

**THE HIGH COURT OF TRIPURA
AGARTALA**

CRL. REV. P. NO.49 OF 2006

Shri Alek Miah,
S/O Late Mangal Miah of
Gakulpur(Khilpara Tilla),
P.S. R.K. Pur, Udaipur,
District-South Tripura.

..... *Accused*

For and on behalf of the accused
Shri Raja Miah,
S/O Late Ramajuddin Miah,
Purba Gakulpur(Khilpara Tilla),
P.S. R.K. Pur, Udaipur,
South Tripura.

..... *Petitioner*

- *Vs* -

The State of Tripura

..... *Respondent*

CRL. REV. P. NO.59 OF 2006

Shri Tajer Islam @ Taju Mia,
S/O Kala Mia,
R/O Chanban,
P.S. R.K. Pur,
District-South Tripura.

..... *Petitioner(accused)*

- *Vs* -

The State of Tripura

..... *Respondent*

**BEFORE
THE HON'BLE MR. JUSTICE S.C. DAS**

Advocate for petitioner in
Crl. Rev. P. No.49 of 2006 : Mr. R.K.P. Singh

Advocate for petitioner in
Crl. Rev. P. No.59 of 2006 : Mr. S. Dutta Choudhury

Advocate for respondent in
both the cases : Mr. R.C. Debnath, Addl. P.P.

Date of hearing : **17.01.2015**

Date of delivery of
Judgment & order : **29.01.2015**

Whether Fit for Reporting :

Yes	No
√	

JUDGMENT & ORDER

Both the revisional applications were heard together on the prayer of learned counsel of both side since the origin is a single criminal prosecution, i.e. Case No. G.R. 222/2002 wherein both of them were found guilty, and thereafter they filed independent appeals and both the appeals were dismissed. Therefore by this common judgment both the revisional applications are disposed of.

2. Heard learned counsel, Mr. R.K.P. Singh for the petitioner in Crl. Rev. P. No.49 of 2006 and learned counsel, Mr. S. Dutta Choudhury for the petitioner in Crl. Rev. P. No.59 of 2006. Also heard learned Addl. P.P., Mr. R.C. Debnath for the State respondent.

3. Prosecution case is that on the intervening night of 15.08.2002 and 16.08.2002 at any time accused-petitioners, Alek Miah and Tajer Islam alias Taju Miah along with another accused Fajar Ali had broken open the locking system of Udaipur Police Court Malkhana and entered into the Police Court and thereafter from the Police Court they had stolen different articles including fire

arms and ammunitions, etc. which were alamats(seized articles) of different police report cases.

3.1. On 16.08.2002 PW5, Sri B.B. Das, Court Sub-Inspector of the Police Court lodged an FIR before O/C R.K. Pur P.S. alleging that on that day in the morning at about 9.00 AM he was reported by a Daily Rated Worker(DRW) of the Police Court that locks of the Malkhana room were broken and he immediately rushed to the Police Court and found that the entry locks of the Malkhana were broken and entering into the Malkhana he found about 67 bottles of seized beer in connection with C.R. 272/2001 were missing and he further alleged that it was revealed in the preliminary verification and further information about the theft of other seized articles will be informed later on after verification.

3.2. O/C R.K. Pur P.S. accordingly registered R.K. Pur P.S. Case No.217/2002 under Sections 457 and 380 of IPC and investigation was taken up.

3.3. On 18.08.2002 verification of Malkhana was made in presence of senior police officers and it was found that the miscreants also had stolen one seized carbine, one S.L.R., some magazines with ammunitions which were seized articles of different cases. Those were kept in a wooden safe in the Malkhana under lock and key and on inspection it was found that the locks were broken and thereafter those articles were stolen from the wooden

