

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA (DB) 36 of 2022

With

CRAN 1 of 2022

Habibur Rahaman & Ors.

Vs.

The State of West Bengal

With

CRA (DB) 62 of 2022

Serajul Haque

Vs.

The State of West Bengal

For the Appellants in CRA (DB) 36 of 2022	: Mr. Sekhar Kumar Basu, Ld. Sr. Adv. Mr. Soubhik Mitter, Adv. Ms. Rajnandini Das, Adv.
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For the Appellant in CRA (DB) 62 of 2022	: Mr. Milon Mukherjee, Ld. Sr. Adv. Mr. Rahul Ganguly, Adv.
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For the State in in CRA (DB) 36 of 2022	: Mr. Madhusudan Sur, Ld. APP Mr. Dipankar Pramanik, Adv.
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For the State in CRA (DB) 62 of 2022	: Mr. Madhusudan Sur, Ld. APP Mr. Dipankar Pramanik, Adv.
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Hearing Concluded on	: April 18, 2023
Judgement on	: May 15, 2023

DEBANGSU BASAK, J.:-

1. Two appeals have been heard analogously as they have emanated from the same impugned judgement of conviction and the order of sentence.

2. By the impugned judgement of conviction dated February 9, 2022, the learned Trial Court has found twelve accused guilty of offences under Section 148/302/201/149 of the Indian Penal Code, 1860. The learned Trial Judge has acquitted all the appellants, of the charge under Section 379 of the Indian Penal Code, 1860.

3. By the impugned order of sentence, the learned Trial Judge has sentenced the appellants to suffer rigorous imprisonment for three years under Section 148 of the Indian Penal Code, 1860, three years rigorous imprisonment and to pay a fine of Rs. 5,000/- and in default to suffer rigorous imprisonment of six months for the offence under Section 201 of the Indian Penal Code, 1860, rigorous imprisonment for life and to pay a fine of Rs. 20,000/- and in default to suffer rigorous imprisonment for one year for the offence under Section 302 of the Indian Penal Code, 1860.

4. The learned Trial Judge has convicted twelve accused persons. The learned Trial Judge has filed the case forever against one accused who died during pendency of the case.

5. Out of the twelve convicted persons, eleven have filed CRA (DB) 36 of 2022. For the sake of convenience, the appellants therein have been referred to as the appellants in

the first appeal, and their appeal as the first appeal, in this judgement and order. One of the convicts namely Serajul Haque has filed CRA (DB) 62 of 2022 and for the sake of convenience he is referred to as the appellant in the second appeal.

6. Police had received written complaint dated March 20, 2008 from Prosecution Witness (PW) 15 with regard to murder of her husband on March 19, 2008. In her written complaint, PW 15 had named 29 persons along with others to be involved in the murder of her husband. She had narrated that on March 19, 2008 at 5 P.M her husband was coming from Malda Town by Malda Katihar Train. Such train was at Valuka Road at about 6.45 P.M, the accused persons in a pre-planned manner boarded the train with arms in their hands and forcefully pulled her husband out of the train. Thereafter, they had put her husband on the motor vehicle and took her husband towards Rangaipur. The accused persons had tied both the hands of her husband to the motor vehicle and after making him naked started assaulting him physically. The accused persons had cut the nerves under knees of both the legs of her husband with sharp weapons, hit his head with fire arms causing severe bleeding injury, cut the right leg into two

pieces. The appellants had assaulted her husband with sharp weapons, seriously injuring him and murdered him. During the assault, they had snatched the wrist watch of her husband and mobile and other articles of her husband. The appellants had thrown the dead body and amputated leg in the northern side of Daulatpur Bridge. Thereafter, the appellants had gone to Rangaipur village. The accused persons had threatened the villagers that, if anyone revealed anything, they would be send to hell. She had explained the late lodging of the written complaint as she was busy with the post mortem work. She had come to the police station with her brother-in-law to lodge the written complaint.

7. On the basis of such written complaint, police had registered Harishchandrapur Police Station F.I.R No. 42/08 dated March 20, 2008 under Sections 302/201/379/120B/34 of the Indian Penal Code, 1860 against 29 named accused along with other unnamed persons.

