

(2014) 07 AHC CK 0003
In the Allahabad High Court
Case No : Government Appeal No. 946 of 1982

State of U.P.

APPELLANT

Vs

Bir Singh and Others

RESPONDENT

Date of Decision : 21-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313 374(2) 378
Penal Code, 1860 (IPC) — Section 147 148 149 302 353

Citation : (2015) 4 ALJ 384

Hon'ble Judges : Vikram Nath, J; Kalimullah Khan, J

Bench : Division Bench

Advocate : H.C. Mishra, Advocate for the Appellant; A.N. Mullah, A.K. Ojha, A.S. Diwekar, D.P. Singh, Meraj Uddin, S.P. Sharma, Shamshad Ahmad Khan and V.K. Srivastava, Advocate for the Respondent;

Judgement

Kalimullah Khan, J.

1. Criminal Appeal No. 182 of 1982 u/S. 374(2), Cr.P.C. and Government Appeal No. 946 of 1982 u/S. 378, Cr.P.C. have been filed challenging the impugned judgment and order dated 21.12. 1981, passed by learned Sessions Judge, Jhansi, in S.T. No. 25 of 1980, whereby accused Ganga son of Ram Dayal, Mata Deen son of Gyani, Ram Sewak son of Jugal and Omkar son of Brikch Bhan were acquitted from the charges u/Ss. 147, 148, 302/149 and 376, I.P.C.. Accused Veer Singh son of Basante was acquitted u/S. 376, I.P.C.. But, he was held guilty and convicted u/Ss. 147, 302/149, I.P.C. and was sentenced to undergo one year R.I. u/S. 147, I.P.C. and to undergo imprisonment for life u/S. 302/149, I.P.C.. Both the sentences were directed to run concurrently. As such, Veer Singh-accused filed the aforesaid criminal appeal u/S. 374(2), Cr.P.C. whereas State of U.P. has filed aforesaid Government appeal u/S. 378, Cr.P.C. Government Appeal has abated vide order dated 28.3.2014 as against respondent Omkar on account of his death. Therefore, this judgment pertains to rest of the accused respondents.

2. Since both the aforesaid appeals have been directed against the common judgment and order dated 21.12.1981, therefore, for the sake of convenience, they are being disposed of by this common judgment.

3. As per the prosecution case, Baba Bharkhandi, a Sadhu, was residing on a hillock situated two miles away from the village Khailar. He had constructed a Marhi (hut) there. A temple and a well were also there. There was a forest. Prior to the incident of this case, accused Matadeen was apprehended by Dal Chand (P.W. 9), a Forest Guard, when he was unauthorizedly cutting forest tree with kulhari (Axe). On his apprehension by Forest Guard, Matadeen started quarrelling with him. The aforesaid Forest Guard, Dal Chand, called Baba Bharkhandi in his support. Baba Bharkhandi along with his two disciples, Siya Ram and Mathura, went there to support the cause of Forest Guard. They scolded Matadeen, whereupon he went away leaving the cut wood at spot. Dal Chand reported this matter to his Ranger, who prepared a report (Ext. Ka-7) regarding the aforesaid incident, dated 5.10.1977, at about 06.00 a.m. On its basis, FIR was lodged against Matadeen on 05.10.1977, at 12.15 a.m., at PS. Prem Nagar, District Jhansi, vide Crime No. 169/1977 u/S. 353/379, I.P.C. and after completing the investigation, he was charge-sheeted and prosecuted. Matadeen started nursing grudge against Baba Bharkhandi, hereinafter called the "deceased". This is the motive assigned to Matadeen against Baba Bharkhandi.