safe. They could also notice that there was a small passage in the backside of the Malkhana room and the door of that passage was broken and the iron rods of the windows were also broken. After verification and inspection he submitted a further report to the R.K. Pur P.S. It is the case of the prosecution that on 25.08.2002 at about 9.00 AM the stolen arms and ammunitions were found near the house of accused Kala Miah and at that time the other accused Tajer Islam and Fazar Ali and Alek Miah were found fleeing away from that spot and accordingly by a seizure list dated 25.08.2002 those arms and ammunitions which were stolen from the Police Court Malkhana were seized by preparing seizure list in presence of all witnesses and one accused Kala Miah was arrested on 25.08.2002. On 26.08.2002, on the basis of secret information PW23, O/C of Kakraban Police Outpost, SI Pranab Debnath arrested accused Fazar Ali and Tajer Islam and they were handed over to the police of R.K. Pur P.S. On interrogation of those accused persons the other accused Alek Miah was arrested on 01.09.2002. After interrogation, on the statement of accused Alek Miah, pant and shirt which were stolen from the Police Court Malkhana were seized on production of accused Alek Miah from his house and at his instance a 'shabal'(crowbar) was also seized from the bushy area of the backside of Police Court Malkhana on 02.09.2002 at about 1005 hrs.

3.4. After completion of investigation police submitted charge sheet against accused Fazar Ali, Tajer Islam alias Taju Miah, Alek Miah and Kala Miah.

3.5. Cognizance was taken on the basis of the police report and in the course of trial charges were framed against Fazar Ali, Tajer Islam alias Taju Miah and Alek Miah under Section 457 read with Section 34 of IPC and Section 380 read with Section 34 of IPC to which they pleaded not guilty and claimed to be tried.

3.6. As against accused Kala Miah charge under Section 212 of IPC was framed to which he also pleaded not guilty and claimed to be tried.

3.7. To prove the charges prosecution examined 24(twenty four) witnesses, namely—(1) PW1 Shri Debaki Dulal Bhattacharjee, PW2, Shri Sankar Das, PW3 Shri Subrata Biswas, PW4 Smti. Aslubala Sutradhar, PW5 Shri Bibhuti Bhushan Das, PW6 Shri Ranjit Goswami, PW7 Shri Sunil Dey, PW8 Shri Samarendra Das, PW9 Shri Kshirmohan Das, PW10 Shri Nimai Datta, PW11 Shri Kabir Hossain, PW12 Shri Sankar Lal Dhar, PW13 Shri Sankar Kr. Saha, PW14 Shri Pradip Kr. Saha, PW15 Shri Santi Ranjan Das, PW16 Shri Kamal Datta, PW17 Shri Tapan Baidya, PW18 Shri Subrata Chakraborty, PW19 Shri Nandan Chakraborty, PW20 Shri Tapan Sarkar, PW21 Shri Sridam Kasari, PW22 Shri Bipin Debbarma, PW23 Shri Pranab Debnath and PW24 Shri Ratan Majumder.

Two witnesses were examined as Court Witness, namely—CW1 Shri Subhashis Sharma Roy and CW2 Md. Manu Mia.

3.8. During examination of the aforesaid witnesses prosecution also proved the FIR lodged by PW5, seizure list of pant and shirt at the instance of accused Alek Miah marked Exbt.5, seizure list of 'shabal'(crowbar) recovered at the instance of accused Alek Miah marked Exbt.6. Seizure list of arms and ammunitions recovered from Chanban Vivekananda road area near a mango tree marked as Exbt.4, previous statement of PW4 recorded by I.O. as Exbt.1, previous statement of PW21 recorded by I.O., marked as Exbt.11, previous statement of PW13 recorded by I.O. as Exbt.7, previous statement of PW19 recorded by I.O. marked as Exbt.10, previous statement of PW17 recorded by I.O. marked as Exbt.8, previous statement of PW18 recorded by I.O. marked as Exbt.9. The statement of CW2 recorded by Judicial Magistrate, First Class, Subhashis Sharma Roy(CW1) under Section 164(5) of CrPC has also been proved by CW1 marked as Exbt/X.1 and the signature of CW2 marked as Exbt.X.1/1. The seized arms and ammunitions have been proved as Exbt.MO2 series.

3.9. Learned Chief Judicial Magistrate at the conclusion of trial found accused Fazar Ali, Tajer Islam alias Taju Miah and Alek Miah guilty of committing offence punishable under Sections 457 and 380 of IPC and sentenced them to suffer RI for three years under Section 457 of IPC and further to suffer RI for four years

under Section 380 of IPC and directed that both the sentences shall run concurrently. Learned Chief Judicial Magistrate acquitted accused Kala Miah from the charge leveled against him under Section 212 of IPC.