8. On the conclusion of the investigations, police had submitted charge sheet against 36 persons on January 15, 2009 under Section 302/201/379/120B/74 of the Indian Penal Code, 1860. Court had framed charges.

9. Charges under Sections 148/202/149/379/201 of the Indian Penal Code, 1860 had been framed against 34 accused persons on February 7, 2011 and against 2 persons on March 3, 2013. The accused persons had pleaded not guilty and claimed to be tried. At the trial, prosecution had examined 20 witnesses to bring home the charges and relied upon various documentary and material exhibits. On conclusion of the evidence of the prosecution, the appellants had been examined under Section 313 of the Criminal Procedure Code where they claimed to be innocent and falsely implicated. The defence had examined one defence witness.

10. Learned Senior Advocate appearing for the appellants in the first appeal has submitted that, there was a delay of one day in lodgement of the First Information Report. Such delay has cast a shadow of doubt on the foundation of the case of the prosecution since the police and the family members of the deceased had already met at the place where the dead body had been found.

11. Learned Senior Advocate appearing for the appellants in the first appeal has submitted that, the Investigating Officer, PW 20 had stated that, an unnatural death case was started on the basis of a complaint lodged by Mujibur

Rahman. According to him, there had been two complaints in connection with the death of the victim. According to him, there has been an attempt on the part of the prosecution to suppress the first complaint with no explanation being furnished about suppression of the same.

12. Learned Senior Advocate appearing for the appellants in the first appeal has submitted that, the date and time of the alleged incident is ambiguous. He has referred to the testimony of the prosecution witnesses. He has submitted that, there is a fluctuation of the time of death between 6.30 P.M to 10 P.M.

13. Learned Senior Advocate appearing for the appellants in the first appeal has submitted that, the prosecution could not establish any motive for the offence. Prosecution has not produced any evidence to establish any past enmity between the appellants and the victim.

14. Learned Senior Advocate appearing for the appellants in the first appeal has submitted that, the autopsy surgeon deposed that the injuries found on the dead body of the victim had been caused by a hard and blunt object and sharp cut wounds were caused by a sharp cutting weapon. The so called weapons had not been placed before the autopsy surgeon for

identification. They had also not been sent for forensic examination. He has questioned the veracity of the recovery of the weapons. The autopsy surgeon did not conduct any scientific analysis to ascertain if the severed leg had indeed been a part of the body of the victim.

15. Learned Senior Advocate appearing for the appellant in the first appeal has submitted that, the testimonies of the so called eye witnesses being PWs 10, 13 and 14 are unreliable. Statement of PWs 10 and 14 had been recorded before the learned Magistrate after a lapse of about 5 months 2 days. No explanation has been furnished by the prosecution to explain the delay. He has relied upon ***AIR 1980 Supreme Court 1750 (Bhagwan vs. State of Madhya Pradesh)*** and ***AIR 1971 Supreme Court 804 (Balakrushna vs. State of Orissa)*** and ***2015 (2) Calcutta Criminal Law Reporter (Cal) 882 (Hamid Mondal vs. State of West Bengal)*** and contended that delay in recording such statements makes them unworthy of credence and cannot be relied upon to convict the accused persons.

16. Relying upon ***AIR 1976 Supreme Court 2488 (State of Orissa vs. Brahmananda)*** learned Senior Advocate appearing for the appellants in the first appeal has submitted

that, the conduct of PW 10 and 14 were unusual and unnatural and the same cast a shadow of doubt on the veracity of the case of the prosecution. None of the so called eye witnesses being PWs 10, 13 and 14 had lodged a written complaint against the accused persons immediately after witnessing the incident of assault or after seeing the dead body of the victim especially since they were related to the victim.

17. Learned Senior Advocate appearing for the appellants in the first appeal has contended that, the Investigating Officer did not interrogate any independent co-passenger of the train or guard or travelling ticket examiner of the train. The investigations had not been conducted in right earnest. Conviction has been based on the deposition of PW 11 who had been declared hostile by the prosecution. PW 11 had recorded a statement under Section 164 of the Criminal Procedure Code on March 26, 2008 and the same was tutored.

