29. PW-3 has admitted that she had met Rajanna who belongs to Reddy

community, in Meer Alam theatre. She developed friendship with him. He works in a Restaurant. They were not married but they lived together in Hospet for six months. They had gone to village called Agali in Hospet and after two months they got married, They had not informed their parents. PW-3 had remained with Rajanna for six months. Later, his parents had accepted her as their daughter-in-law and hereafter there was a fight between them and he had left her in the house of PW-2 and had not returned. PWs-1 and 2 admitted that they did not know Honnaranahalli. They had not gone to the house of PW-3. The genesis of this case is based on the evidence of PWs-1 to 3 that they were proceeding to Agali village, but it is not known where Agali village is situated and it is not even clear as to why they came to Madhugiri, whether to go to Agali village or to go to Honnaranahalli they have not reached Madhugiri.

30. Yet another reason which creates serious doubt in the prosecution case is that PWs-1 to 3, in their evidence, have stated that at about 3 a.m. i.e. on 30.11.2000 / 1.12.2000, the police sub-inspector came and enquired PWs-1 to 3 who were sitting near the hotel of PW-4, However PWs-1 and 2 did not disclose the incident to him. The police sub-inspector told them that he would come back in the morning and directed them not to leave the place without informing him. However, PW-2, in her evidence at para 7 stated that at about 3 a.m., a policeman came who was a sub-inspector and at that time they did not tell the sub-inspector as to what happened. Sub-inspector told them to wait-till he comes back at 6 a.m. and at 6 a.m., he came back to the place and they told in detail what happened and what had transpired in the night. Though PWs-2 and 3 have stated that they had informed about the incident at 6 a.m. only however PW-22 recorded the statement of PW-1 only at 8.30 a.m. PWs-1 to 3 are consistent as to sub inspector coming at 3 a.m. and enquiring PWs-1 to 3 but PW-22, in his cross-examination, has stated "We do night patrolling. On the night (night of 30.11.2000 or early morning of 1.12.2000) at 3 a.m., 1 was not on night rounds and did not meet Durgamma and others in Mathrusagar hotel". He further stated that he cannot say without verifying the station house diary as to who conducted the night rounds. He also denies of having any knowledge of PW-1 coming to the police station at 6 a.m. and further admits that PW-1 was not present in the police station along with other women at 7 a.m. when he reported for duty. Now, this evidence shows that he is not the officer who had met PWs-1 to 3 in the night. He had not seen PWs-1 to 3 at 6 a.m. He had reported to duty only at 7 a.m. The prosecution has not disclosed as to which officer had visited the hotel where PWs-1 to 3 were sitting at 3 a.m. and who got the information from PW-1 at 6 a.m. Whether any entry is made in the station house diary and whether the statement of PW-1 recorded at 6 a.m. was recorded or not. is not explained.

31. No doubt, evidence of PW-1 shows that she was subjected to repeated sexual intercourse, but her evidence is supported by the evidence of PW-20 Doctor who examined PW-1 and opined that the FSL report indicates presence of seminal stains on item No.4 and pettycoat. Presence of spermatozoa was detected on vaginal smear. She opined that the injuries i.e. scratch on the left side of the

neck and scratch over the posterior side of the right elbow joint were simple in nature and opined that. PW-1 was subjected to sexual intercourse. She also opined that seminal stain found on the vagina of the victim was more than expected. The evidence of PW-1 and PW-20 proves that PW-1 was subjected to sexual intercourse. PW-1 has shown her age as 25 and she was married and having children. Prosecution has proved that PW-1 has been subjected to sexual intercourse, however, to prove that the accused have committed the rape, the prosecution has failed to prove that the accused were the same persons who committed rape on PW-1. The injuries of PW-1 also do not suggest that there was any force used to commit intercourse, but they may not be relevant as PW-1 has stated that accused Nos. 1 to 4 committed repeated rape and they were holding her hands and legs.

32. No doubt, accused were also subjected for medical examination and PW-21 has examined all the accused, but they were examined on 5.12.2000 i.e. nearly after five days of the incident and found no nail marks on the face and body and no biological stain on the body of the accused and it may be true that biological stain may not be present because of lapse of five days, but no external injuries are found on the body of any of the accused.

33. In a case where victim's evidence is credible, clear and acceptable, no corroboration is necessary. However, in this case the accused are strangers and incident had occurred during the night of 30.11.2000/1.12.2000. PW-4 is a cook in a hotel where PWs-1 to 3 had taken shelter. PW-4 has turned hostile and in his evidence, though he states about the presence of PWs-1 to 3 along with them, his evidence does not support that accused came and took PWs-1 to 3. PW-1, in her complaint, has stated that accused Nos.1 to 4 threatened and forced -them to follow them. In the evidence of PWs-1 to 3, it is stated that accused Nos.1 to 4 directed the PW1 to PW3 to follow them to the police station and instead of taking them to police station, they took to the public toilet, near bus stand, and committed rape. PW-1 had admitted that it was dark. Now, the only possibility of identification was when the accused came to the hotel and took them, This is not supported by PW-4. Further, description of the accused was not stated in the complaint. First, the accused were arrested and thereafter, they were shown to accused Nos. 1 to 3 in the police station. This creates serious doubt as to whether the very same accused had committed rape or not. May be PW-1 was subjected to sexual intercourse, but the prosecution was required to prove with the clear evidence the identity of the accused Nos. 1 to 5. Though accused No.5 was not initially mentioned in the complaint, but in the evidence PWs-1 to 3 it is stated that accused No.5 also came. It is not clear as to why PW-1 has not given the names of the accused when she had heard the names and she had disclosed in the evidence. PW-23 has stated that PW-5 gave the information. PW-5 has not supported the case of the prosecution. In the absence of this, it is not known how accused were arrested and what was the basis for arresting accused Nos. 1 to 5. The Apex Court, in the judgment referred to above, has clearly laid down a law that in case the accused were not known to the identifying witnesses and if

they were shown in the police station and thereafter, they were shown in the Court, such identification is fatal to the prosecution and in this case also. PW-1, in her complaint, has stated that four persons came, they did not name any accused, they did not disclose any identity nor physical description and the accused were only shown in the police station as accused and on the basis of which, the identification has been made.

34. The Trial Court has not at all considered as to whether PWs-1 to 3 have identified the accused. The identification of the accused is itself doubtful in this case and if the identification is not proved, even though prosecution has proved the case that PW-1 was subjected to sexual intercourse, that will not prove the charge of rape against the accused. It is in these circumstances, in my opinion, the judgment of the Trial Court has failed to appreciate the evidence on record and has come to the wrong conclusion. Hence, these appeals are required to be allowed.

Accordingly, I pass the following

ORDER

Appeals are allowed. Judgment of conviction in S.C.No.33/2001 dated 30.08.2004 on the file of the Principal Judge, Tumkur is hereby set aside. All the accused Nos. 1 to 5 are acquitted.

Registry is directed to send the operative portion of the order to the concerned jail authorities forthwith to release the accused, if they are not required in any other case or if they are not detained in any other case.