

Mr. Sumit Chowdhury@Babai vs The State Of Tripura on 26 May, 2026

Author: T. Amarnath Goud

Bench: T. Amarnath Goud

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2026:THC:717-DB

HIGH COURT OF TRIPURA
AGARTALA
CRL.A(J) NO.10 OF 2026

Mr. Sumit Chowdhury@Babai,
S/o- Sri Sishir Kanti Chowdhury,
R/o-Ramthakur Road,
Near Udiyaman Sangha,
P.S.- East Agartala,
District West Tripura.

..... Appellant(s)

Versus

The State of Tripura.

..... Respondent(s)

For the Appellant(s) : Mr. Milon Mukharjee, Sr. Advocate.
Mr. Bibhal Nandi Majumder, Sr. Advocate.
Mr. Biswajit Manna, Advocate.
Mr. Dhruva Jyoti Saha, Advocate.
Mr. Somanta Roy, Advocate.
Mr. Monoswae. Dey, Advocate.
Mr. Dipankar Das, Advocate.
Mr. Raunak Chakraborty, Advocate.
Mr. Vibek Deb, Advocate.

For the Respondent(s) : Mr. R. Datta, P.P.
CRL.A(J) NO.18 OF 2026

Sri Sumit Banik@ Bapi,

S/o, Sri Naresh Chandra Banik,
Of Ramthakur Road, College Tilla, Adarsha Palli,
P.S.- East Agartala,
District-West Tripura

..... Convict Appellant(s)

Versus

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The State of Tripura.

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For the Appellant(s) : Mr. Subrata Sarkar, Sr. Advocate.
Mr. K. Dharendra Singha, Advocate
Ms. Ayesha Saha Hirawat, Advocate
Mr. Dhiman Gope, Advocate.
Ms. Megha Sarkar, Advocate.

For the Respondent(s) : Mr. R. Datta, P.P.

Date of hearing : 19.05.2026 and 20.05.2026

Date of delivery of
Judgment & Order : 26/05/2026

Whether fit for reporting : YES.

HON'BLE JUSTICE DR. T. AMARNATH GOUD
HON'BLE MR. JUSTICE S. DATTA PURKAYASTHA
JUDGMENT & ORDER

Dr. T. Amarnath Goud, J.

1. Both these present appeals have been filed by the accused- appellants herein challenging the Judgment and Orders of conviction and sentence dated 02.06.2023 and 03.06.2023 passed in Case No. ST.(T-1) 103 of 2019. The case against both the accused-appellants in Crl. A.(J) No. 10 of 2026 and Crl. A.(J) No. 18 of 2026 arises out of West Agartala Police Station Case No. 172 of 2019 dated 04.08.2019, under Sections 307/326/34 of the Indian Penal Code (in short, „IPC).

2. It is pertinent to mention that the FIR was initially registered under Sections 307/326/34 of the IPC. Thereafter, upon the death of the victim on 16.08.2019, the offence under Section 302 of IPC was added.

3. The brief facts of the case are that, on 04.08.2019, one Smt. Ranjana Das (PW-1) appeared at West Agartala Police Station and lodged a written complaint with the Officer-in-Charge alleging,

inter alia, that on 02.08.2019 her son, namely Bodhisattwa Das, who was a Branch Manager of UCO Bank, Dharmanagar Branch, came to Agartala from Dharmanagar with a view to travel to Kolkata for official work. On the next day, i.e., on 03.08.2019, at about 12:00 midnight, when her son did not return home, she called him on his mobile phone, and he informed her that he would return shortly. As he did not return even after some time, she again called him at about 1:00 a.m. (on 04.08.2019), and at that time she only heard sounds like "GB, GB".

4. On hearing this, she, along with other relatives, rushed to GBP Hospital and found Bodhisattwa lying unconscious with multiple stab injuries on different parts of his body, and his intestines had almost protruded from his abdomen. In the written complaint, it was further stated that she learnt that, in the intervening night of 03/04.08.2019 at about 00:50 hours, near Jackson Gate, Agartala, in front of Sarada Medical Hall, one Mr. Sumit, son of the proprietor of Kalika Jewellers, along with Sueb Miah and others, attacked her son with broken wine bottles and caused severe bleeding injuries with the intention to kill him, and he was thereafter admitted to GBP Hospital in a critical condition.

5. On the basis of the said complaint, West Agartala P.S. Case No. 172 of 2019 dated 04.08.2019 was registered under Sections 307/326/34 IPC and was entrusted to SI Suman Ullah Kazi for investigation. Upon completion of investigation, a charge sheet was submitted against the accused persons, namely, Sumit Chowdhury @ Babai, Omar Sharif @ Sueb, Sumit Banik @ Bapi, and Sukanta Biswas vide Charge Sheet No. 73 of 2019 under Section 302/34 IPC before the Court of the learned Chief Judicial Magistrate, West Tripura, Agartala, to face trial.

6. The Trial Court examined on behalf of the prosecution P.W.-1 to P.W.-56 and marked Exbts- No.1 to 27/1 and also material objects under seizure.

7. After hearing both sides, the learned trial court delivered the judgment of conviction and order of sentence dated 02.06.2023 and 03.06.2023 respectively in the following manner:-

"There is no doubt that this case does not come within the purview of the rarest of the rare cases. Thus, taking into notice the facts and circumstances of the case, I am of the view that sentence of imprisonment for life along with fine of Rs.50,000/-, each, for the offence committed by the convicts will suffice to render proper justice in this case.

Accordingly, the convicts namely Sumit Chowdhury @ Babai, Sumit Banik @ Bapi, Sukanta Biswas @ Bapi and Omar Sharif @ Sueb @ Shoiab Miah are hereby sentenced to suffer rigorous imprisonment for life U/S 302 of Indian Penal Code read with Section 34 of IPC.

The convicts are also sentenced to pay fine of Rs.50,000/-, each, and in default of payment, to suffer rigorous imprisonment for further 6 (six) months:

The pre-conviction detention served by the convicts during the police investigation and trial shall be allowed to set off against the term of imprisonment imposed upon the convicts as per provision of Section 428 of the Code of Criminal Procedure."