4. On 24.2.1978, deceased was sleeping in his marhi as usual. His chela, Lala Ram (P.W. 2), along with his wife, Smt. Vimla Devi (P.W. 3), aged about 19 years and their minor son, Bharat, were also staying with the deceased during those days because Lala Ram was learning Yoga from him. Lala Ram and his wife Vimla Devi were the disciples of the deceased. At 1.00 a.m. on 25.02.1978, 7-8 miscreants raided the kutiya of the deceased and started beating him mercilessly. Lala Ram and his wife Vimla Devi protested but the miscreants warned them not to interfere as they had come to take the life of the deceased because he was in the habit of making false complaints against them and was regularly prohibiting them from cutting the forest wood. Baba Bharkhandi died instantaneously. Thereafter, miscreants commanded Lala Ram and his wife to accompany them and took them down to hillock. 3-4 miscreants caught hold of Smt. Vimla Devi and took her 20-25 paces away and rest of the miscreants remained sitting there with Lala Ram. The miscreants, who had taken Vimla Devi away from Lala Ram, asked her to put off her clothes and submit her for sexual intercourse otherwise they would kill her and her son. Under these compelling circumstances, she had no option except to submit herself for sexual intercourse. All the miscreants committed rape upon her one after the other. The miscreants were smoking bidi throughout. It was the moon night. They were flashing torches also and in the light of all these sources, Lala Ram and Smt. Vimla Devi recognized the miscreants. After satisfying their lust, they relieved Smt. Vimla Devi, her husband and the child with a command that if anybody intercepts them in the way, they were to say that the Gang of Atar Singh had committed the aforesaid mischief.

5. Lala Ram along with his family came to his village Khailar at about 04.30 a.m. He narrated the entire incident to Siya Ram Yadav and Ratan Lal Dube (R.W. 4) and went to his house and apprised the aforesaid incident to his elder brothers. Thereafter, they along with others returned to the temple on the hillock but the dead body of the deceased was not traceable in spite of search. Lala Ram along with his wife went at police station Prem Nagar and lodged the oral report (Ext. Ka-2). On its basis, check report was drawn on 25.2.1978, at about 11.45 a.m. and the case was registered in the general diary in the presence of S.I. Chura Singh (P.W. 10). Smt. Vimla Devi was sent to the Civil Hospital, Jhansi, for medical examination. Dr. Suman Srivastava (P.W. 1) medically examined her at 11.30 p.m. on 25.2.1978 and prepared the medical examination report (Ext. Ka-1) in her own handwriting and signature. Supplementary report (Ext. Ka-1A and Ka-1B) was also prepared by her on 27.2.1978 and 2.3.1978. On the basis of the medical examination report, the doctor opined that Smt. Vimla Devi was used to sexual intercourse but no definite opinion regarding rape could be given although there was evidence of recent intercourse. The victim was aged about 19 to 20 years I.O. Chura Singh (S.I.) prepared the site plan (Ext. Ka-17); searched for the dead body of the deceased on the hillock. Some blood stains were there on the well and on the basis of this clue, he got the dead body recovered from the well, which was wrapped in a blanket (material Ext. 4) along with stones. Inquest was prepared and after preparing challan lash, photo lash and letter to C.M.O. (Ext. Ka-19 to 21), he sent the dead body in a sealed cover to mortuary and prepared the fard of recovery of blood stained and plain earth from the well and also from the place of incident.

6. Dr. R.C. Gupta (P.W. 13) conducted the post-mortem examination on the dead body of the deceased and prepared autopsy (Ext. Ka-33). Nine incised wounds apart from multiple abrasions with swelling all over the body as well as fracture of occipital and parietal bones were found by the doctor. The cause of death was shock and haemorrhage due to anti-mortem injuries. He interrogated the prosecution witnesses; collected the evidence against accused and got arrested all the accused except Ram Sewak, who surrendered before the court. All the accused were kept baparda throughout. Recovery of kulhari, ballam and lathi were made at the instance of the accused persons. Recovery memos were prepared. Accused were put up for test identification parade. Except accused Ram Sewak, all other accused, Veer Singh, Ganga, Omkar and Matadeen were correctly identified by Lala Ram and his wife Vimla Devi without committing any mistake. However, they could not identify accused Ram Sewak.

7. I.O. collected following three types of evidence against accused:--

- (i) evidence of identification,
- (ii) evidence of extra-judicial confession,
- (iii) and evidence of recovery of weapons of crime at their instance.

After completing the investigation, charge-sheet was submitted against all the

accused.

8. The case being exclusively triable by the court of Sessions, it was committed to the court of Sessions. Learned Sessions Judge framed charge u/S. 147, I.P.C. against accused Ganga, Ram Sewak and Veer Singh. Omkar and Matadeen were charged u/S. 148, I.P.C. and all the five accused were charged u/Ss. 302/149 and 376, I.P.C.. They denied the charge and claimed their trial.

