

**HIGH COURT OF TRIPURA**

**A\_G\_A\_R\_T\_A\_L\_A**

**Crl.A(J). No. 51 of 2019**

1. Manik Miah, son of Sultan Miah, resident of Tepania, P.S: R. K. Pur, District: Gomati, Tripura.

*.....Appellant*

**-V E R S U S-**

1. The State of Tripura.

*..... Respondent.*

**Crl.A(J). No. 54 of 2019**

1. Arjan Ali @ Ali Arjan, son of Saheb Ali, resident of Hadra, Gulmura, P.S. Kakraban, District: Gomati, Tripura.
2. Bahar Uddin, son of Mana Mia, resident of Hadra, Khastilla, P.S. Kakraban, District: Gomati, Tripura.

*.....Appellants*

**-V E R S U S-**

1. The State of Tripura.

*..... Respondents.*

**B\_E\_F\_O\_R\_E**

**HON'BLE MR. JUSTICE T. AMARNATH GOUD**

**HON'BLE MR. JUSTICE ARINDAM LODH**

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For Appellant(s)	:	Mr. P. K. Biswas, Sr. Advocate. Mr. P. Majumder, Advocate.
For Respondent(s)	:	Mr. Sumit Debnath, Addl. P.P.
Date of hearing	:	<b>01.12.2021</b>
Date of delivery of judgment and order	:	<b>22.12.2021</b>
Whether fit for reporting	:	<b>YES</b>

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**JUDGMENT & ORDER**

**[T. Amarnath Goud, J]**

Heard Mr. P. K. Biswas, learned senior counsel assisted by Mr. P. Majumder, learned counsel appearing for the appellants. Also heard Mr. Sumit Debnath, learned Addl. Public Prosecutor appearing for the respondent-State.

[2] This criminal appeal under Section-374 of the Code of Criminal Procedure is directed against the judgment and order of conviction dated 12.07.2019 passed by the learned Sessions Judge, Gomati Judicial District, Udaipur, in connection with case No. S.T. 05 (GT/U) of 2017, whereby and whereunder, the appellants have been convicted and sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.10,000 each, for committing offence punishable under Section-302 read with Section-34 of IPC, with default stipulations.

[3] The factual background of the prosecution case is that one Ayat Ali, the complainant [PW-1], son of Abdul Kadir of Hadra, under Kakraban Police Station lodged a written ejahar with the Officer-in-charge of Kakraban police station on 10.10.2016 stating, inter alia, that on 09.10.2016 his elder brother, namely, Ahmed Ali [deceased herein], went to his shop at Hadra Hathat Chowmuhanani but, did not return at night. It has been further alleged that at night at about 2.00 am, when his son Kabir Hossain [PW-26], son of the complainant was returning home by an auto rickshaw after enjoying Durga Puja at Udaipur town, found that the accused persons, namely, Arjan Ali @ Ali Arjan and Manik Miah along with other 2/3 persons were engaged with an altercation with Ahmed Ali on the road in front of the puja pandal of Hadra Hathat Chowmuhanani. As there were other passengers in the auto rickshaw, the driver did not stop the auto there. After the passengers got down, Kabir Hussain again returned to the place of occurrence where he saw the accused persons along with other 2/3 persons squabbling with Ahmed Ali. Thereafter, when Kabir Hussain was returning to his house, he saw Ahmed Ali was lying dead on the pucca road with bleeding injuries. It was alleged by the complainant that his brother was killed by sharp cutting weapon and he suspected that the accused persons named above, killed his brother.

[4] On the basis of the aforesaid complaint dated 10.10.2016, the Officer-in-charge of Kakraban Police Station registered Kakraban Police Station FIR No. 2016KKB080 dated 10.10.2016 and treating the said complaint as FIR, registered Kakraban P.S. Case No. 80 of 2016 under Section-302/34 of IPC against the accused persons. After criminal law was set in motion, the investigating authority started investigation and subsequently, the accused persons, namely, Arjan Ali @ Ali Arjan, Manik Miah and Bahar Uddin were arrested. On completion of the investigation, the investigating officer submitted charge-sheet against the accused persons, for commission of offence punishable under Section-302/34 of IPC. Subsequently, as the case was exclusively triable by the Court of Sessions, the case was committed to the Court of learned Sessions Judge, Gomati Judicial District, Udaipur, for trial in accordance with law.