8. Aggrieved thereby the appellants herein have filed these present appeals.

9. The appellant in CrI. A.(J) No. 10 of 2026, namely Mr. Sumit Chowdhury @ Babai, is accused No. 1 in FIR No. 2019/WAG/172 and was tried as such in Sessions Case No. S.T.(T/1) 103 of 2019.

10. The appellant in CrI. A.(J) No. 18 of 2026, namely Mr. Sumit Banik @ Bapi, was not named in the FIR, but his name appeared subsequently in the charge sheet, and he was shown as an accused in Sessions Case No. S.T.(T/1) 103 of 2019.

11. Accused No. 4, namely Mr. Omar Sharif @ Sueb @ Shoiab, in Sessions Case No. S.T.(T/1) 103 of 2019, preferred Criminal Appeal (Jail) No. 57 of 2023 against the Judgment and Orders of conviction and sentence dated 02.06.2023 and 03.06.2023 before this Court. Upon consideration of the case in its entirety and after hearing both sides, this Court on 01.07.2025 dismissed the appeal and affirmed the judgment of the trial court.

12. Subsequently, accused No. 1, namely Sri Sumit Chowdhury @ Babai, preferred CrI. A.(J) No. 10 of 2026, and accused No.2 Sri Sumit Banik @ Bapi preferred CrI. A.(J) No. 18 of 2026.

13. Since both the appeals arise out of the same Judgment and Orders of conviction and sentence dated 02.06.2023 and 03.06.2023, and involve common questions of fact and law, with the consent of both sides, they were heard together and are being disposed of by this common judgment.

14. Heard Mr. Milon Mukherjee, learned Senior Counsel, along with Mr. B.N. Majumder, learned Senior Counsel, assisted by Mr. D.J. Saha, Mr. S. Sarkar, Mr. M. Dey, Mr. S. Roy, Mr. D. Das, Mr. R. Chakraborty, and Mr. V. Deb, learned counsel appearing for the appellant in CrI. A.(J) No. 10 of 2026 and Mr. S. Sarkar, learned Senior Counsel, assisted by Ms. Ayesha Saha Hirawat, Mr. K. Dharendra Singha, Mr. D. Gope, and Ms. M. Sarkar, learned counsel appearing for the appellant in CrI. A.(J) No. 18 of 2026. Also heard Mr. R. Datta, learned Public Prosecutor, appearing for the State-respondent.

15. Mr. Milon Mukherjee, learned Senior Counsel, along with Mr. B.N. Majumder, learned Senior Counsel, arguing for the appellant in CrI. A.(J) No. 10 of 2026, submitted that the FIR cannot be trusted. It was pointed out that while information was allegedly given to the Fire Service, the phone number of the caller was never traced, nor was the caller, one Ranjan Das (as mentioned by PW-15), ever examined by the prosecution. Furthermore, the Fireman who first arrived at the spot on 04.08.2019 was not brought before the Court. There is also a significant mismatch regarding the timing of the ejarah; the discrepancies between the statements of PW-1 (the mother-complainant) and the police officials suggest that the complaint received at the hospital could not have been the same document signed at the police station. Evidence of P.W.-2, eye-witness is unreliable due to his conduct. Despite being a childhood friend of the victim, PW-2 neither informed the authorities nor

rendered any assistance to the victim while he lay bleeding. It was further emphasized that, according to PW-2's own statement, the role of the present accused-appellants Mr. Sumit Chowdhury and Mr. Sumit Banik was limited strictly to "fist and blows." He categorically stated that it was the other convict, Omar Sharif @ Sueb, who stabbed the victim with a sharp knife. Since the medical report confirms death was caused solely by sharp cutting injuries and not by fist blows, the conviction under Section 302 IPC against these appellants cannot be sustained. Furthermore, PW-3, whose shop is located at the place of occurrence, stated in cross-examination that there was no light at the time of the incident, casting doubt on the identification of the assailants. PW-11, the medical doctor, who deposed that the patient was conscious but he was "disoriented," meaning he had lost his sense of direction. With a critical blood pressure of 60/40, it is also stated in such deposition that all the injuries were cut injuries, inflicted solely by Mr. Omar Sharif@sueb@Shoib. Therefore, Section 302 IPC is not attracted in the present case. At most, Section 323 read with Section 34 IPC could be considered, especially since Section 34 requires a "prior meeting of minds", which is absent here as the incident was a sudden altercation. The appellants have already suffered over six years of imprisonment, which is far beyond the maximum punishment for simple hurt.

16. In continuation, Mr. B.N. Majumder, learned Senior Counsel, challenged the disclosure statement of the co-accused, Omar Sharif. He submitted that this statement was recorded by an Executive Magistrate and not a Judicial Magistrate, which is a violation of the mandatory provisions of Section 164 of the Cr.P.C. As per settled law, a confession made in police custody is inadmissible under Section 26 of the Evidence Act unless made in the immediate presence of a Judicial Magistrate. Learned Senior Counsel further argued that the prosecution failed to prove the use of beer bottles as weapons. Although PW-2 admitted that he and the victim were consuming beer prior to the incident, there was no blood found on the broken bottles during the SFSL examination. The story of "broken beer bottles" mentioned by PW-1 in the FIR stands uncorroborated by her own testimony in Court. Furthermore, the medical evidence suggests the crime was on 04.08.2019 and the victim died on 16.08.2019 due to „Septicemia , a bacterial infection. It was argued that this was a result of medical negligence or improper intervention rather than the injuries themselves. The dying declaration recorded via video is also contested, as PW- 11 (and later PW-32) established that the victim was "disoriented" and not in a "fit state of mind" to make a credible statement. Highlighting that there was no prior enmity, learned Senior Counsel urged the Court to allow the appeal and set aside the conviction, as the act of merely complaining to Omar Sharif about their friend Sukanta Biswas- co-accused being beaten by deceased does not amount to instigation for murder.

To support his argument on the point of accused herein complaining to the convict- Omar Sharif@sueb about the incident does not amount of instigation, learned Sr. counsel relied upon Para-2 of the Judgment of Hon ble Supreme Court reported in 1998 CRI.L.J. 4590 titled as Ajay Sharma Vs. State of Rajasthan dated 15.09.1998.