9. In order to prove its case, prosecution examined 15 witnesses including the witnesses of fact and formal witnesses. Their evidence shall be discussed at appropriate place in the body of this judgment as and when required.

10. Accused were examined u/S. 313, Cr.P.C. They denied the prosecution allegations and evidence and attributed their false implication on account of enmity. They have filed documentary evidence to establish their enmity with the prosecution witnesses as detailed in the impugned judgment and order.

11. Considering the submissions made by learned counsel for the parties and after making appraisal of the evidence on record, learned trial court, vide impugned judgment and order dated 21.12.1981, disbelieved the evidence of prosecution witnesses led against accused Ganga, Omkar and Matadeen. There was no evidence against Ram Sewak. He acquitted them from the charges levelled against them but the evidence led by the prosecution against accused Veer Singh was found reliable and hence he was held guilty and was convicted u/Ss. 147 and 302, I.P.C. and sentenced, as stated above.

12. Therefore, from the impugned judgment and order dated 21.12.1981, the aforesaid two appeals have emerged out.

13. We have heard Sri S.P. Sharma, learned counsel for the appellant in Criminal Appeal No. 182 of 1982 and for the respondents in Government Appeal No. 946 of 1982 and Sri D.I. Faridi, learned A.G.A. for the State respondent in Criminal Appeal and State appellant for the Government Appeal and perused the records.

14. We are conscious of the fact that appeal filed against the judgment and order of acquittal should be decided in the light of the guidelines given by the Hon"ble Supreme Court from time to time. Learned counsel for the parties have invited our attention towards circumstances pointed out in the case of Chandrappa and Others Vs. State of Karnataka, under which the finding of acquittal may be interfered with by the Appellate Court.

15. The observations made in the aforesaid case was reiterated in a recent decision in Murugesan and Others Vs. State through Inspector of Police, wherein Hon"ble Supreme Court had the occasion to consider the broad principles of law governing the power of the High Court under Section 378 of the Code of Criminal Procedure, 1973. The summary of the relevant principles of law set out in para 21 of the judgment may be extracted hereinunder:

"21. A concise statement of the law on the issue that had emerged after over

half a century of evolution since Sheo Swarup v. King Emperor AIR 1934 PC 227 (2) is to be found in para 42 of the Report in Chandrappa and Others Vs. State of Karnataka, . The same may, therefore, be usefully noticed below:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

i. An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

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

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

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

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

16. Ratan Lal (P.W. 4), Zahar Singh (P.W. 6) and Vijay Kumar (P.W. 14) are the witnesses of extra-judicial confession. The perusal of their evidence on the aforesaid point reveals that none of the witnesses are worth reliance.

17. Ratan Lal (P.W. 4) is resident of village Khailar where Lala Ram, first informant resides. According to Ratan Lal (P.W. 4), first informant Lala Ram came to his house at about 3:00 a.m. in the night of incident and narrated the incident to him inside his house. Confronting his aforesaid statement, Lala Ram (P.W. 2) deposed that he met Ratan Lal in the night of incident at 4:30 a.m. when he was sleeping in a hotel. Therefore, the time and place of meeting of Lala Ram with Ratan Lal (P.W. 4) are contradictory to each other and that cannot be relied on.

18. Ratan Lal (P.W. 4) has deposed that accused Matadeen, Ganga Ram, Omkar, Ram Sewak and Veer Singh were not pre-known to him and he himself was one