18. Learned Senior Advocate appearing for the appellants in the first appeal has submitted that, the examination of the appellants under Section 313 of the Criminal Procedure Code was conducted in an improper manner and caused prejudice and injustice to the appellant. In support of such contention,

he has relied upon **1984 Volume 4 Supreme Court Cases 116 (Sharad Birdhichand Sharda Vs. State of Maharashtra).**

19. Learned Senior Advocate appearing for the appellant in the second appeal has adopted the contentions and submissions of the learned Senior Advocate appearing for the appellants in the first appeal.

20. In addition thereto, he has contended that his client is named Serajul. Two Serajuls had been involved in the police case with one being acquitted. According to him, learned Trial Judge has acquitted one Serajul and convicted the present one without giving any cogent reason as to why his client has been convicted. Same and identical questions had been put to the appellant in the 2nd appeal as also to the other Serajul in their respective examination under Section 313 of the Criminal Procedure Code. The other person had been acquitted.

21. Learned Senior Advocate appearing for the appellant in the second appeal has contended that there are major discrepancies in the deposition of various prosecution witnesses. He has referred to the deposition of the prosecution witnesses in this regard.

22. Learned senior advocates appearing for the appellants in both the appeals have contended that, all the appellants should be acquitted.

23. Learned Advocate appearing for the State has submitted that, the prosecution was able to prove the charges against the appellants in both the appeals beyond reasonable doubt. He has contended that, the prosecution had produced eyewitnesses to the incident at the trial.

24. Learned Advocate appearing for the State has contended that PW 10, 13 and 14 were eyewitnesses to the incident. He has drawn the attention of the court to their testimonies. According to him, PW 10 had seen some of the appellants to drag the victim out of the train and being taken to an engine fitted rickshaw van. PW 10 had described that the hands of the victim were tied. PW 10 had returned to his house and thereafter found the body of the victim. PW 10 had identified the appellants at the dock and also recorded a statement under Section 164 of the Criminal Procedure Code.

25. Learned Advocate appearing for the State has similarly drawn the attention of the Court to the deposition of PW 13 and 14 and contended that, the factum of the appellants dragging the victim out of the train, tying his hand, taking the

victim to the place where ultimately the dead body was discovered and assaulting the victim had been established by eyewitnesses.

26. Learned Advocate appearing for the State has submitted that, the impugned judgement of conviction and sentence should be upheld.

27. PW 1 had deposed that he knew the victim. He had stated that, there was a land dispute between the victim and one of the appellants namely Habibur Rahaman. He had identified his signature on the seizure list which was marked as Exhibit 1 and his signature on the label which was marked as Exhibit 2. He had been declared hostile by the prosecution. On cross examination by the prosecution he had denied the suggestions to him.

28. On further cross-examination by the prosecution in respect of some accused persons, he had identified the 2 accused persons.

29. The stepbrother of the victim had deposed as PW 2. He had stated that the victim was murdered on March 13, 2008. He had seen the dead body of the victim lying near Daulatpur bridge. He could not say who had committed the murder. He had seen bleeding injuries on the dead body of the victim. He

had found one leg to be chopped. He had failed to identify the accused persons. He had been declared hostile by the prosecution. On cross examination by the prosecution subsequent to being declared hostile, he had denied the suggestions put to him.

30. An acquaintance of the victim had deposed as PW 3. He had been declared hostile by the prosecution. He had denied the suggestions put to him by the prosecution after he being declared hostile.

31. Another acquaintance of the victim had deposed as PW 4. He had signed one seizure list which he tendered in evidence and the same was marked as Exhibit 3.

32. An acquaintance of the victim had deposed as PW 5. He had stated that he heard about the murder of the victim. He had identified one of the accused in the court. He had stated that he did not hear the names of other persons as murderer of the victim. He did not add anything of value on his further cross-examination in respect of other persons.