[5] After hearing both sides and on perusal of the documents submitted by the prosecution, the learned Sessions Judge, framed charge against the above named accused-persons, the appellants herein, for the offence punishable under Sections-302/34 of IPC, to which the appellants pleaded not guilty and claimed to be tried.

[6] To substantiate the charge, the prosecution adduced as many as 42 [forty-two] witnesses including the complainant and also exhibited certain relevant documents and materials [Exbts.1 to 24] including the inquest report.

[7] On closure of prosecution evidence, the accused-persons were examined separately under Section-313 of Cr.P.C. for having their response in respect of the incriminating materials surfaced in the evidence, as adduced by the prosecution, wherein, the accused-persons declined to adduce any evidence in support of their defence. Thereafter, on appreciation of the evidence and materials on record, the learned

Sessions Judge by the judgment and order dated 12.07.2019, convicted the accused-persons, namely, Arjan Ali @ Ali Arjan, Manik Miah and Bahar Uddin, under Sections-302/34 of IPC and sentenced them to suffer rigorous imprisonment for life and to pay a fine of Rs.10,000/- each and in default to pay fine, to suffer further rigorous imprisonment for 6 [six] months.

[8] Being aggrieved by and dis-satisfied with the said judgment and order of conviction dated 12.07.2019 passed by the learned Sessions Judge, Gomati Judicial District, Udaipur, in Case No. S.T. 05 (GT/U) of 2017, the appellants herein have preferred this appeal before this Court.

[9] Mr. S. Debnath, learned Addl. Public Prosecutor appearing for the respondent-State to establish the case against the accused-persons has contended that prosecution had examined Md. Ayat Ali (PW-1), the brother of the deceased and Kabir Hossain (PW-26), the nephew of the deceased also the media persons, independent witnesses, medical officers, forensic experts and investigating officers. Though the prosecution rests on circumstantial evidence, the incriminating circumstances against the accused persons are strong and convincing enough to fasten guilt on the accused persons.

[10] He further stated that there is evidence of last seen together given by the independent witnesses which is convincing and trustworthy and moreover, the weapon of offence was also recovered from the place of occurrence. Motive of the crime has also been clearly established from the evidence of witnesses. The medical evidence relating to the injuries of the deceased, also corroborative in nature, being caused by the weapon of offence i.e. the spade. Mr. Debnath, learned Addl. P.P. further stated that a complete chain of circumstances on the commission of murder of the deceased has been established against the accused persons.

[11] On the basis of the said premises, the contention of the learned Addl. P.P. is that the prosecution has successfully proved the case against the accused persons beyond reasonable doubt. So, he urged for conviction of the accused-persons in view of the charge framed against them and for their exemplary punishment.

[12] On the other hand, Mr. Biswas, learned senior counsel assisted by Mr. P. Majumder, learned counsel appearing for the accused-persons has submitted that the wife of the deceased also sworn an affidavit to the effect that the accused-persons were not involved in the murder. He also submitted that there were number of inconsistencies and contradictions in the evidences of the PWs rendering their evidence doubtful with regard to the involvement of the accused-persons in the alleged crime.

[13] He further contended that the independent witnesses have not corroborated the prosecution case in regard to the commission of murder of the deceased by the accused-persons. He has stated that the deceased was found dead in the road and there is no evidence strong enough to show that the accused-persons committed the crime. The road being an open place was exposed to all and sundry and as such it could be anybody who committed the crime and on the above premise, Mr. Biswas, learned senior counsel averred that the prosecution has miserably failed to establish the case against the accused-persons beyond shadow of doubt and for that reason, Mr. Biswas, learned senior counsel urged for acquittal of the accused persons from the charge leveled against them.