4. Aggrieved, accused Alek Miah preferred Criminal Appeal No.29(3)/2005 in the Court of learned Sessions Judge, South Tripura, Udaipur and by impugned judgment dated 16.03.2006 learned Sessions Judge dismissed the appeal filed by the accused and upheld the conviction and sentence.

Accused Tajer Islam alias Taju Miah also having felt aggrieved preferred Criminal Appeal No.30(3)/2005 in the Court of learned Sessions Judge, Udaipur, South Tripura and learned Sessions Judge by impugned judgment dated 16.03.2006 dismissed the appeal and upheld the judgment and order of conviction and sentence.

5. While exercising jurisdiction under Section 397 read with Section 401 of CrPC this Court is to see the correctness, legality and propriety of the judgment/order passed by the inferior Courts and regularity of the proceedings thereof. This Court is not required to re-examine and re-appreciate the evidence on record unless there is allegation of perversity in the appreciation of evidence.

6. Learned counsel, Mr. Singh and Mr. Dutta Choudhury candidly argued that the circumstantial evidence which the prosecution relied is not complete and the trial Court mechanically arrived at a conclusion of guilt of the accused persons and sentenced them wrongly. The appellate Court also failed to properly consider the evidence on record and arrived at a wrong finding and therefore this Court is required to re-examine the evidence on record for fair ends of justice.

7. It is argued by learned counsel, Mr. Singh that according to prosecution a pant and a shirt alleged to have stolen from the Police Court Malkhana were recovered from the house of accused Alek Miah on production by accused himself but those pant and shirt were not produced before the Court to prove such seizure. Secondly, it is the case of the prosecution that on 02.09.2002 a 'shabal'(crowbar) was recovered from the bush behind the Police Court Malkhana which was used in breaking the door and windows and that has not been proved by leading evidence of leading to discovery and hence no case is proved against accused Alek Miah.

8. Learned counsel, Mr. Dutta Choudhury has submitted that certain arms were seized from Rajarbag area on 25.02.2002 but there is no evidence that the accused petitioners were in possession of those articles or that they left the same on that spot. Most of the seizure witnesses were declared hostile by the prosecution and while the fact that the seized arms and

ammunitions were not recovered from the possession of the accused petitioners they cannot be held guilty.

9. Both the learned counsel of the petitioners further submitted that on 16.08.2002 the FIR was lodged but on that day nothing was reported that any arms and ammunitions were stolen from the Police Court Malkhana. Nothing was also stated that the backside door and windows of the Malkhana were broken and that was detected only on 18.08.2002. Therefore the entire prosecution case is suspicious and cannot be accepted for conviction of the accused petitioners. Both the learned counsel also referred to some other insignificant discrepancies and lacunas here and there which I think are not at all material for discussions.

10. Learned Addl. P.P., Mr. Debnath on the other hand has submitted that Udaipur Police Court Malkhana is a huge Malkhana and immediately after the incident, verification of the Malkhana could not be made on 16.08.2002. On 17.08.2002, PW5 who was the Sub-Inspector of Police Court was absent and so on 18.08.2002 in the presence of the senior police officers verification of Malkhana was taken up and it was found that the arms and ammunitions were stolen and that was reported to the O/C of the P.S. There is nothing wrong in the action taken by the police and there is nothing to show that because of any animosity or otherwise a false prosecution initiated against the accused petitioners and the other accused. He also submitted that the accused-convict Fazar Ali did

not prefer any appeal or revision against the judgment of conviction and sentence. The State also did not prefer any appeal against acquittal of accused Kala Miah. He has contended that the trial Court as well as the appellate Court very meticulously considered the evidence on record and found the accused persons including the accused-petitioners guilty of the charges. The pant and shirt alleged to have seized at the instance of accused Alek Miah could not be produced by the prosecution but there is evidence that those were seized in presence of PWs 11, 12 and 21 on production of accused Alek Miah from his house. The seizure of 'shabal'(crowbar)(Exbt.6) has been proved with overwhelming evidence. He has also submitted that accused Fazar Ali, Tajer Islam and Alek Miah fled away from the spot leaving the stolen arms and ammunitions near a mango tree at Rajarbag and those were seized. Accused Fazar Ali and Tajer Islam tried to flee away crossing the river at Kakraban and when they were chased by the police they tried to escape by jumping in the river but they were caught red handed with the help of local people and all the circumstances has proved the prosecution case with all certainty and hence the judgment and order of conviction and sentence should be maintained.

