

(2006) 06 CAL CK 0026
In the Calcutta High Court
Case No : Criminal A. No. 210 of 1997

Bablu Das

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 19-06-2006

Acts Referred:

Arms Act, 1959 — Section 25, 27

Criminal Procedure Code, 1973 (CrPC) — Section 302, 313, 464

Penal Code, 1860 (IPC) — Section 148, 149, 302, 307, 326

Citation : (2006) 4 CHN 100

Hon'ble Judges : Sankar Prasad Mitra, J;Amit Talukdar, J

Bench : Division Bench

Advocate : Shekhar Basu and Debasish Roy, for the Appellant;Kazi Safiullah and Swapan Mullick, for the Respondent

Final Decision : Allowed

Judgement

Sankar Prasad Mitra, J.—This appeal has been preferred by the appellant against the judgment dated 26th June, 1997, passed by the learned Additional Sessions Judge, 2nd Court, at Alipore, 24(P) South, whereby the appellant was convicted and sentenced u/s 302 of IPC to suffer imprisonment for life and also to pay a fine of Rs. 5,000/-, in default, to suffer rigorous imprisonment for six months, in connection with Sessions Case No. 3CD/1996, S.T. No. 2(1) of 1997.

2. The prosecution's case in brief is that on 14th September, 1994 at about 10.00 a.m. Ashim @ Rabi Mazumder and Buno @ Bimal Hazari while going from the side of Khalpole of the area and proceeding towards Mollah Gate following B.B.T. Road by riding a bicycle near welding shop, accused Dulal Das, Bablu Das, Babul Das, Sanjoy Dutta and Kamal Dutta and some other started bombing and firing from firearms aiming Buno @ Bimal Hazari and Ashim @ Rabi Mazumder and as a result they sustained injuries and fell down on the Budge Budge Trunk Road and Ashim @ Rabi Mazumder even after receiving injuries crossed some distance running to save his life but, the miscreants attacked him again with

bombs and injured him seriously. Buno @ Bimal Hazari, in the meantime, hired a taxi and went to S.S.K.M. Hospital for treatment where he was admitted. On hearing hue and cry Kalimohan Mazumder father of Ashim @ Rabi Mazumder came to the place of occurrence and found Ashim with injuries. After the incident there was road blocked and police came there to maintain law and order situation and Kalimohan Mazumder handed over a written complaint to S.I. Sambhu Nath Roy, (P.W.19) who sent the said complaint to Maheshtala Police Station through an officer, A.S.I. Santosh Sarkar, for registering a case and A.S.I. Anil Chatterjee, (P.W.7) who was on duty received the complaint and started Maheshtala P.S. case No. 255 dated 14th September, 1994 by filling up the formal FIR. The O.C. Maheshtala P.S. in the meantime, made arrangement for sending injured Ashim @ Rabi Mazumder to S.S.K.M. Hospital for treatment on 14th September, 1994 who was admitted there at 10.30 a.m. but as his condition was alarming he expired on the same day at about 12.50 p.m. The victim Ashim @ Rabi was admitted to S.S.K.M. Hospital as indoor patient under Dr. T. Sen, (P.W.10) inquest was held on the body of the victim, Ashim @ Rabi Mazumder, at S.S.K.M. Hospital by A.S.I., Dipak Kanti Aich, (P.W.13) and he sent the dead body through a constable for post-mortem examination on 15th September, 1994 and at about 1.30 p.m. Dr. P.B. Das, (P.W.11) held P.M. examination of the victim at Alipore Police Morgue being identified by constable T84 Dayamay Goswami of Bhabanipur Police Station. The investigation of the case was first taken up by S.I. Sambhu Nath Roy, who during investigation visited the P.O., recorded statement of witnesses, prepared sketch map with index of the P.O. On 28th March, 1995, he moreover the charge of the case to the then O.C. of Maheshtala P.S. and thereafter S.I. Partha Mazumder, (P.W.20) on 2nd April, 1995, took up the investigation of the case and during investigation he seized bed head ticket, admission form of injured Buno @ Bimal Hazari and collected death certificate of victim Ashim @ Rabi Mazumder. He did not prepare any sketch map of the P.O. and on 30th April, 1995 he recorded the statement of Kalimohan Mazumder. Subsequently, he submitted chargesheet in this case and thereafter submitted a supplementary chargesheet against the six accused persons under sections 148, 149, 326, 307/302 of IPC.

3. The Trial Court framed charges under Sections 148/302 read with Section 149 of IPC and Section 302/307 read with Section 149 of IPC and in answer to the charges the accused persons pleaded not guilty and claimed to be tried. The defence version is that they have been falsely implicated in this case due to political rivalry.

4. In the Trial Court the prosecution in order to prove the charges against the accused persons examined as many as twenty witnesses. That apart, the prosecution has exhibited the written complaint. Exhibit 1, signed by P.W. 1, Kalimohan Mazumder, seizure list dated 14th September, 1994, Exhibit 2, proved by P.W.5, Ashok Mazumder, brother of the victim, showing seizure of sutli, blood-stained earth, controlled earth etc., from the P.O., formal FIR Exhibit 3, proved by P.W.7, Anil Chatterjee, admission form of S.S.K.M. Hospital relating to Ashim

@ Rabi Mazumder bearing signature of P.W.15, Dr. P.C. Subuddhi vide Exhibit 4/1 which is part of Exhibit 4, postmortem examination report of the dead body of the victim Exhibit 5, proved by P.W. 11 Dr. D.P. Das, Exhibit 6, inquest report relating to the dead body of the victim proved by P.W. 13, D.K. Aich, S.I., Exhibit 7, outdoor ticket of S.S.K.M. Hospital dated 14th September, 1994 showing that Bimal Hazari @ Buno attended outdoor with bomb injuries on his person and the order as to his admission was passed on the day proved by P.W. 14, Dr. S. Banerjee, Exhibit 8, admission form of S.S.K.M. Hospital relating to Buno Hazari proved by P.W. 15, Dr. P.C. Subuddhi and Exhibit 8/1 represents the endorsement of P.W. 15 on the admission form. Exhibit 9 is the seizure list dated 15th June, 1995 showing seizure of bed head tickets of Buno Hazari and Ashim @ Rabi Mazumder from S.S.K.M. Hospital proved by PW 10, SI Partha Mazumder, I.O. Exhibit 10 is the death certificate of Ashim @ Rabi issued by the S.S.K.M. Hospital collected by the I.O. Exhibit 11 represents index of the P.O. prepared by P.W. 19, the previous I.O. S.N. Roy.