Stating thus, learned Sr. counsel urged this Court to allow this appeal by quashing the impugned Judgment and order of conviction.

17. Mr. Subrata Sarkar, learned Senior Counsel, assisted by Ms. Ayesha Saha Hirawat, appearing for the appellant in CrI. A.(J) No. 18 of 2026, submitted that the name of the appellant, Sumit Banik @ Bapi, is conspicuously absent from the FIR. This clearly indicates that at the time of lodging the complaint, the complainant-mother had knowledge about the non-involvement of the present appellant. Since the complainant came to know about the incident from PW-2(eye-witness), and the name of Sumit Banik @ Bapi was not mentioned by PW-2 while narrating the incident to the complainant. It proves that the present appellant has been roped in at a belated stage and was not present or involved at the initial instance. It was further submitted that there was no premeditation on the part of both the appellants in these appeals. From the chronology of events, it is evident that the incident occurred when PW-2 and the victim were having beer. The appellants herein along with Sukanta Biswas arrived at the spot in a car, and an altercation broke out between PW-2 and Sukanta Biswas co-accused, who was a traffic inspector, due to the defacing of the shop by the latter by urinating. Upon seeing the altercation, the appellants came down from the car. Thereafter, the convict Omar Sharif @ Sueb passing therefrom, came to the spot accidentally and on his own volition, and stabbed the victim. There is no evidence that the said Sueb was called by the appellants herein. There are no call records or any other evidence to suggest that the appellants had summoned him. Sueb took out a knife on his own and stabbed the victim. Since the knife which could be easily possessed by the appellants could not have had any idea that such a weapon was being carried by him. In such circumstances, Section 34 of the IPC cannot be attributed to the appellants herein, and even if Section 34 is held to be applicable, the same cannot be read with Section 302 of the IPC. There was no premeditation from the sequence of events narrated above. The actions of the appellants show that there was no prior meeting of minds. There is also no previous enmity between the parties. The accused-appellants joined the assault only because their friend, Sukanta Biswas, was being assaulted by the deceased, and they were trying to save him. They were not the perpetrators of the crime. As such, they come under the ambit of „general exemption' under the Indian Penal Code as they lacked criminal intent.

He further submitted that, as per the deposition of PW-32, the medical doctor who examined the victim in the hospital, the victim was disoriented, his blood pressure had come down to 60/40, and there was lack of flow of oxygen to the brain. The victim was in a bad condition. Therefore, the alleged dying declaration is not trustworthy, and any video recording of the same cannot be relied upon to bring it to the standard of a dying declaration. The same does not pass the test of credibility. A dying declaration is required to be made by a mentally fit person, but the victim was not in a fit mental condition at the relevant point of time. That no blood stains were found on the broken beer bottles in the SFSL examination, and therefore the beer bottles could not be linked with the alleged assault on the victim. Furthermore, the two accused-appellants did not even know the victim, which fact has not been stated by any of the prosecution witnesses.

17.1. Mr. S. Sarkar, on the point that confession given before the Executive Magistrate is violated to the mandatory provision of law, has cited paras-20 and 29 of the Hon ble High Court of Gauhati reported in 2007(3) GLT 697 titled as State of Assam Vs. Anupam Das dated 03.08.2007.

17.2. On the point of common intention and pre-arranged plan, Mr. Sarkar, learned Sr. counsel relied upon paras-21, 23, 24, 27 and 28 of the Hon ble Supreme Court Judgment reported in (2020)

4 SCC 126 titled as Chhota Ahirwar Vs. State of Madhaya Pradesh dated 6th February, 2020.

17.3. On the point of intention of the assault, Mr. Sarkar, learned Sr. counsel referred to the Judgment of the Hon ble Privy Council reported in CrIJ 1945 689, titled as Mahbub Shah Vs. King-Emperor.

17.4. To support his argument made under the Evidence Act, Learned Sr. counsel relied upon the relevant Paras-7 and 8 of the Judgment passed by the Hon ble Supreme Court reported in 1975 AIR(SC)1026 titled as Ram Kumar Pande Vs. The State of M.P. 16.5. Further on the point of common intention, learned Sr. counsel cited para-3 of Hon ble Apex Court Judgment reported in 1995 Supp(4) SCC 558, titled as Kashmira Singh Vs. State of Punjab dated October, 21st , 1992.

17.6. On the point of Section 25 and 27 of the Evidence Act, learned Sr. counsel relied upon Paras-15 and 16 of the Hon ble Apex Court Judgment titled as Criminal Appeal No.297 of 2024 titled as Randeep Singh@ Rana & Anr. Vs. State of Haryana and ors.

Stating thus, learned Sr. counsel urged this Court to allow this appeal by quashing the impugned Judgment and order of conviction and grant acquittal.

18. On the other hand, the learned Public Prosecutor appearing for the State-respondent placed heavy reliance on Para-44 of the judgment previously passed by this Court on 01.07.2025 in CrI. A.(J) No. 57 of 2023. In that case, where the co-accused Omar Sharif was found guilty of the offence, this Court observed that the appellant therein (Omar Sharif), acting upon the instigation of his co-accused, produced a large knife and inflicted severe stabbing blows on the deceased, leading to his collapse. The learned P.P. contended that the present appellants effectively complained or signaled to Sueb (Omar Sharif) to attack the victim, thereby instigating the fatal assault. To counter the defense's argument regarding lack of visibility at the crime scene, the learned P.P. referred to the testimony of PW-27, an Executive Engineer (Electrical) at the Agartala Municipal Corporation. This witness deposed that, at the relevant time of the incident, the street lights in the area were functional and there was no record of any complaint regarding the dysfunction of the electrical lighting system. Regarding the absence of the appellant's name in CrI. A.(J) No. 18 of 2026 from the FIR, the learned P.P. submitted that the FIR specifically mentioned the involvement of "others" alongside the named accused, therefore, the subsequent identification and addition of his name in the charge sheet is legally sound. The learned P.P. further contended that common intention was clearly established, as all the accused persons launched a joint attack on the victim with the intent to cause grievous hurt, which ultimately resulted in death. He further argued that the accused shared a common object and intention during the commission of the act. Finally, it was submitted that the minor discrepancies pointed out by the defense regarding the investigation cannot outweigh the overwhelming weight of the evidence brought forth by the prosecution witnesses.