11. I have considered the submissions of learned counsel of both side and meticulously gone through the impugned judgment passed by the learned Chief Judicial Magistrate and the appellate Court's judgments passed by learned Sessions Judge. I have also gone through the evidence on record to satisfy myself as to

whether the trial Court and the appellate Court properly appreciated the evidence or not.

From the evidence of PWs 1 to 9 and the evidence of PWs 22 to 24 it is overwhelmingly established that a theft was committed in the Malkhana of Udaipur Police Court on the intervening night of 15.08.2002 and 16.08.2002 at any time and the miscreants had stolen away 67 bottles of seized beer and other arms and ammunitions from the Malkhana. In the FIR lodged on 16.08.2002 PW5, the Court Sub-Inspector at the first instance stated that he found shortage of 67 bottles of seized beer and at that time he could not notice the theft of other articles but it was clearly stated in the FIR that after verification whether there was missing of any other articles or not will be reported later on. It is in the evidence on record that on 17.08.2002 he went out to Sabroom for some official duty and on 18.08.2002 in the presence of senior police officers verification of Police Court Malkhana was done and it was found that arms and ammunitions were also stolen from the wooden safe of Court Malkhana which was under lock and key and the miscreants had stolen the arms and ammunitions after breaking the lock of wooden safe of Court Malkhana and it was proved that a theft was committed and certain articles were stolen from the Police Court Malkhana and if any such article is subsequently found in the possession of anybody else a presumption should be drawn that either the person is a thief or that knowing well those were stolen property the person kept it.

12. There is no eyewitness of the occurrence. PW3 who was the Night Guard of the Court premises stated that there was heavy storm and therefore he entered into the recreation room during night time and on the following day he came to learn that there was a theft occurred in the Police Court Malkhana. The other Night Guard has not been examined. The miscreants got their entry in the Malkhana not through the front collapsible gate of the Court building but they got their entry through the backside window which was broken and the iron rods were taken out and the backside door of the passage was also broken. So it is clear that the miscreants got their entry not through the front collapsible gate but through the gaps of the window in the backside of the Police Court Malkhana.

13. Let us first see the statement of CW2, Manu Miah. He was produced before the Judicial Magistrate, First Class(CW1) during the course of investigation and he made a clear statement regarding the incident occurred on the night of occurrence and that statement has not been shaken in any manner in cross-examination. The entire statement made by Manu Miah which is proved as Exbt.X/1 and Exbt.X 1/1 reads as follows:

"One night at about 10 O'clock in the month of August, after completing a marriage trip, I was returning to our house situated at Rajarbag with my commander jeep. At that time when I reached near Rajarbag bus stand. Tajer Islam, Fajar Ali and Alekh

Miah stopped me alongwith my jeep on the road and told me that they would go to a place at Udaipur and for this purpose they reserved my jeep for Rs.150/- and told me that they would return to Rajarbag within an hour. Thereafter, as per the words of the said three persons, when I brought them in front of the Udaipur hospital by my vehicle, the said three persons told me to wait there with my jeep and all three of them came walking towards Udaipur Court. About an hour later Tajer Islam came in front of the hospital and boarded my jeep and told me to go near the coal field. Thereafter, as per his words, when I came near the coal field with the jeep Fajar Ali and Alekh Miah boarded my jeep from the backside and told me to go to Tajer Islam's house at Rajarbag with the vehicle. Thereafter, as per their words, when I went to Rajarbag with the vehicle I could see the three said persons getting off my vehicle with a sack and that Fajar Ali was holding a fire arm in his hand. When I said that I would inform the police about the incident all three of them threatened to kill me by way of firing. Thereafter, out of fear, I took Rs.150/- from them as my fare and came home.