of the disciples of the deceased as Lala Ram was. Still Matadeen, Ganga Ram, Sewak Ram and Veer Singh came to him seeking excuse for committing murder of the deceased and committing rape upon Smt. Vimla and they further requested to impose social punishment upon them. Ratan Lal (P.W. 4) asked them to come to him the next day but none of the accused turned up on the next day. The aforesaid deposition of Ratan Lal (P.W. 4) appears to be wholly absurd in view of the fact that being Chela of the deceased he was not in a position to screen the accused from legal punishment in such a heinous offence of rape and murder. Their non-turning up on the next day further fortifies that he was not of any use to accused and, therefore, learned trial court has rightly disbelieved the evidence of extra-judicial confession given by this witness. The evidence of extra-judicial confession is a very weak type of evidence. Unless a person is so influential and is placed in such a dominating social or authoritative position that he is capable of saving the skin of culprits from being prosecuted and punished in accordance with law, no offender would like to confess his guilt unnecessarily. Especially in the present case when his name has not been brought to light during investigation till then. The witness Ratan Lal (P.W. 4), has deposed that 4-5 days after the incident the aforesaid extra-judicial confession was made to him and 4-5 days thereafter he informed it to me I.O. There appears substance in the contention of learned counsel for the accused that no such confessional statement was ever made by either of the accused to this witness rather it was the need of prosecution to create some evidence against accused, be it in the nature of extra-judicial confession and that is why the police picked up Ratan Lal, the Chela of deceased Baba to stand as prosecution witness of extra-judicial confession. The falsity of his evidence reflects from the fact that he has deposed that Lala Ram along with his wife Smt. Vimla went to police station from village Khailar at about 7:00 a.m. and he himself went to the place of incident, i.e. Bharkhandi Hillock. The F.I.R. appears to have been lodged at 11:45 a.m. Contradicting his deposition, Smt. Vimla (P.W. 3) has stated that she did not accompany her husband from her village to police station rather she remained at her house till 10-11:00 a.m. while her husband had left for police station earlier.

19. Likewise, Zahar Singh (P.W. 6) deposed that 4-5 days after the incident, accused Ganga Ram resident of his village Sainiyar came and requested to accompany him to the house of Kamta Prasad, Pradhan. When both of them reached at the house of said Pradhan, they found other accused sitting there. When Kamta Prasad asked them to tell him whatever they like, in one voice all the accused persons present there confessed to have committed the offence of murder of Baba Bharkhandi and rape upon Lala Ram's wife and begged to save from police. Zahar Singh is no other except a milkman who used to supply milk to the policemen. Like Ratan Lal (P.W. 4), Zahar Singh asked them to come on the next day but accused did not turn up. It means that accused Ganga Ram and others were well aware of the fact that Zahar Singh a milkman was not capable of getting them exonerated from the allegations made against them to police. Prosecution has not been able to adduce any evidence to show that this witness

Zahar Singh was in such a privileged position that he could have saved the accused from police. Learned trial court has rightly disbelieved the evidence of this witness.

20. Vijay Kumar (P.W. 14) a resident of village Gorakhpur, District Jabalpur (State of M.P.) is the last witness of extra-judicial confession. According to his deposition, accused Veer Singh was employed in his dairy at Gauri Ghat. He demanded money on 13.04.1978 to return to his home as he was in trouble. On the next day, Vijai Kumar asked him about the nature of his trouble whereupon he disclosed that he had committed the murder of a Baba at Jhansi and then this witness got accused Veer Singh arrested by police. In cross-examination, this witness has stated that accused Veer Singh had worked at his dairy for a period of 5-6 days and he had asked Rs. 30/- only to return to Jhansi. He has further deposed that he had maintained a register wherein he has written that accused Veer Singh was a resident of Kanpur as disclosed by him but the register has neither been produced in the court nor given to the I.O. The witness admitted that he did not pay the aforesaid amount of Rs. 30/- to the accused till date rather he got him arrested by police. There appears substance in the contention of learned counsel for the appellant Veer Singh that no prudent man would believe that if after committing the offence of murder and rape accused left the place of incident and went up to Jabalpur so that he may not be arrested by local police in the aforesaid offences, he would prefer to return within a week at the risk of being arrested. Defence has given suggestion to this witness in his cross-examination that he is telling a he on the instance of one Siya Ram, a resident of the village of appellant with whom he was on inimical terms on account of village party friction. The witness expressed his ignorance as to whether or not accused Veer Singh had gone to Jabalpur to see S.D.O. in M.E.S. from where he was apprehended.

21. There was no occasion for accused to make extra-judicial confession before this witness, a resident of another State with whom he was not pre-acquainted. His testimony is not free from doubt and is not worthy of credence. It is not safe to rely on and base the conviction of accused Veer Singh upon his evidence of uncorroborated testimony of extra-judicial confession.