[14] To fortify his submission, Mr. Biswas, learned senior counsel appearing for the appellants relied upon a decision of the Apex Court in paragraphs No. 13 and 14 of ***Javed Masood and Anr. v. State of Rajasthan***, reported in (2010) AIR SCW 1656,. For the purpose of reference, the relevant paragraphs may be reproduced hereunder:

"13. In the present case the prosecution never declared PWs 6,18, 29 and 30 "hostile". Their evidence did not support the prosecution. Instead, it supported the defence. There is nothing in law that precludes the defence to rely on their evidence. This court in *Mukhtiar Ahmed Ansari vs. State (NCT of Delhi)*<sup>1</sup> observed:

"30. A similar question came up for consideration before this Court in *Raja Ram v. State of Rajasthan*, (2005) 5 SCC 272. In that case, the evidence of the Doctor who was examined as a prosecution witness showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The Doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the Doctor and it was binding on the prosecution.

31. In the present case, evidence of PW1 Ved Prakash Goel destroyed the genesis of the prosecution that he had given his Maruti car to police in which police had gone to Bahai Temple and apprehended the accused. When Goel did not support that case, accused can rely on that evidence."

14. The proposition of law stated in the said judgment is equally applicable to the facts in hand."

[15] Mr. Biswas, learned senior counsel appearing for the accused-persons has further relied upon a decision of the Apex Court in paragraphs-16 and 17 of *Harbeer Singh v. Sheeshpal and Others with State of Rajasthan v. Sheeshpal and others*, reported in *AIR 2016 SC 4958*, where it has been held thus:

"16. As regards the incident of murder of the deceased, the prosecution has produced six eye-witnesses to the same. The argument raised against the reliance upon the testimony of these witnesses pertains to the delay in the recording of their statements by the police under Section 161 of Cr.P.C. In the present case, the date of occurrence was 21.12.1993 but the statements of PW1 and PW5 were recorded after two days of incident, i.e., on 23.12.1993. The evidence of PW6 was recorded on 26.12.1993 while the evidence of PW11 was recorded after 10 days of incident, i.e., on 31.12.1993. Further, it is well-settled law that delay in recording the statement of the witnesses does not necessarily discredit their testimony. The Court may rely on such testimony if they are cogent and credible and the delay is explained to the satisfaction of the Court. [See *Ganeshlal Vs. State of Maharashtra*, (1992) 3 SCC 106; *Mohd. Khalid Vs. State of W.B.*, (2002) 7 SCC 334; *Prithvi (Minor) Vs. Mam Raj & Ors.*, (2004) 13 SCC 279 and *Sidhartha Vashisht @ Manu Sharma vs. State (NCT of Delhi)*, (2010) 6 SCC 1].

17. However, *Ganesh Bhavan Patel Vs. State Of Maharashtra*, (1978) 4 SCC 371, is an authority for the proposition that delay in recording of

statements of the prosecution witnesses under Section 161 Cr.P.C., although those witnesses were or could be available for examination when the Investigating Officer visited the scene of occurrence or soon thereafter, would cast a doubt upon the prosecution case. [See also *Balakrushna Swain Vs. State Of Orissa*, (1971) 3 SCC 192; *Maruti Rama Naik Vs. State of Maharashtra*, (2003) 10 SCC 670 and *Jagjit Singh Vs. State of Punjab*, (2005) 3 SCC 68]. Thus, we see no reason to interfere with the observations of the High Court on the point of delay and its corresponding impact on the prosecution case.”

[16] Mr. Biswas, learned senior counsel appearing for the accused-persons has further relied upon a decision of the Apex Court in paragraphs-9 of *Raja Ram v. State of Rajasthan*, reported in (2005) 5 SCC 272, wherein the Apex Court has observed thus:

“9. But the testimony of PW-8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW-5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (sic declare) PW-8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW-8 is binding on the prosecution. Absolutely no reason, much less any good reason, has been stated by the Division Bench of the High Court as to how PW-8’s testimony can be sidelined.”