33. PW 6 had seen the dead body of the victim. He could not say who had murdered the victim. He had been declared hostile by the prosecution. On further examination by the

prosecution in respect of other co-accused, he did not add any substance to the case of the prosecution.

34. A tea stall owner at the railway station had deposed as PW 7. He had stated that, he saw one person being dragged by 15/20 persons with one person shouting “save me”. He had seen that one person to be dragged outside the platform towards west. He had failed to identify any of the miscreants.

35. The photographer who took photographs of the dead body and the severed lower portion of the right leg of the victim had deposed as PW 8. He had tendered the photographs and the negatives as well as his signature on the seizure list which were marked as Exhibits. He did not add any value to the case of the prosecution on his further examination by the prosecution in respect of 2 accused. He had failed to identify such accused.

36. PW 9 had seen a group of persons going towards the Daulatpur Bridge at about 7:30/8 PM on the date of the incident. He had searched the place and found an injured dead body lying there. He had seen the lower portion of one of the legs of the dead body missing. On his further examination in chief he did not add any substance to the case of the prosecution.

37. The brother-in-law of the victim had deposed as PW 10. He had stated that on March 19, 2008 he came near the railway station for repairing his spray machine. He had stated that, he found some of the appellants and many others dragging the victim. They had forcibly dragged the victim out of the train. He had identified the appellants as such persons, in court. The appellants had been shouting that on account of some commission, the victim owed some money to them and for that reason the victim was taken by an engine fitted rickshaw van. Both hands of the victim had been tied. The appellants had taken the victim towards north and towards Daulatpur bridge side. He had returned to his house. Thereafter, he had gone to the bridge and found the dead body of the victim there. He had also noticed the portion of leg of the victim severed from the body. He had tendered his statement recorded under Section 164 of the Criminal Procedure Code in evidence which was marked as Exhibit 5.

38. In his cross-examination, PW 10 had stated that, police interrogated him 5 months from the date of the incident. He had stated that he did not inform the matter to the members of the family of the victim. He had also not

informed the matter to any person of Daulatpur. He had stayed at Daulatpur for half an hour and left the place.

39. At his further examination in chief, PW 10 had identified 2 of the accused persons in court and stated that he had seen those accused persons along with others at the time of the incident.

40. The person who had driven the engine fitted rickshaw van at the time of the incident deposed as PW 11. He had said that he did not know anything about the incident. Police did not interrogate him. Police had produced him before the magistrate where he recorded a statement which was tendered in evidence and marked as Exhibit 6. He had said that he did not know anything about the victim.

41. PW 11 had been declared hostile by the prosecution. On cross examination by the prosecution after PW 11 had been declared as hostile, he denied the suggestions put to him.

42. A passenger of the train in which the victim had been travelling on the fateful day deposed as PW 12. He had said that he heard that the victim was forcibly taken down from a train by a group of people as the victim owed money to such persons. He had stated that he did not find any known

passenger in the train. He had also stated that the police tutored him and he recorded those things before the learned Magistrate as per asking of the police. He had tendered his statement recorded under Section 164 of the Criminal Procedure Code which was marked as Exhibit 7.

43. PW 12 had been declared hostile by the prosecution. On his being declared hostile, PW 12 had denied the suggestions put to him in cross-examination by the prosecution.

44. In his cross-examination by the defence, PW 12 had stated that, he did not notice the victim on the date of the incident in the train. He had also stated that whatever he deposed was hearsay evidence.

45. A brick kiln owner had deposed as PW 13. He had stated that, he went to Daulatpur to collect money from his customer. After collecting the money from his customer, while he was going back, he had stood near the bridge for smoking. At that time, he had found some of the appellants on an engine fitted rickshaw van of PW 11. He had noticed that those persons was throwing a person from the engine fitted rickshaw van beside the bridge. They had thrown the person at a distance of 10 to 15 feet from the engine fitted rickshaw

van. He had identified all the appellants in court. He had rushed to the place where the person had been thrown and the found that it was the that body of the victim. He had found bleeding injury on the right leg of the victim. A portion of the right leg of the victim had been severe. He had informed the family members of the victim. After 20 to 50 minutes police had come to the place of occurrence. The member of the family of the victim and other persons had also come to the place of occurrence in the meantime. He had stated all those things to the police and thereafter narrated the incident to the magistrate who recorded the statement. He had tendered his statement recorded under Section 164 of the Criminal Procedure Code which was marked as Exhibit 8.