22. Learned trial court appears to have fallen in error in relying upon his evidence without assigning any reason. The discussions of the evidence of this witness made by the learned trial court in the body of the judgment impugned makes it crystal clear that not even a single reason or reasoning has been recorded for placing implicit reliance on his evidence. The finding recorded by the learned trial court to the effect that the evidence of this witness Vijay Kumar (P.W. 14) may be relied on and acted upon is purely arbitrary and, therefore, this finding deserves to be set aside. The conviction of accused Veer Singh cannot be based on the uncorroborated testimony of extra-judicial confession deposed to by this witness who is wholly unreliable.

23. From the scrutiny of evidence of extra-judicial confession led by prosecution

against accused, it is amply clear that the said evidence is not sufficient for the court to hold conviction of either of the accused in the charge framed against them. The evidence of extra-judicial confession is a very weak type of evidence and it is not safe to base conviction of accused solely on its basis, if other surrounding circumstances and the materials available on the record do not suggest his complicity.

24. So far as the evidence relating to recovery of weapons on the pointing out of the accused persons is concerned, we have delved into the evidence available on record. Accused Matadeen and Ganga Ram were allegedly arrested by S.I. Chura Singh (P.W. 10) on 06.03.1978 from their houses in village Sainiyar in the presence of prosecution witness Zahar Singh. It is said that accused Matadeen gave to the police an axe and a lathi from his house which are material Exhibits 2 & 3 while accused Ganga Ram is said to have given a lathi and a ballam to the police allegedly used in the crime. Accused Omkar was arrested on 11.03. 1978 in the presence of Mathura (P.W. 5) and Govind Singh (P.W. 8). He is said to have handed over axe material Exhibit 1. As per chemical examiner's report, disintegrated blood was found on the axe given by Matadeen and no blood was found on any other article. Since the blood found on the axe of accused Matadeen was disintegrated, the determination of blood group could not be made.

25. To prove the factum of recovery, prosecution has examined Mathura (P.W. 5) who has deposed that accused Omkar was arrested by I.O. in his presence and he promised to handover the axe used in the crime. He led them to his house and brought out a blood stained axe material Exhibit 1 from inside the house. Recovery memo Exhibit Ka-7 was prepared by I.O. and the said axe was sealed at the spot. There appears substance in the contention of learned counsel for the appellant Veer Singh that since no blood has been found on the axe, therefore, there is no evidence to connect this axe with the crime of alleged murder.

26. Govind Singh (P.W. 8) is another witness of recovery of axe from the house of Omkar. He has admitted that Daya Ram was also residing in the same house of Omkar but he was not present in his house at the time of recovery. No witness of vicinity has been produced to corroborate his testimony. Moreover, it cannot be said that the house in question was in exclusive possession of accused Omkar.

27. This witness Govind Singh has flatly denied to have stood a prosecution witness against Matadeen accused in a police case of cutting of wood launched on the information of Dal Chand which is the motive of this case as stated above but the certified copy Exhibit Ka-4 of his depositions made in the aforesaid criminal trial falsifies his statement and proves that he was a witness against Matadeen. Hence, this witness is not a reliable witness and the learned trial court has rightly disbelieved his testimony.

28. Another witness of recovery is Zahar Singh (P.W. 6) who has deposed that Matadeen, Ganga Ram were arrested from Hillock on 06.03.1978 in his presence. They were threatened by I.O. who asked them to make disclosure statement

about the case otherwise they would be beaten. On the threat extended by police, Matadeen delivered axe and ballam whereas accused Ganga Ram delivered lathi as stated above. No human blood was found on the lathi or axe. Learned trial court has rightly disbelieved this witness Zahar Singh on the ground that the alleged disclosure statement has been made under the threat of beating, therefore, it is inadmissible because it was not a discovery on account of disclosure statement of accused, made voluntarily.

29. On the basis of the aforesaid statements, learned trial court has rightly concluded that accused Ganga Ram and Matadeen did not make any voluntary confession before the police and as per the statement of Zahar Singh, I.O. had threatened accused to beat and only then, they made disclosure statement and for want of presence of human blood on the recovered weapons, the evidence of recovery is not helpful to the prosecution and that cannot form the basis of conviction of accused.