[17] In view of the above submissions and observations, let us examine the evidence of Md. Ayat Ali, the brother of the deceased (PW-1), which is very important for determining the case in hand. PW-1, in his deposition has stated that the deceased Ahmed Ali was his elder brother. On the second day of Durga Puja at about 3.00 pm Ahmed Ali (deceased herein) went to his shop for selling meat, situated at Hathat Chowmuhani but thereafter, he did not return to the house. At about 2.00 am in the night his (PW-1) son, Kabir Hossain (PW-26), went out of home to enjoy Durga Puja and after returning to home told that the body of Ahmed Ali was lying on the middle of the road nearby their house. Thereafter, they rushed to the spot and found his brother was already dead with severe bleeding injuries on his right eye and back side of this head. Thereafter, they called one Sriman Bhowmik (PW-18), the elected member of

Panchayet Samity and subsequently, police personnel came and brought the dead body to Kakraban hospital. PW-1 further stated that prior to finding of dead body of the deceased on the road side, Kabir Hossain, nephew of the deceased did not see Ahmed Ali in alive condition on that night in any place. He further deposed that, on the following morning, he along with Sriman Bhowmik and some others went to Kakraban P.S. and there Sriman Bhowmik brought one ejahar written by somebody else. Thereafter he signed on the said ejahar which is marked as Exbt.1.

[18] Kabir Hossain, PW-26 nephew of the deceased in his deposition has deposed that Ahmed Ali is the elder brother of his father Ayed Ali (PW-1). In the fateful night of Astami Durga Puja when he returned to his home by an auto rickshaw after enjoying puja, he noticed that Ahmed Ali was lying on the ground near a pond on Hadra Gulumura road. After reaching home, he informed his another uncle namely, Rahamat Ali about the incident and thereafter they all came to the place of occurrence and found severe bleeding on the person of Ahmed Ali, but he could not notice any specific injury. Thereafter, police was informed and at about 3.30am police came to the spot on that night. He also stated that he did not see the deceased in alive condition along with any other persons.

[19] It is pertinent to mention here that the learned trial court after examining the evidence of PWs-1 and 26, declared the said witnesses hostile as they deviated from their previous statements recorded under Section-161 of Cr. P.C.

[20] PW-17, Naresh Ch. Shil is a neighbour of the deceased. His evidence relates to the recovery of some voter I-card etc., one long pant, one white colour full sleeve shirt and one black mobile phone from the house of the Ali Arjan, though he denied being part of the seizure by the



police officer. Subsequently, after his cross-examination he was declared hostile.

[21] PW-26, Kabir Hossain, nephew of the deceased Ahmed Ali, stated that on the night of Astami Durga Puja in the year 2016 he returned home along with Jamshed Ali by an auto rickshaw of Rasel Miah after enjoying Durga Puja. On the way he found Ahmed Ali was lying on the road side near a pond on Hadra-Gulmura road with severe bleeding injuries. Reaching home he informed his uncle Rahamat Ali. Thereafter, they all came to the spot. Police was informed and at about 3.30am police came to the spot. Later on, PW-26 was declared hostile and was cross-examined by the prosecution which he declined to have stated to the investigating officer that at *“Hathat Chowmuhan he found Ahmed Ali, Bikash, Ali Arjan, Manik Miah, Bahar Uddin and 3/4 others were altercating with each other in the road and at that time those persons were giving threat to Ahmed Ali that in future they would see him.”*

[22] PW-32, Smt. Monica Debbarma, is the Senior Scientific Officer-cum-Assistant Chemical Examiner of the SFSL, who examined the viscera of the deceased. She has opined that she examined those items (samples of kidney and lever of the deceased, Exbt.E.10 & stomach of the deceased Exbt.11) and finally observed that ethyl alcohol was detected in the viscera samples of the deceased which suggested that he had consumed liquor prior to his death.