46. In cross-examination, PW 13 had stated that he narrated about the incident to the police after 2/3 days. He had recorded his statement before the learned Magistrate on August 14, 2008.

47. On his further examination in chief, PW 13 had identified 2 of the appellants as participants in the murder of the victim.

48. A brother-in-law of the victim had deposed as PW 14. He had stated that the incident of murder took place on

March 19, 2008, he was on the train where he found the victim sitting in a compartment. He had sat beside the victim. He had stated that PW 12 was also sitting in the same compartment of the train. After the train had arrived at Valuka Road station at about 6:45 PM, 15 to 20 persons got in the same compartment. He had narrated how each of the accused had assaulted the victim after tying a napkin around the neck of the victim. He had narrated how the accused had pushed the victim and made the victim get down from the train. The accused had assaulted the victim on the platform when the victim lost his sense. The accused had dragged the victim out on the platform and took the victim to the road. Thereafter, they had placed the victim on the engine fitted rickshaw van of PW 11. The accused had sat on the van of PW 11 and took the victim towards Daulatpur. He had also got down at the Valuka railway station from the train. After 20 minutes, he could avail one engine fitted rickshaw van and had gone towards his house at Rangaipur. He had gone towards the bridge and found a gathering. He had found the dead body of the victim lying there and a portion of his right leg was found to be severed. He had noticed injuries over the body of the victim. After a while police had arrived there. He

had identified the appellants in Court. He had recorded a statement under Section 164 of the Criminal Procedure Code which was tendered in evidence and marked as Exhibit 9.

49. In cross-examination, he had stated that out of fear he could not inform the incident to any authority or shop owner of the locality immediately after him getting down from the train. Out of fear he had failed to take any steps to rescue the victim. He had also stated that he did not inform the relatives about the incident as he was not in a stable mental condition. He had lost the railway ticket which he purchased for his journey.

50. In his further examination in chief, PW 14 had identified 2 of the accused persons as participants in the assault and murder of the victim.

51. The wife of the victim had deposed as PW 15. She had stated that the appellants had dragged her husband from the train and put her husband on the engine fitted rickshaw van of PW 11 where her husband was assaulted by sharp cutting weapons. The appellants had murdered her husband. She had heard about the incident from PW 13. She had gone to the police station on the next date and met the scribe of the written complaint there. She had narrated the entire incident

to the scribe who wrote it. The complaint had been read to her after which she signed it. She had tendered the written complaint in evidence which was marked as Exhibit 10. She had stated that PW 13 had come to her house and reported to her about the incident. In her further examination in chief, PW 15 had identified the 2 accused in court.

52. A seizure list witness had deposed as PW 16. He had stated that, the appellant No. 1 and Akbar Ali had brought out one sharp cutting weapon each from the bush and handed over the same to the police on April 26, 2008. He had tendered his signature on the seizure list which was marked as Exhibit 12. He had identified the 2 sharp cutting weapons seized. He had identified the appellant No. 1 and Akbar Ali in court.

53. The scribe of the written complaint had deposed as PW 17. He had identified the written complaint which was marked as Exhibit 10. In cross-examination, he had stated that he wrote the written complaint in the house of PW 15 when he went to the house of PW 15 to see what actually happened.

54. The autopsy surgeon had deposed as PW 18. He had described the injuries that he found on the dead body of the victim. He had opined that, death of the victim was caused due to the effect of ante-mortem injuries, homicidal in nature.

All the injuries had been caused by hard and blunt object except injury No. 2 which had been caused by hard and sharp cutting instrument. He had also stated that, head, both legs, both knees injury individually and by all collectively were sufficient to cause death. He tendered the post-mortem report which was marked as Exhibit 13.