Subsequently when the policemen caught Tajer Islam Fajar Ali with the fire arms I came to Udaipur P.S. and informed the incident to the O/C of the P.S."

14. The above evidence of CW1 Manu Miah speaks amply against the accused-petitioners and accused Fazar Ali that they together with their previous meeting of mind and pre-arranged plan committed the robbery in the Police Court. While the above evidence remains unshaken and intact, the other evidence on

record has become academic to prove the charges against the accused persons.

15. Regarding the seizure of pant and shirt at the instance of accused Alek Miah as I find a pant and a shirt were seized on 01.09.2002 at about 1245 hrs. in the house of accused Alek Miah on his production. PWs 11, 12 and 21 are the witnesses of the seizure. PW21 was declared hostile by the prosecution and his previous statement has been marked as Exbt.11. The oral evidence of PWs 11, 12 and 21 which is supported by the previous statement of PW21 marked Exbt.11 makes it abundantly clear that a pant and a shirt were produced by the accused from his house to the I.O. and those were seized. But as I find there is no evidence or no allegation made by PW5 that any pant or shirt was also stolen from the Police Court Malkhana and in the absence of any such evidence of theft of any pant and shirt from Police Court Malkhana, recovery of any pant and shirt from the house of the accused cannot afford any positive evidence in support of the prosecution. If something is proved to have stolen from the custody of the owner or person in possession and that was recovered from the possession of somebody else, a presumption under Section 114 is available that the person in possession of the stolen good is either a thief or has retained the stolen good knowing it to be stolen. While there is no evidence or allegation of theft of pant and shirt the seizure of any pant or shirt from the possession of the accused does not afford any positive evidence against accused Alek Miah.

The accused Alek Miah was arrested on 01.09.2002. While he was in custody of the police he made statement that the 'shabal'(crowbar), which was used at the time of commission of theft for breaking the window, was left in the bush, in the backside of the Police Court Malkhana and that he will be able to find out it. Accordingly, he was taken to the place in the backside of Police Court Malkhana on 02.09.2002 and at about 1005 hrs. he brought out the 'shabal' in presence of other witnesses and it was seized and proved as Exbt.MO/3. PWs 13, 14 and 19 are the witnesses of the seizure of 'shabal' at the instance of accused Alek Miah and in my considered opinion the trial Court and the appellate Court rightly appreciated the evidence of PWs 13, 14 and 19 and the I.O. in respect of recovery of 'shabal'. PWs 13, 14 and 19, all proved their signatures in the seizure list and out of them PWs 13 and 19 were declared hostile. The oral evidence of PWs 13, 14 and 19 coupled with the Exbt.7 and Exbt.10 as I find proved the recovery of 'shabal' at the instance of the accused and so this circumstance is proved against accused Alek Miah that he recovered the 'shabal' which was used in the commission of the offence.

16. The next is the recovery and seizure of arms and ammunities. By means of seizure list dated 25.08.2002 which is marked as Exbt.4 following articles were seized:

(i) One SLR bearing registration no.15315192 and but no.652.

(ii) One empty SLR magazine and 7 live 7.62 Rds and one empty cartridge.

(iii) One carbine bearing registration no.UU5492 of 1974.

(iv) 3 empty magazines of carbine each of which bear the same no.1005-000969, OF DC-93 is inscribed on the body of one and SAF 1992 is inscribed on the body of the other two.

(v) One hundred and twenty 9 mm Rds of Rds and 132 Rds of AK-47 rifle.

(vi) One empty magazine of AK 47 rifle.

17. PWs 10 and 16 are the witnesses of seizure list. They proved the seizure list and the seized articles marked as Exbt.MO/2 series. PWs 17 and 18 are the witnesses who found the accused persons immediately before the seizure and were fleeing away. Both of them were declared hostile by the prosecution and the previous statement of PWs 17 and 18 proved as Exbts.8 and 9.