[23] PW-35, Ripan Ch. Datta, in his evidence has deposed that at about 11.00pm/12.00am on that night, suddenly a quarrel broke out in the puja pandel between Arjan Ali, Manik Miah, Anch Miah and Bahar Uddin. Thereafter, the puja committee closed the celebration and he went to Daspara puja pandal. He further deposed that at about 1.30/2.00am when he was returning from said puja pandal to his house, he noticed that

Ahmed Ali was returning to his house on foot with a bi-cycle on his hand and at a distance of 10/12 cubits behind, Ahmed Ali, Arjan Ali, Bahar Uddin and Manik Miah were also going behind him. He saw one brown colour piece of cloth and one spade in the hand of Arjan Ali.

[24] PW-37, Sri Bikash Kar, deposed that on the night of Astami at about 11.30pm Arti was being performed in the puja pandal and he was also present there. Suddenly, he heard quarrel took place between Manik Miah and Anch Miah. He further deposed that the distance between puja pandal and his house would be around 50 meters. At about 1.30am in that night suddenly he heard hue and cry coming from puja pandel. Thereafter he proceeded towards the puja pandel and near the said pandel he noticed that Ahmed Ali was going towards his house situated at Gulmura and Ali Arjan, Manik Miah and Bahar Uddin were also following him keeping a distance of 7/8 cubits. He noticed there was a spade and one brown colour piece of cloth meant for decoration of pandel in the hand of Ali Arjan.

[25] In view of the above observation, this Court is of the opinion that during cross-examination, both PW-1 and PW-26, did not support the prosecution case and accordingly, they were declared hostile and most of the witnesses examined by the prosecution were declared hostile. Not a single witness implicated the accused-persons, the appellants herein, with the commission of murder of the deceased and, as such, the learned trial Court has committed serious error and illegality by convicting the appellants under Sections-302/34 of IPC, which is liable to be set aside.

[26] On perusal of the evidence on record, it is crystal clear that the order of conviction and sentence passed by the learned trial Court is based on no evidence and there is no evidence on record to establish any case against the appellants and, as such, the order of conviction and

sentence passed by the learned trial Court is based on mere surmise and conjecture and also passed on no evidence.

[27] Though the prosecution had examined as many as 42 witnesses but, on perusal of the evidences furnished by the prosecution witnesses, it has been found that there is no evidence direct/indirect or circumstantial even to suspect the appellants to kill the deceased. The entire facts and circumstances clearly show that the allegations/story put forward by the prosecution is quite absurd and against the human conduct and the learned trial court should not have placed any reliance upon the prosecution story.

[28] There is no eye witness to the incident and the brother of the deceased, the complainant (PW-1) and the nephew of the deceased PW-26, who is the son of PW-1, also turned hostile. The circumstantial evidence is not supporting the case of the prosecution with regard to who killed Ahmed Ali (the deceased). As there is no circumstantial evidence against the accused & also recovery of spade confirming the commitment of crime by the accused, there is no strap link to fix the accused. In the above background, we are of the opinion that the order of conviction and sentence passed by learned Sessions Judge, Gomati Judicial District, Udaipur, in connection with case No. S.T. 05 (GT/U) of 2017, under Sections-302/34 of IPC, is liable to be set aside and quashed.

[29] The evidence of PW-32 and PW-37 is also not supporting the case of the prosecution. As per the prosecution case that the accused persons followed the deceased in the late hour with a spade in hand with some cloths wrapped with it, do not indicate that they killed Ahmed Ali, the deceased herein. The altercation and some commotion between both the accused-persons and the deceased, which is originally said to have been stated by PW-26 nephew of the deceased who is also the son of PW-1 Ayet Ali, did not support the case of the prosecution.

[30] In that view of the matter, we are of the opinion that the judgment and order of conviction and sentence passed by the learned Sessions Judge, Gomati Judicial District, Udaipur, in connection with case No. S.T. 05 (GT/U) of 2017, stands set aside and quashed.

[31] Hence, the instant appeals filed by the accused-persons, namely, Arjan Ali @ Ali Arjan, Manik Miah and Bahar Uddin, stand allowed and the accused-appellants shall be released forthwith, if not wanted in connection with any other case. As a sequel, miscellaneous applications pending, if any, shall stand closed. Send down the LCRs.

**JUDGE**

**JUDGE**

*A.Ghash*