55. A police constable had deposed as PW 19. He had stated that on March 19, 2008 he accompanied the assistant sub- inspector of police where he found one dead body having its one leg amputated. He had taken the dead body and the leg to the police station. Thereafter, he had taken the dead body in the lake to the district hospital and produced the same before the medical officer for the purpose of post-mortem on March 20, 2008. He had tendered the seizure list which was marked as Exhibit 14/1. The dead body challan had been tendered in evidence and marked as Exhibit 15/1.

56. The Investigating Officer had deposed as PW 20. He had narrated about the course of investigation. He had tendered the formal First Information Report which was written by the inspector in charge of the police station. The formal First Information Report had been marked as Exhibit 11/1. He had held the inquest over the dead body of the

victim. The inquest report had been tendered in evidence and marked as Exhibit 16. He had stated that an unnatural death case was started on the basis of the complaint lodged by PW 1 to the effect that a dead body was found on the northern side of the bridge. He had tendered the inquest report over the amputated leg of the dead body which was marked as Exhibit 17. He had tendered the rough sketch map and index which were marked as Exhibit 18 and Exhibit 18/1. He had examined available witnesses and recorded their statements under Section 161 of the Criminal Procedure Code on March 20, 2008. He had arrested one accused on March 20, 2008. He had tendered the seizure lists which were marked as Exhibit 14/2, 19, 4/2, 12/1 and 3/1.

57. PW 20 had stated that, he recorded statements of witnesses. He had facilitated recording of statements under Section 164 of the Criminal Procedure Code of some of the witnesses. In particular, he had referred to the fact that PW 11 made statement which he recorded under Section 161 of the Criminal Procedure Code. He had seized the sharp cutting weapon by a seizure list which was tendered as Exhibit 20. He had identified such chopper in Court which was marked as Material Exhibit. He had also seized blood stained earth.

58. In cross-examination, PW 20 had stated that, he examined Prosecution Witnesses about a month later. He had also stated that, PW 11 was the only eye witness to the occurrence and that other witnesses were circumstantial evidence. He had stated that, he examined PW 10 on August 13, 2008, and produced PW 10 before the Magistrate for recording his statement. He had examined PW 13 also on August 13, 2008 and produced him before the Magistrate on August 14, 2008.

59. The appellants had been examined under Section 313 of the Criminal Procedure Code where they claimed to be innocent and falsely implicated. The defence had produced one witness.

60. The Branch Manager of State of Bank of India, Harishchandrapur branch had deposed as DW 1. He had stated that, a cheque was deposited on May 4, 2012 in the account specified by PW 11 for a sum of Rs. 75,000/- such amount was deposited in the account of Mrs. Lal Banu.

61. The dead body of the victim had been found on March 19, 2008. PW 18 had performed the post mortem on such dead body on March 20, 2008. He had prepared the post mortem report which had been marked as Exhibit 13. Exhibit

13 has described the injuries found on the dead body of the victim. PW 18 had opined that the death was caused due to the effect of ante mortem injuries, homicidal in natures. All the injuries had been caused by hard and blunt object except injury No. 2 which was caused by hard and sharp cutting instrument. The head, both legs, both knees injury individually and collectively were sufficient to cause death.

62. Prosecution had therefore, on the basis of the Post Mortem Report being Exhibit 13 as well as the deposition of the post mortem Doctor, PW 18 had established that the victim was murdered.

63. PW 7 has a tea stall at Valuka Road Railway Station. On March 19, 2008 he had seen Malda Katihar Train to arrive at the platform at about 6:30/7 P.M. He had seen one person shouting from the platform near the train saying “save me save me”. He had also noticed about 15/20 person attacking such person and taking such person outside the platform towards West. He, however, could not identify any of the miscreants during the trial.

64. PW 10 is a relative of the victim. The wife of the victim is the sister of PW 10. He had found the appellants along with many others dragging the victim out from the train. He had

identified the appellants on the dock. PW 10 had stated that on May 19, 2008, he had come near Valuka Road Station for repairing his spray machine. He had found the appellants dragging the victim from a train. The appellants had been shouting that on account of some commission victim owed some money to them and for that reason the victim was taken from the railway station by an engine fitted rickshaw van, with both the hands of the victim being tied. The appellants had taken the victim towards Daulatpur bridge side. PW 12 had also seen the victim being taken out from the train.