18. It is a settled law that evidence of a hostile witness should not be rejected outright. That part of the evidence of the hostile witness which is corroborated with other witness unless otherwise found to be untrue may be accepted as a legal evidence. *Prima facie*, a witness who makes different statements at different times is to be presumed that he has no regard for truth. The Court, should, therefore, be slow to act on the testimony of such a witness and, normally, it should, look for corroboration of the evidence of such witness. Where evidence of such witness is corroborated by other items of evidence, that part of the statement of the hostile

witness may be accepted. There is no legal compulsion that merely because a witness is declared hostile, his entire evidence does not get excluded or rendered unworthy of consideration.

In the case at hand, PWs 17 and 18 in their previous statements recorded by I.O. stated that they found the accused persons fleeing away from the spot where Exbt.MO/2 series, i.e. the arms and ammunitions were found and were seized. Accused Tajer Islam and Fazar Ali tried to flee away from the State and they were arrested by PW23 on 26.08.2002 while they were about to cross the Gomati river and they jumped in the water seeing the police but by the help of local people they were nabbed and taken to custody. All the circumstances coupled with the evidence of Court Witness No.2 and PWs 10 and 16 as well as the evidence of PW23, the I.O., it is quite clear that accused persons Tajer Islam, Fazar Ali and Alek Miah were involved in the commission of the crime as alleged and the arms and ammunitions marked Exbt.MO/2 series were taken by them to the spot near a mango tree near the house of Kala Miah and they could not remove it and when they found that police were searching them they left the gunny bag and fled away from the spot.

19. It is, therefore overwhelmingly established that the accused persons committed house breaking by night by entering into the Police Court Malkhana of Udaipur Police Court and committed theft of arms and ammunitions and other articles. While

appreciating the evidence on record learned Chief Judicial Magistrate has recorded his observation in para 12 of the judgment which is found to be relevant and quoted herein as follows:

".....It is no doubt true that the prosecution evidence does not suffer from some natural ignorable and acceptable inconsistencies here and discrepancies there. But it is merely a shortcoming from which no criminal case is perhaps free.

When any witness is examined and cross-examined at length it is quite possible for him/her to make some negligible discrepant statements.

No true witness can possibly escapes from making some emissive and discrepant details and it may happen because one can not always express what he or she exactly wants to say or there may be slip of tongue and does not always get scope for prompt corrections being besieged with barrage of questions in the unfamiliar situation in the witness box of the court's ejalash or due to normal error of observations normal error of memory due to lapse of time or due to mental disposition such as shock and horror seeing the scene of occurrence or post scenarios of the occurrence or likewise.

Here, the main thing to be seen is whether such inconsistencies and etc. go to the root of the main fact to stamp it out.

But here such inconsistencies and etc. do not wipe out the main fact of theft and its post immediate scenarios as narrated in the ejaher and subsequent information given by the complainant and the concerned PWs. Gave a tell-tale scenarios that an occurrence of

theft was occurred in the malkhana police court in the night of 15-16/8/02 and C.W.2 also gave a post immediate tell-tale scenarios of the theft in the malkhana of the police court.

From the foregoing discussions, I find that there are number of impelling circumstances attending this case leading to an irresistible and inescapable conclusion that it was none but the accused persons namely, Fajar Ali, Tajer Islam and Alek Miah who in furtherance of their common intention committed theft on 15-16/8/2002 at about 10 p.m. in the malkhana of Udaipur police court and took away fire arms and ammunitions as mentioned in Ext.4/3 including some other articles and subsequently they hid these under a mango tree near the house of Tajer Islam situated at Rajar Bag.....”

20. I have very carefully gone through the impugned judgments and also gone through the evidence on record and in my considered opinion the facts and circumstances which are brought on record clearly establish the fact that the accused persons committed house breaking by night and thereafter committed theft of seized articles and all the circumstances brought on record led to the hypothesis of guilt of accused and inconsistent with their plea of innocence. There is no break in the circumstances brought on record and hence I find no merit in the revisional applications and accordingly the revisional applications stand dismissed. The accused persons are directed to serve out the sentence.

21. Send back the L.C. records along with a copy of this judgment.

JUDGE