30. Now, we consider the evidence of identification.

31. It is settled law that identification proceedings are as much in the interest of prosecution as in the interest of the accused. The acquittal or conviction of accused can be based on substantive evidence only. Substantive evidence is the evidence which is given by witness before the court. In the cases based on identification, the performance of witnesses in test identification parade has its corroborative value. If no proceeding for identification is held, the witness's reliability cannot be put to a test. In short, test identification is designed to furnish evidence to corroborate the evidence which the witness concerned tenders before the court. The Court is bound to follow the rule that evidence as to the identification of an accused person must be such as to exclude with reasonable certainty the possibility of an innocent person being identified. The evidence of identity must be thoroughly scrutinized, giving benefit of doubt to the accused. But if after a thorough scrutiny there appears to be nothing on the record to suspect the testimony of the identification witnesses, the Court ought not to feel shy in basing a conviction on such evidence alone. This is the golden rule to be followed by the courts while appreciating the evidence of identification.

32. In Asharfi and Another Vs. The State, , this Court has held that while appreciating the identification evidence, following aspects of the matter ought to be looked into:--

- (1) Did the identifier know the accused from before?
- (2) Did he see him between the crime and the test identification?
- (3) Was there unnecessary delay in the holding of the test?
- (4) Did the Magistrate take sufficient precautions to ensure that the test was a fair one?
- (5) What was the state of the prevailing light?

- (6) What was the condition of the eye-sight of the identifier?
- (7) What was the state of his mind?
- (8) What opportunity did he have of seeing the offenders?
- (9) What were the errors committed by him?
- (10) Was there anything outstanding in the features or conduct of the accused which impressed him?
- (11) How did the identifier fare at other test identifications held in respect of the same offence?
- (12) Was the quantum of identification evidence sufficient?

33. The performance of each witness in the identification parade of accused persons is of prime importance. In appraising the evidence of witnesses who identified a particular accused, the Court should take into account the result of their identification in all other parades held in connection with the same offence. Before the Court holds an accused guilty, it must make certain that chance has not been responsible for his identification. If a suspect is mixed with nine innocent persons and is identified by a witness, the mathematical probability of the witness picking him out by chance is one in ten. Hence only one identification cannot eliminate the possibility of the pointing out being purely through chance, and for this reason, it is insufficient to establish the charge. If the same suspect is identified by two witnesses, the probability of his being pointed out by chance is one in a hundred. The possibility of chance playing a part in his identification is therefore slight, and, other conditions being satisfied, two good identifications should be enough to establish his guilt beyond reasonable doubt. In such a case, it can safely be assumed that his identification was perfectly genuine but the human nature is to commit mistakes which are bound to occur. Therefore, if in a case, without committing any mistake, witness correctly identifies accused with a 100% performance, then it casts a serious doubt on the genuineness and purity of their identification evidence and possibility of the witness being pre-acquainted with the accused or accused being shown to such witnesses after the arrest and before test identification parade cannot be ruled out.

34. In case of every offence committed during the hours of darkness, the prevailing light is a matter of crucial importance. Most of the crimes like dacoity or violence against a particular victim cannot be committed in pitch darkness because even the criminals need some light to identify their targets or to discover then-desired goods and they have to take precaution to guard against counter attacks. All this makes the presence of adequate source of light imperative. The existence of the source of light on the place of incident may become a normal phenomena. Moonlight too cannot be ignored. Even the miscreants arm themselves with electric torches both for enabling them to see their way and to facilitate their work and for the said purpose they flash their torches on the face of a witness whereby he gets dazzled for some moments and

may not be able to see anything. While considering the test identification of a witness, the court is to judge as to what was the state of his mind during the incident. It cannot be disputed that calm minds view a thing better than emotionally-stirred persons, for excitement or fear or terror may subvert the mind. Yet a witness's mind may all the time be riveted on the object or the incident that impresses his mind and thus a close detachment may follow in his observing connected matters even though these happen simultaneously.

35. The prosecution witnesses, Lala Ram and his wife, Smt. Vimla Devi, have deposed that they had seen the miscreants/respondents for the first time in the incident and thereafter in the identification parade conducted in the jail. They were not pre-acquainted with them. They had not seen either of the miscreants between the date of the incident and the date of identification parade. Prosecution has led further evidence to the effect that soon after the arrest and recovery from the accused persons, they were kept "baparda" with the instructions that they should keep themselves "baparda" throughout and, in fact, according to prosecution, they were not shown and identified by the prosecution witnesses after their arrest till they were put up for test identification.