65. PW 13 had identified the appellants as the persons who threw the victim from the engine fitted rikshaw van of PW 11 beside the bridge. PW 13 had deposed that, he found the appellant on an engine fitted rikshaw van of PW 11. He had also noticed that the appellants were throwing a person from that van beside the bridge. He had rushed to the place where the person was found and found the dead body of the victim.

66. PW 11 had recorded a statement under Section 164 of the Criminal Procedure Code which was marked as Exhibit 6 at the trial. During his deposition, he had stated that, he drove one engine fitted rikshaw van and that he plied such van from Kariyali (Valuka Road Station) to Tulsihata.

67. The dead body had been discovered on March 19, 2008. PW 11 had recorded a statement under Section 164 of the Criminal Procedure Code being Exhibit 6 on March 26, 2008. In Exhibit 6, he had stated that, eight persons had brought one person to his van and threw such person on the van. Thereafter, two out of the eight persons being Sirajul and Alauddin had pointed a fire arm to him and asked him to start the van. After he had started the vehicle, they asked him to take the vehicle towards Rangaipur. While on the road, near the patrol pump he had turned to look at the back when he found that the person thrown on his rikshaw van by the other persons was the victim. He had named the appellant No. 1, 2, 3, 4, 8 and Akbar as the persons on the van assaulting the victim. Near the petrol pump, those persons had assaulted the victim and also inflicted cut injuries on him. Since he had turned around, he was also assaulted. They had gone to Daulatpur where the dead body of the victim was thrown. Thereafter, when he had turned to his back he found the vehicle of PW 10 to be coming. In such vehicle of appellant No. 10 there were other persons whom he could not identify. After throwing the dead body of the victim, the assailants had got on the vehicle and alighted after some distance. At the time of

getting down from his van, such persons told him to wash the van and if he spoke to the police he would be murdered. He went to his home out of fear, washed his van and told his mother about everything. His mother told his maternal uncle. His maternal uncle had told another person and thereafter his maternal uncle and such other person took him to the police station.

68. All through out, in Exhibit 6, PW 11 had described the assailants as dacoits. Exhibit 6 had been recorded in close proximity to the date of the incident. The incident had occurred on March 19, 2008 and Exhibit 6 had been recorded on March 26, 2008.

69. Police had facilitated the recording of Exhibit 6. Therefore, the claim of PW 11 that police did not interrogate him in his deposition is belied from the records made available to Court. PW 20 had stated he had interrogated PW 11.

70. PW 11 in his deposition had taken a stand that he was not aware of the incident. He had been declared hostile by the prosecution. He had been cross-examined by the defence at length. No question had been put to him with regard to Exhibit 6 and the contents thereof. No suggestions had been put to him as to the veracity of the contents of Exhibit 6.

71. PW 11 had been cross-examined with regard to a transaction happening in his mother's bank account on May 4, 2012. He had claimed that he had been offered money for the purpose of falsely deposing against the appellant. In support of such money transaction, DW 1 had been examined. DW 1 had merely spoken about encashment of a cheque in a bank account. DW 1 did not establish any money trail for the purpose of the police case.

72. Be that as it may, the statement of PW 11 being Exhibit 6 had been recorded on March 26, 2008. Therefore, the claim that the relatives of the victim had paid him money in 2012 for the purpose of falsely deposing at the trial was without any basis. Significantly, PW 11 did not claim in his cross-examination by the defence that, he was offered such money for the purpose of recording Exhibit 6.

73. Taking the evidence of the prosecution in its totality we are of the view, Exhibit 6 remained unsullied by the claim of the defence that PW 11 was instigated to falsely implicate the accused. PWs 10, 13 and 14 had recorded their statements on August 13, 2008, August 14, 2008 and May 7, 2008. The Investigating Officer being PW 20 had classified them not to be

eye witnesses but persons who gave deposition to the circumstances.