18.1. On the point that small discrepancies in the investigation process does not hinder the present case, learned P.P., referred to Para-20 of the Judgment of the Hon ble Supreme Court reported in 2025 SCC Online SC 627, titled as Firoz Khan Akbarkan Vs. State of Maharashtra.

18.2. On the point of contradiction, learned P.P., referred to para- 23 of the Judgment of the Hon ble Supreme Court reported in 2023 SCC Online SC 1396, titled as Birbal Nath Vs. State of Rajasthan and ors., dated October, 30, 2008.

Stating thus, learned P.P., urged this Court to dismiss both these appeals and uphold the impugned Judgment and order of conviction.

19. Heard and perused the record.

20, Admittedly, on the intervening night of 03/04th August, 2019, there was a scuffle between the deceased and accused No.3 in S.T.(T/1) 103 of 2019, namely Sukanta Biswas (Traffic Inspector), when the later was urinating in front of the shop (medical store). The appellants intervened, and in the process, accused No. 4 in S.T.(T/1) 103 of 2019, namely Omar Sharif@Sueb@Shoiab (convict/appellant in Crl. A.(J) No. 57 of 2023, which was dismissed on 01.07.2025 by this Court), who was passing by on his two- wheeler, on seeing the scuffle and upon being informed by the appellants that their friend Sukanta Biswas was being assaulted, stabbed the victim/deceased indiscriminately several times with his knife. The deceased was later shifted to G.B.P. Hospital for treatment and was subsequently shifted to Kolkata for better treatment. However, on 16.08.2019, he succumbed to his injuries, also due to „septicaemia .

21. The prime accused, namely Omar Sharif@Sueb@Shoiab, was convicted for life imprisonment under Sections 302, 326 and 34 of the IPC by the Trial Court, and this Court in Crl. A.(J) No. 57 of 2023 confirmed the same. The seized weapon/knife and the cut injuries inflicted on the body of the victim/deceased were duly confirmed by the FSL examination (Exbt. 12) and also by PWs-11 and 32 (medical doctors) through their medical reports. The doctor who examined the preliminary injuries, namely PW-11, confirmed the injuries through his injury report [Exbt. Nos. 14(i) and 14(ii)].

22. In the complaint marked as Exhibit No. 1, PW-1, the mother of the victim/deceased stated thus:-

□ humbly state that my son, Bodhisattwa Das, is currently employed as the Branch Manager of UCO Bank at Dharmanagar. On Friday, 2nd August 2019, he traveled from Dharmanagar to Agartala to proceed to Kolkata for official work. Last Saturday night, when he did not return home by 12:00 a.m., I contacted him. He assured me that he would be home shortly. However, when he did not arrive, I called him again around 1:00 a.m. on 4th August 2019. The call was unclear, but I distinctly heard him mention "G.B. - G.B. Upon reaching G.B. Hospital, I met my relatives and found my son in an unconscious state, undergoing treatment for multiple bleeding injuries on his stomach, neck, hands, and back, with his intestines exposed. My son has been grievously injured by repeated strikes, with sharp weapon. Subsequently, I learned that around 12:50 a.m., Sumit, boy ch Chandary of Kalika Jewellers, along with Shoaib Miah and others, attacked my son near Sarada Medical Hall at Jackson Gate and brutally assaulted him using liquor bottles and sharp objects with the intent to kill.

Presently, my son is fighting for his life in the G.B. Hospital.

Therefore, I earnestly request your good office to conduct a thorough investigation and take strict penal action against the accused persons to ensure justice is served

23. PW-1 was only a hearsay witness/complainant. PW-2, who is the eye-witness to the incident and was also present along with the victim/deceased, informed PW-1 about the crime that had taken place.

24. PW-2, in his deposition, stated that on 03.08.2019, after closing his factory, he met the deceased near Jackson Gate. Both of them sat in front of Sarada Medical Hall and consumed two bottles of beer. Around 11:30 pm to 12:00 midnight, a white-coloured vehicle arrived and stopped in front of Sarada Medical Hall. Sukanta Biswas, a Traffic Inspector and known to PW-2, came down from the vehicle and started urinating in front of an adjacent shop. When PW-2 and the deceased objected, a hot altercation ensued between Sukanta Biswas and the deceased. During the altercation, two other persons, namely Sumit Chowdhury of Kalika Jewellers and Sumit Banik, came down from the same vehicle. Both Sumit Chowdhury and Sumit Banik joined Sukanta Biswas and started assaulting the deceased. Sukanta Biswas pushed the deceased to the ground, sat on his chest, and assaulted him severely. Sumit Chowdhury and Sumit Banik also participated in the assault. Thereafter, Shoiab Miah (Omar Sharif) arrived at the spot on a scooter. At that time, Sumit Chowdhury and Sumit Banik complained to Shoiab Miah that the deceased had assaulted their "Sir" (Sukanta Biswas). All four persons, namely Sukanta Biswas, Sumit Chowdhury, Sumit Banik, and Shoiab Miah, then conjointly assaulted the deceased and dragged him from one side of the road to the other. Suddenly, Shoiab Miah took out a big knife from his waist and inflicted multiple stabbing blows on various parts of the body of the deceased, including the chest and back. The deceased put his hand on his belly and fell down on the ground. Shoiab Miah then attempted to assault PW-2, but was prevented by one Basu Kar.

PW-2 identified all the four accused persons, namely Sumit Chowdhury, Sumit Banik, Sukanta Biswas, and Shoiab Miah, both by name and by face, with the help of the street light. After the incident, the three accused persons (Sumit Chowdhury, Sumit Banik, and Sukanta Biswas) left the spot in the vehicle, while Shoiab Miah followed PW-2 and Basu Kar for some distance before taking a different route.