36. Contrary to it, accused Matadeen has stated in his statement recorded u/S. 313, Cr.P.C. that it is wrong to say that after his arrest, he was kept "baparda" and nobody was allowed to see him. According to him, after his arrest, he was detained in the police station for three days where he was shown and got identified by prosecution witnesses, Lala Ram and his wife, Smt. Vimla Devi. Apart from it, these witnesses were pre-known to him and all other prosecution witnesses, Sidh Ram, Net Ram, Govind Singh, Jahar Singh and others are inimical to him. They had already falsely deposed against him earlier in another case and prosecution witnesses, Jahar Singh and Govind Singh are real brothers inter se. He has further stated that his sister resides in village Khailar in the same mohalla in which Lala Ram resides. He used to go to see his sister and Lala Ram and his wife, Smt. Vimla were pre-known to him.

37. Accused Ram Sewak has stated that he surrendered before the court and was sent to jail "baparda".

38. Accused Ganga Prasad stated that he was arrested from his house by Chura Singh (Daroga). No lathi was recovered from his possession. He was not made "baparda" rather he was shown to the witnesses in the police station. Prosecution witnesses, Lala Ram and his wife, Smt. Vimla Devi, were pre-known to him. He always passes through their village. Witnesses are inimical to him and they belong to one pedigree inter se.

39. Accused Omkar stated that he was not made baparda after his arrest. Prosecution witnesses, Lala Ram and his wife, Smt. Vimla Devi, were pre-acquainted to him. His sister is married in village Khailar where he often used to go. Prosecution witnesses, Lala Ram and his wife, Smt. Vimla Devi, used to come to the house of his sister in kathavarta. They had quarrelled with him.

Prosecution witnesses, Jahar Singh, Govind Singh are criminals. They often used to get his crop grazed by their animals resulting into quarrel. Siya Ram and Net Ram are history-sheeters and they are under the influence of police. They have falsely implicated him in this case.

40. Veer Singh accused has stated that he was not kept "baparda" after his arrest. He has falsely been implicated in this case on account of enmity with the villagers. He never absconded. He had gone to see Sri Tikam Singh, S.D.O. at Jabalpur, when he was coming back, prosecution witness Siya Ram Yadav saw him at Jabalpur and got him arrested.

41. From the perusal of the records and performance of these witnesses, Lala Ram and his wife, Smt. Vimla Devi, in the test identification parade of accused persons, it transpires that the contention of accused bears substance in view of the fact that without committing any mistake in the identification parade, both these prosecution witnesses, Lala Ram and his wife, Smt. Vimla Devi, had correctly identified all the accused who were arrested by police. Their performance is 100 per cent, which is too good to believe. It is noteworthy that out of these respondents, Sewak Ram was not arrested by the police rather he surrendered himself before the court of learned Magistrate from where he was sent to jail "baparda". There was no opportunity to the witnesses to see and recognize his face after his surrender and prior to the date of his identification parade in the jail. Probably, this is the reason that he could not be identified either by Lala Ram or by Smt. Vimla Devi, who had earlier claimed in the FIR that they had seen and recognized the faces of all the miscreants, who had committed the murder and rape.

42. Hundred per cent, performance of witness in the test identification parade of accused suggests that the witnesses were either pre-known to the accused or they were provided opportunity to see and recognize the faces of miscreants after the incident and prior to the date of their test identification. Such identification loses its corroborative value and it is not safe to base conviction of accused on the basis of such identification result.