74. *Bhagwan (supra)* has found that one of the prosecution witnesses was kept in police custody for two days before making the statement under Section 161 of the Criminal Procedure Code. In such circumstances, it was thought to be unsafe and unreasonable to rest the conviction of the accused on such evidence.

75. *Balakrushna (supra)* has observed that, unjustified and unexplained long delay on the part of the Investigating Officer in recording statement of material eye witness during investigation of the murder will rendered evidence of such witness unreliable.

76. *Hamid Mondal and Others (supra)* has observed that scanning the evidence of that case found sufficient reason to doubt the reliability of the evidence of two prosecution witnesses. It has found that there was inordinate delay of such prosecution witnesses mentioning the names of the accused persons.

77. In ***Brahmananda (supra)*** the case of the prosecution has defended on the evidence of a person claiming to be eye witness. Such eye witness did not disclose the name of the

assailant for a day and half after the incident and the explanation offered for nondisclosure has been found to be unbelievable. It has therefore held that delayed disclosure was a serious infirmity which destroys the credibility of the evidence of the witness. Victim being dragged out of the train and taken outside the railway platform had been established by PWs 5, 7 and 10.

78. *Sharad Birdhichand Sharda (supra)* has dealt with a death which was caused by poisoning. It has observed that, where there are two possibilities one of commission of the crime and the other of innocence reasonably possible, accused is entitled to benefit of doubt. It has also observed that, morally and contentiously an accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof. It has reiterated that, graver the crime greater should be the standard of proof.

79. Delay in recording the statement under Section 161 or 164 of the Criminal Procedure Code is not fatal to the case of the prosecution ipso facto, in the ratio of **2017 Volume 11 Supreme Court Cases 222 (*Anjan Dasgupta vs. State of West Bengal & Ors*)**. Delay can be occasioned for various reasons. In the facts of the present case PW 10 and PW 14

had recorded statements before the police and also before the Magistrate under Section 164 of the Criminal Procedure Code. Recording of such statements had been made within reasonable period of time. Statement of PW 10 under Section 164 of the Criminal Procedure Code had been recorded on August 13, 2008 and of PW 14 on August 14, 2008. There had been a fear psychosis prevailing in the locality as would appear from Exhibit 6.

80. Oral testimonies of PW 10 and PW 13 have been corroborated by Exhibit 6 recorded by PW 11. Oral testimonies of PW 10 and PW 13 have implicated the appellants in CRA (DB) 36 of 2022. So far as the appellant of CRA (DB) 62 of 2022 is concerned, as has been pointed out by the learned Senior Advocate appearing for such appellant that, there were two Serajul Haque accused in the Police Case with one being acquitted. As has been rightly pointed, there is no distinguishing feature established by the prosecution to implicate the appellant of CRA (DB) 62 of 2022 on the basis of the oral testimonies of PW 10 and PW 13 read with Exhibit 6. The appellant in CRA (DB) 62 of 2022 is therefore entitled to the benefit of doubt.

81. In view of the discussions above, we affirm the conviction and sentence of the appellants in CRA (DB) 36 of 2022. CRA (DB) 36 of 2022 is dismissed.

82. With the dismissal of CRA (DB) 36 of 2022 nothing survives in the interim application being CRAN 1 of 2022. The same is also dismissed.

83. So far as CRA (DB) 62 of 2022 is concerned we acquit the appellant therein on the ground of benefit of doubt.

84. The appellant in CRA (DB) 62 of 2022 is directed to be set at liberty forthwith, if not required in any other case. He shall, however, furnish a bail bond to the satisfaction of the trial Court which shall continue for six months from date in terms of Section 437A of the Criminal Procedure Code.

85. A copy of this judgement and order along with the Trial Court records be remitted to the appropriate Court forthwith for necessary action.

86. Urgent Photostat certified copy of this judgement in order be made available to the parties expeditiously on compliance of the formalities.

[DEBANGSU BASAK, J.]

87. I agree.

[MD. SHABBAR RASHIDI, J]