PW-2 further deposed that out of fear, he initially returned home. Later, upon the request of his mother, he again went to the spot but did not find the deceased there. On the next day (04.08.2019), he went to GBP Hospital and narrated the entire incident to the mother of the deceased (PW-1) in the presence of her relatives. His statement was recorded by the police on the same day, and subsequently, his statement under Section 164 Cr.P.C. was recorded before a Judicial Magistrate on 24.10.2019.

25. It is categorically seen that in the light of the evidence of PW-2 (eye-witness) and the seized knife/weapon, along with Exbt. Nos. 14 (injury reports confirmed by PWs-11 and 32, the medical doctors), the case clearly attracts Section 307 IPC, which was later converted to Section 302 and 326

IPC. In view of the same, the prime accused Omar Sharif@Sueb@ Shoiab has been convicted by the Trial Court, which was affirmed by this High Court.

26. Now, the matter falls for consideration as to what extent the present appellants are involved in the crime so as to attract Section 302 read with Section 34 of the IPC, as can be seen from the judgment of the Trial Court.

Section 302 and Section 34 of IPC is extracted here-in-

under:-

302. Punishment for murder.--

Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

34. Acts done by several persons in furtherance of common intention.--

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

27. Admittedly, as per the evidence of P.W.-2, eye-witness, it is seen that he deposed that:-

Meanwhile one Shoiab Miah of Santipara reached there along with a Scooty, when Sumit Chowdhury and Sumit Bnak complained to Shoiab Miah that Budhisatya had assulted their Sir, Sukanta Biswas.

28. It is seen from the evidence of PW-2 that the appellants only said to the convict Omar Sharif@Sueb@Shoiab, on his sudden arrival, that their friend was being beaten. Here the friend is Sukanta Biswas (Traffic Inspector), who was being beaten up by the victim/deceased. Instantaneously, the said Omar Sharif@Sueb@Shoiab proceeded further and stabbed the victim/deceased.

29. On examination of Section 34 of the IPC read with Section 302 of the IPC, pre-meditation and common intention to kill the victim becomes essential. There is no evidence on record, either from the prosecution witnesses or any exhibits, indicating that the appellants had a common intention and a plan to kill the deceased. As per the evidence of PW-1 and the complaint (Exbt. No. 1), it is stated that her son was stabbed with liquor bottles. Though the liquor bottles were seized and got examined by the forensic expert, nowhere is it indicated that there were fingerprints of the appellants on the liquor bottles. Further, there was no blood stain on the liquor bottles pertaining to the deceased. Thus, it can be safely construed that the deceased was not killed by the beer bottles, but was killed by the convict Omar Sharif@Sueb with his knife. As such, the cause of common intention is not made out as there is no „pre-meditation . Therefore, the present appellants cannot be brought under the ambit of Section 302 of the IPC read with Section 34 of the IPC and the same

is not germane.

30. Further, it is seen that the confession has been recorded under Section 164 of the Cr.P.C. by the Executive Magistrate. It is a settled principle that the Executive Magistrate is not recognized under the Criminal Procedure Code, and as per the definition under Section 164 Cr.P.C., "Magistrate" means a „Judicial Officer of the Court of law. It is settled law that an extra-judicial confession cannot be used against the accused person. It is a settled principle of law that no confession recorded by a police officer in a police station can be used against the accused person unless it is corroborated, and the same is not proved beyond reasonable doubt. In the present case, requirement under law has been satisfied by the prosecution to fix the appellants under the alleged crime.

31. Mr. B.N. Majumder, learned Sr. counsel appearing for the appellants on the point of accused herein complaining to the convict- Omar Sharif@Sueb about the incident does not amount of instigation cited following paras of Ajay Sharma Vs. State of Rajasthan(Supra), the same is cited here- in-below:-

"□. Mr. Jayant Bhushan, the learned counsel for the appellant, submitted that as the only overt act attributed to him was that he caught hold of the deceased and exhorted Daljeet by saying 'Maro', so it cannot be said that there was common intention to kill the deceased: the appellant only said 'Maro', which did not mean 'to kill', therefore, he ought not to have been convicted under Section 302 read with Section 34 IPC. To examine the contention of the learned counsel, we have perused the First Information Report and the statement of Mohan Mujral (pw-1). The relevant allegation in the F.I.R. reads as follows:

"At this both Pappu (appellant) and Ganeshi said strike at his Daljit".

PW - 1 deposed before the Court.

"when we raised the alarm, both Pappu Pandit and Ganeshi instigated Daljit Singh 'Strike'. They exhorted him to strike at Kailash. At this Daljit took out a short kripan from under the stockings he had worn. He, then, in a jiffy struck at Kailash 2-3 blows on the left portion of his body'. Thus, from the averments in the FIR as well as from the statement of PW- 1, it cannot be said that the appellant had shared common intention to kill the deceased. The appellant might not have been known that Daljeet Singh was having a kripan under his stockings. The instigation was only 'to strike' and as such his conviction under Section 302 read with Section 34 IPC is not sustainable. [See Jai Narain Mishra vs. State of Bihar (AIR 1972 SC 1764) and Matadin vs. State of Maharashtra 1998 5 JT (SC)

264. The conviction of the appellant under Section 302/34, IPC is, therefore, set aside; instead he is convicted under Section 324 read with Section 110 IPC and sentenced to the period already undergone. His bail bonds shall stand cancelled and

he be released forthwith unless he is required to be incarcerated in any other case. The appeal is accordingly disposed of.

32. Mr. Subrata Sarkar, learned Sr. counsel appearing for the appellant of CrI.A.(J) No.18 of 2026, on the point that confession given before the Executive Magistrate, in this present case is violative of mandatory provisions has cited the following Paras of State of Assam Vs. Anupam Das(supra).

□20. It can be seen from the language of Section 26 that the only exception to the Rule contained under Section 26 is that any such confession, which is otherwise hit by Section 26, can be proved against the accused if such a confession is made in the immediate presence of a Magistrate. It is not the case of the prosecution that the alleged confession before PW-8 was made in the immediate presence of a Magistrate, therefore, the same is clearly hit by Section 26 and cannot be looked into.