43. Even otherwise, prosecution witnesses, Lala Ram and his wife, Smt. Vimla Devi, do not appear to be reliable witnesses. Smt. Vimla Devi has deposed that she did not accompany her husband to police station to lodge the FIR while her husband Lala Ram deposed that he along with his wife Smt. Vimal Devi went to the police station and lodged the report on 25.2.1978, at 11.45 a.m. Smt. Vimla Devi had deposed that she remained at her house up to 11.00 a.m. while her husband had left the house for police station at 07.00 a.m. Lala Ram has admitted in his cross-examination that in a case of teasing a lady prior to this incident, he was convicted and sentenced for six months" imprisonment. In the FIR, he had stated that there was a marhi at the hillock wherein he, his wife, minor son and Baba Bharkhandi were sleeping but during the course of trial, he deposed that Baba was sleeping in the "kutiya" and he along with his family was sleeping in the marhi. According to the FIR, Baba was beaten inside the kuti,

wherein both the aforesaid witnesses were also sleeping but during the course of trial, both these witnesses deposed that Baba was dragged from marhi and was killed at chabutara situated outside marhi. In the FIR, Lala Ram mentioned that the miscreants started beating the Baba till he took his last breath but during the course of trial, he and his wife, Smt. Vimla Devi, both deposed that Baba (deceased) was assaulted with kulhari and ballam. There appears substance in the finding recorded by learned trial court that word "beating" connotes an idea that probably lathi or danda was used at the deceased to inflict injuries his person but now the first version has been changed and they left the theory of Baba being beaten and introduced a new theory of injuries being caused with kulhari and ballam.

44. It transpires from the depositions of Lala Ram and Smt. Vimla Devi that none of these witnesses had an opportunity to see the miscreants committing the murder of the deceased because murder was committed at the "chabutara" outside the "kutiya" and throughout during the commission of the murder both these witnesses were inside the "marhi". Their mental condition was not such as to encourage them to see the miscreants committing the murder especially in view of the fact that miscreants had warned them to keep silence as they had nothing to do with them rather they had come to take the life of the Baba (deceased) who was habitual to make complaints against them.

45. So far as the opportunity available to Lala Ram and Smt. Vimla Devi to recognize the faces of miscreants during the commission of rape against her will is concerned, there are no two opinions that prosecution has established that there were sufficient sources of light viz. moonlight, torches of the miscreants and the light produced from lighting bidies especially when the miscreants were very close to her during commission of rape.

46. Be it known that learned trial court has rightly held that charges of rape against accused respondents are not proved for want of evidence of injuries and symptoms of rape on the body of the victim.

47. 7-8 miscreants are said to have committed rape upon the victim for about 45 minutes after which she was thrown naked on an uneven surface of the earth. Absence of any injury on her person rules out the commission of rape upon her. There was no inflammation either on her private parts or on her breast although according to her, all the miscreants were rubbing her breast throughout. Since medical evidence is inconsistent with the ocular testimony, therefore, none of these two witnesses are reliable witnesses.

48. Lala Ram has stated that miscreants were putting "dhathas" on their faces while committing the murder of the said Baba but later on they removed the same but this fact is not mentioned in the FIR.

49. But, Smt. Vimla Devi did not say that miscreants were putting "dhata" at any moment of time. The case of Lala Ram is that he has lodged the oral report to the police station but contrary to it, Head Constable, Kali Charan (P.W. 7), has

deposed that the FIR was prepared by him on the basis of a written report, which is not available on record. Prosecution has neither declared this witness hostile nor stated otherwise on the correctness of aforesaid statement of Head Constable. This is such a glaring defect, which is fatal to the prosecution case.

50. Undisputedly, learned trial court has come to the conclusion in the impugned judgment and order that accused Ganga, Matadeen, Ram Sewak and Omkar were not found guilty for the charges levelled against them. Veer Singh alone has been found guilty u/Ss. 147 and 302/149, I.P.C. .

51. Be it known that no unlawful assembly can be formed by less than five accused persons. Therefore, if we include 2 or 3 unknown persons, who could not be brought to light as accused with Veer Singh during the course of investigation even then no unlawful assembly can be said to have been formed, therefore, accused Veer Singh cannot be held guilty either u/S. 147, I.P.C. or u/S. 302, I.P.C. with the aid of section 149, I.P.C.

52. In the facts and circumstances of the case, the finding of acquittal recorded by learned trial court was only possible view and no other view is possible.

53. Government Appeal is, therefore, dismissed. Criminal appeal is allowed. Impugned judgment and order which distinctly relates to the conviction and sentence of accused Veer Singh u/S. 147 and 302/149, I.P.C. is hereby set aside. He is not found guilty and therefore, he is acquitted of the charge framed against him. He need not surrender. His bail bonds are cancelled and sureties are discharged.