29. From the foregoing discussion we have no alternative but to reach an irresistible conclusion that the expression "Magistrate" occurring in Section 26 of the Evidence Act can only mean a Judicial Magistrate but not an Executive Magistrate.

33. Mr. Sarkar, learned Sr. counsel on the point of common intention and pre-arranged plan has also cited this following paras of Hon ble Supreme Court Judgment in Chhota Ahirwar Vs. State of Madhya Pradesh(supra):-

"□21. It is a settled principle of criminal law that only the person who actually commits the offence can be held guilty and sentenced in accordance with law. However, Section 34 lays down a principle of joint liability in a criminal act, the essence of which is to be found in the existence of common intention, instigating the main accused to do the criminal act, in furtherance of such intention. Even when separate acts are done by two or more persons in furtherance of a common intention, each person is liable for the result of all the acts as if all the acts had been done by all of these persons.

23. Common intention can only be inferred from proved facts and circumstances as held by this Court in Manik Das & Ors. vs. State of Assam . Of course, as held in Abdul Mannan vs. State of Assam reported in, the common intention can develop during the course of an occurrence.

24. Section 34 is only attracted when a specific criminal act is done by several persons in furtherance of the common intention of all, in which case all the offenders are liable for that criminal act in the same manner as the principal offender as if the act were done by all the offenders. This Section does not whittle down the liability of the principal offender committing the principal act but additionally makes all other offenders liable. The essence of liability under Section

34 is simultaneous consensus of the minds of persons participating in the criminal act to bring about a particular result, which consensus can even be developed at the spot as held in Lallan Rai &

Ors. vs. State of Bihar reported in. There must be a common intention to commit the particular offence. To constitute common intention, it is absolutely necessary that the intention of each one of the accused should be known to the rest of the accused.

28. The question in this case is, whether the Prosecution has been able to establish a pre-arranged common intention between the accused appellant and the main accused Khilai to kill the complainant in pursuance of which the accused Khilai open fired from his pistol. The answer to the aforesaid question has to be in the negative for the following reasons:

28.1. A quarrel broke out between the accused appellant and the complainant. When the accused appellant tried to prevent the complainant from going to the field, the complainant insisted on doing so. While the quarrel was going on, the main accused Khilai arrived at the spot and intervened whereupon the complainant told him off, saying he should go home as he was in no way concerned with the dispute. At this, the main accused Khilai brought out a pistol from his right pant pocket and aimed it at the complainant.

28.2. There is no evidence to establish any pre-arrangement to converge at the place of occurrence. The circumstances established suggest that intervention by the main accused Khilai was by chance. The main accused Khilai chanced to stop as he was passing by the place of occurrence when the accused appellant and the complainant were quarrelling.

34. On the point of intention of assault, Mr. Sarkar, learned Sr. counsel cited the following paras of Hon ble Privy Council Judgement in Mahbub Shah Vs. King Emperor(supra):-

□The learned Judge then proceeded to examine the case of the appellant and Wali Shah. He stated that the case of Mahbub Shah, who was armed with a single barrelled' gun, and of Wali Shah, who had a double barrelled gun, however, stood on a different footing. He distinguished their case on the following ground:

As soon as they ran to the assistance of Ghulam Quasim Shah, they fired simultaneously in the direction of the complainants killing Allah Dad on the spot and causing injuries on the person of Hamidullah Khan. It is difficult to believe that when they fired the shots they did not have the common intention of killing one or more of the complainant party. If so, both of them are guilty of murder notwithstanding the fact that the fatal shot was-fired by only one of them, namely, Wali Shah, absconder.

It will be observed that according to the learned Judge a common intention to commit the crime came into being when appellant and Wali Shah fired the shots.

Their Lordships will now proceed to consider whether the above reasoning is correct, and Section 34 of the Indian Penal Code has been rightly applied to the facts of the

case. Attention has already been drawn to the words of the section. As it originally stood, the section was in the following terms:

When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone.

In 1870, it was amended by the insertion of the words "in furtherance of the common: intention of all" after the word "persons" and before the word "each," so as to make the object of the section clear. Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intentions of all" nor does it say "an intention common to all." Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

On careful consideration, it appears to their Lordships that in the present case "there was no evidence and there were no circumstances from which it might be inferred that the appellant must have been acting in concert with Wali Shah in pursuance of a concerted plan when he along with him rushed to the rescue of Ghulam Quasim. The exaggerated circumstances alleged by the prosecution to invoke the aid of Section 34, Indian Penal Code, have been found against by the High Court who have acted solely on the evidence of P. W. 10 and P. W. 11. There was no evidence to indicate that Ghulam Quasim was aware that the complainant party had been cutting reeds from his uncle's lands, or that the appellant and Wali Shah had been kept behind the bush to come and help him when called upon to do so. The evidence shows that Wali Shah "happened to be out shooting game," and when he and the appellant heard Ghulam's shouts for help they came up with their guns; the former shot the deceased, killing him outright, and the appellant shot at Hamidullah Khan inflicting injuries on his person, Indeed, the High Court negated the existence of a "common intention" at the commencement in the sense in which their Lordships have explained the terms by stating-in considering the application of Section 34, Indian Penal Code, to the case of Ghulam-what has been already quoted, viz.:

that the sole point which requires consideration now is whether a common intention to commit the crime came into being when Ghulam shouted to his companions to come to his rescue and both of them emerged from behind the bushes and fired their respective guns.

35. On his point of Evidence Act, Mr. Sarkar, learned Sr. counsel, cited Hon ble Apex Court Judgment in Ram Kumar Pande Vs. The State of M.P. (supra). The same is extracted here-in-under:-

"7. The prosecution case, as set out in the First Information Report was ; Uttam Singh, PW 1, residing at Ganj Parao, on the first floor went home at about 3.30 p.m. on 23-3-1970 and was preparing to have a bath when Suresh Ahuja came down from an upper storey of the house and complained that Uttam Singh had been quarreling with members of his family. Uttam Singh requested him to take his seat and promised to look into the matter. This angered Suresh Ahuja. Thereafter, his, elder brother arrived and started quarreling with Uttam Singh's daughter. At this stage, the landlord Mulkraj Ahuja, accompanied by the appellant Ram Kumar Pandey, who lives with his family in a side room on the ground floor, entered and immediately gave him a blow on his eye-,brow. Uttam Singh fell down. As Uttam Singh got up, the appellant struck him with a knife from behind. Mukhraj asked Pandey to run down-stairs. Both the accused tried to run away. Uttam Singh tried to catch them but failed. Uttam Singh when asked his son Harbinder Singh to make a telephone call. At this point, Suresh, son of Mulkraj, stabbed Harbinder Singh who fell down in the lane. Uttam Singh saw Harbinder Singh lying near the house of Saudager Shah with an injury on his chest which was bleeding profusely. Harbinder Singh was carried to a hospital on a cart and Gurcharan Singh telephoned the police. Joginder Singh also came while the injuries were being inflicted. Uttam Singh's daughters Amarit Kaur and Taranjit Kaur saw Uttam Singh wrapping a chadar an the wound of Harbinder Singh. Raj Jaggi had seen Harbinder Singh falling down. The motive for this incident was that Mulkraj Ahuja, the landlord, wanted his house vacated by Uttam Singh. Harbinder Singh had died while being taken to hospital.

8. The above mentioned First information Report was lodged at Police Station Ganj on 23-3-1970 at 9.15 p.m. The time of this incident is stated to be 5 p.m. The only person mentioned as an eye witness to the murder of Harbinder Singh is Joginder Singh. The two daughters Taranjit Kaur, PW 2, and Amarjit Kaur, PW 6, are mentioned in the F.I.R. only as persons who saw the wrapping of the chadar on the wound of Harbinder Singh, What is most significant is that it is nowhere mentioned in the F.I.R. that the appellant had stabbed Harbinder Singh at all. It seems inconceivable that by 9.15 p.m. it would not be known to Uttam Singh, the father of Harbinder Singh, that the appellant had inflicted one of the two stab wounds on the body of Harbinder Singh.

36. On the point of common intention, Mr. Sarkar, learned Sr. counsel cited the following paras of Kashima Singh Vs. State of Punjab (supra):-

"□3. Common intention is to be inferred from the circumstances particularly the part played by the accused and the surrounding circumstances, namely, nature of the weapon used and the injury inflicted as well as the meeting of the minds among the accused who are being held constructively liable. The facts stated above would reveal that the appellant tried to pick the pocket of PW 5 who called the deceased and the deceased tried to catch hold of the appellant and it was a sudden act on the part of William who picked out a knife from his pocket and inflicted a single injury on the deceased. Under those circumstances it cannot be held that the appellant and Sukhchain Singh had prior knowledge that William was armed with a knife and the part played by William cannot be said to be a conjoint act so as to attract the element of common intention on the part of the appellant as well as Sukhchain Singh. We also find that the High Court has not examined the reasons given by the Sessions Court for acquitting the appellant and Sukhchain Singh. It may be that two views are possible but the view taken by the trial court in the instant case cannot be said to be unsound. In this view of the matter we set aside the conviction and the sentence awarded by the High Court and confirm the order of the acquittal of the Sessions Court. In our view benefit of this order should also go to Sukhchain Singh who is not before us. In the view we have taken we acquit Sukhchain Singh also and direct that he shall be set at liberty if he is in jail. The appeal is accordingly allowed and the appellant shall be set at liberty. If he is on bail, the bonds shall be cancelled.

37. On the point of Section 25 and 27 of the Evidence Act, Mr. Sarkar, learned Sr. counsel cited the following Paras of the Hon ble Apex Court Judgment in Randeep Singh@Rana and Anr Vs. State of Haryana and ors.(Supra):-

"□5. Sections 25 to 27 of the Evidence Act read thus:

□25. Confession to police-officer not to be proved.-- No confession made to a police-officer , shall be proved as against a person accused of any offence.

26. Confession by accused while in custody of police not to be proved against him.-

- No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation.--In this section □Magistrate does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882).

27. How much of information received from accused may be proved.-- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

16. A perusal of the deposition of PW-27, which we have quoted above, shows that he attempted to prove the confessions allegedly made by the accused to a police officer when they were in Police custody. There is a complete prohibition on even proving such confessions. The learned Trial Judge has completely lost sight of Sections 25 and 26 of the Evidence Act and has allowed PW-27 to prove the confessions allegedly made by the accused while they were in police custody. PW-27 stated that the appellant "suffered disclosure statement at Exhibits 'P55' and 'P56' respectively". Obviously, he is referring to disclosure of the information under Section 27 of the Evidence Act. The law on disclosure under Section 27 is well settled right from the classic decision of the Privy Council in the case of Pulukuri Kotayya & Ors. v. King-Emperor². In the case of K. Chinnaswamy Reddy v. State of A.P.³, this Court relied upon the decision of the Privy Council and in paragraph 9 held thus:

9. Let us then turn to the question whether the statement of the appellant to the effect that "he had hidden them (the ornaments) and "would point out the place where they were, is wholly admissible in evidence under Section 27 or only that part of it is admissible where he stated that he would point out the place but not that part where he stated that he had hidden the ornaments. The Sessions Judge in this connection relied on Pulukuri Kotayya v. King-Emperor [(1946) 74 IA 65] where a part of the statement leading to the recovery of a knife in a murder case was held inadmissible by the Judicial Committee. In that case the Judicial Committee considered 1946 SCC OnLine PC 47 : AIR 1947 PC 67 1962 SCC OnLine SC 32 Section 27 of the Indian Evidence Act, which is in these terms: "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. This section is an exception to Sections 25 and 26, which prohibit the proof of a confession made to a police officer or a confession made while a person is in police custody, unless it is made in immediate presence of a Magistrate. Section 27 allows that part of the statement made by the accused to the police "whether it amounts to a confession or not" which relates distinctly to the fact thereby discovered to be proved. Thus even a confessional statement before the police which distinctly relates to the discovery of a fact may be proved under Section 27. The Judicial Committee had in that case to consider how much of the information given by the accused to the police would be admissible under Section 27 and laid stress on the words "so much of such information...as relates distinctly to the fact thereby discovered" in that connection. It held that the extent of the information admissible must depend on the exact nature of the fact

discovered to which such information is required to relate. It was further pointed out that 'the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact'. It was further observed that-- 'Information as to past user, or the past history of the object produced is not related to its discovery in the setting in which it is discovered. This was exemplified further by the Judicial Committee by observing-- 'Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. If however to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant. (emphasis added) Section 27 is an exception to Sections 25 and 26. It permits certain parts of the statement made by the accused to a police officer while in custody to be proved. Under Section 27, only that part of the statement made by the accused is admissible, which distinctly relates to the discovery. It becomes admissible when a fact is discovered as a consequence of the information received from the accused. What is admissible is only such information furnished by the accused as relates distinctly to the facts thereby discovered. No other part is admissible. By Exhibits 'P55' and 'P56', it is alleged that the accused showed the places where the deceased was abducted, where he was murdered and where his body was thrown. In this case, even the inadmissible part of the statement under Section 27 of the Evidence Act has been incorporated in the examination-in- chief of PW-27. The learned trial judge should not have recorded an inadmissible confession in the deposition. A confessional statement made by the accused to a police officer while in custody is not admissible in the evidence except to the extent to which Section 27 is applicable. If such inadmissible confessions are made part of the depositions of the prosecution witnesses, then there is every possibility that the Trial Courts may get influenced by it.

38. On these points, this Court is of the view that the appellants are supported by the judgments of the Hon'ble Supreme Court.

39. On the point that small discrepancies in the investigation process do not hinder the present case, the learned Public Prosecutor also cited the following paragraphs of the Hon'ble Apex Court Judgment in Firoz Khan Akbarkan vs. State of Maharashtra(supra):-

'20. To our mind, the prosecution has succeeded in proving its case beyond reasonable doubt. Having carefully gone through the material on record, especially the depositions of the witnesses and upon a keen examination of the relevant aspects of the case, we find that the presence of the appellant at the site of the incident and him having stabbed the deceased on the stomach repeatedly has been the consistent stand of the PWs who were eye- witnesses. The Courts below have also concurrently

found the same. The accused- appellant has not been able to controvert the evidence on record. Minor and immaterial inconsistencies and/or discrepancies shall not harm the case of the prosecution, as held, inter alia, in *State of Himachal Pradesh v Lekh Raj*, (2000) 1 SCC 247; *Narayan Chetanram Chaudhary v State of Maharashtra*, (2000) 8 SCC 457; *State of Madhya Pradesh v Ramesh*, (2011) 4 SCC 786; *Mekala Sivaiah v State of Andhra Pradesh*, (2022) 8 SCC 253, and; *Rameshji Amarsingh Thakor v State of Gujarat*, 2023 SCC OnLine SC 1321. The following observations from *Lekh Raj* (supra) are instructive:

7. In support of the impugned judgment the learned counsel appearing for the respondents vainly attempted to point out some discrepancies in the statement of the prosecutrix and other witnesses for discrediting the prosecution version. Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incident there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot-like statements are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement. This Court in *Ousu Varghese v. State of Kerala* [(1974) 3 SCC 767 : 1974 SCC (Cri) 243] held that minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony. In *Jagdish v. State of M.P.* [1981 Supp SCC 40 : 1981 SCC (Cri) 676] this Court held that when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. This Court again in *State of Rajasthan v. Kalki* [(1981) 2 SCC 752 : 1981 SCC (Cri) 593] held that in the depositions of witnesses there are always normal discrepancies, however, honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental CRIMINAL APPEAL NO.257 OF 2013 13 of 27 disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal and not expected of a normal person.

8. Referring to and relying upon the earlier judgments of this Court in *State of U.P. v. M.K. Anthony* [(1985) 1 SCC 505 : 1985 SCC (Cri) 105 : AIR 1985 SC 48] , *Tahsildar Singh v. State of U.P.* [AIR 1959 SC 1012 : 1959 Supp (2) SCR 875] , *Appabhai v. State of Gujarat* [1988 Supp SCC 241 : 1988 SCC (Cri) 559 : JT (1988) 1 SC 249] and *Rammi v. State of M.P.* [(1999) 8 SCC 649 : JT (1999) 7 SC 247], this Court in a recent case *Leela Ram v. State of Haryana* [(1999) 9 SCC 525 : JT (1999) 8 SC 274] held:

There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence....

The court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief CRIMINAL APPEAL NO.257 OF 2013 14 of 27 that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise. (emphasis supplied)

40. On the point of contradiction, learned P.P., cited the following paras of the Hon ble Supreme Court Judgment of Birbal Nath Vs. State of Rajasthan and ors.,(supra):-

20. No doubt statement given before police during investigation under Section 161 are previous statements under Section 145 of the Evidence Act and therefore can be used to cross examine a witness. But this is only for a limited purpose, to contradict such a witness. Even if the defence is successful in contradicting a witness, it would not always mean that the contradiction in her two statements would result in totally discrediting this witness. It is here that we feel that the learned judges of the High Court have gone wrong.

41. In the facts of the present case, the judgments cited by the learned Public Prosecutor are not applicable for the reasons stated supra.

42. Thus, it can be safely construed that Section 34 of the IPC cannot be made applicable against the accused herein, and thus they are not punishable under Section 302 of the IPC. Accordingly, the case of the prosecution fails. It is seen from the record that for the last six years, the appellants have been in jail, though there was an allegation of assault no charge under Section 323 of IPC has been framed and the punishment for assault if proved is only one month.

43. In view of the above observations, this Court is of the considered view that the appellants are entitled to acquittal. Therefore, the appeals are allowed. The Judgments and the Orders of Conviction dated 02.06.2023 and 03.06.2023 passed by the Trial Court in S.T.(T-1) 103 of 2019 against the appellants herein stand set aside. The appellants herein shall be released immediately, if not wanted in any other

case.

44. As a sequel, stay if any stands vacated. Pending application(s) if any also stands closed.

S. DATTA PURKAYASTHA, J

DR. T. AMAR

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