5. The defence did not examine any witness in support of their defence.

6. Considering the oral testimonies of P.W.I and P.W.5 as also the FIR, Exhibit 1, the Trial Court found no involvement of accused Diyen Dutta and, therefore, Diyen Dutta was acquitted from all the charges brought against him. Learned Trial Court found that the occurrence involved in this case took place at 10.00 a.m. or so on 14th September, 1994 and it was found that Ashim @ Rabi with bomb injuries on his person was admitted to S.S.K.M. Hospital on 14th September, 1994 at 10.30 a.m. and he died on the same day at 12.30 p.m. but, the FIR. Exhibit 1 was submitted to police admittedly on 14th September, 1994 at 13.15 hours at P.O. The FIR according to Trial Judge was admittedly belated one and in the facts and circumstances of this case he found that the names of Babul Das, Sanjoy Dutta, Kamal Dutta were written in the FIR after a second thought. Learned Trial Judge considering the entries made in page 72 of bed head ticket, Exhibit 4 of Ashim @ Rabi Mazumder allowed the accused Babul Das benefit of doubt. That apart, he found that the prosecution could not prove beyond any shadow of doubt that Babul Das took part in assaulting P.W.3 Buno @ Bimal Hazari. He also found that it could not be proved beyond doubt by the prosecution that Babul Das had with him 3 to 5 others at the time of hurling bombs aiming Ashim @ Rabi at the second P.O. Thus, according to him the case of the prosecution against the appellant (accused) Bablu Das u/s 148 of IPC could not stand. Similarly, according to him the case of the prosecution against the accused Bablu Das u/s 307 of IPC for causing fatal injury to Buno @ Bimal Hazari could not be accepted as proved beyond doubt. The learned Trial Judge, therefore, found accused Dulal Das, Babul Das, Sanjoy Dutta, Kamal Dutta and Diyen Dutta not guilty to the charges framed against them and they were acquitted. However, he found that the prosecution could prove beyond reasonable doubt that the accused (appellant Bablu Das) committed the offence punishable u/s 302 of the Indian Penal Code for causing death of Ashim @ Rabi Mazumder and he was, therefore, convicted and sentenced accordingly.

7. Let us now consider whether the judgment dated 26th June, 1997 passed by the learned Additional Sessions Judge, 2nd Court at Alipore can be sustained or not?

8. Mr. Shekhar Basu, learned Advocate appearing on behalf of the appellant with Mr. Debasish Roy drawing our attention to the charges framed against the appellant as also his examination u/s 313 of Cr. PC submitted that the appellant faced joint trial with the other accused persons acquitted in this case. That apart the oral dying declaration made by the victim Ashim @ Rabi Mazumder before P.W.1, father of the victim and P.W.5, brother of the victim should not be accepted by this Court to warrant conviction of the accused because in view of the evidence of P.W. 11, Dr. D.P. Das, the victim with multiple injuries had no capacity to speak. It is further submitted by Mr. Basu that the dying declaration at page 72 of bed head ticket relied upon by the Trial Judge to warrant conviction of the appellant should not be accepted by this Court because it is not proved according to law. Moreover, in view of the evidence adduced by doctors at S.S.K.M. Hospital the victim who was gasping and undergone tracheotomy and kept under saline and in deep coma, was not in a position to speak disclosing the names of the assailants. Therefore, conviction of the appellant is unfounded and there is no eye-witness of the incident to show that it was the appellant who actually killed the victim by throwing bomb. Mr. Basu further submitted that the appellant who faced joint trial with the other accused persons should not have been convicted u/s 302 without framing a specific charge against him. In this connection he relied upon particularly two decisions reported in Suraj Pal Vs. The State of Uttar Pradesh, and 1993 SCC 583, Subran @ Subramaniam and Ors. v. State of Kerala and submitted that after framing charges for offence under Sections 148, 149, 302, 307 of IPC the appellant cannot be convicted for substantive offence u/s 302 of IPC simpliciter because there is no direct individual charge against the appellant for specific offence u/s 302 of IPC and therefore conviction of the appellant for an offence u/s 302 is not permissible. It is therefore, submitted by him under the circumstances for want of evidence and the error committed by the Trial Court by not framing specific charge against the appellant, the judgment passed by the learned Trial Court should not be sustained by this Court and it should be set aside. It is further submitted by him that there was miscarriage of justice because had any specific charge u/s 302 of IPC been framed against the appellant by the Trial Court the appellant would have availed the opportunity under the law to cross-examine the prosecution witnesses concerning material facts relied upon by the prosecution. He further submitted that the judgment passed by the learned Trial Court should not be upheld by this Court.

9. The learned P.P., Kazi Safiullah with Mr. Swapan Mullick, appearing on behalf of the State drawing our attention to the deposition of P.W.3 Buno @ Bimal Hazari, who was examined by P.W.15 and the evidence adduced by P.W.1 and P.W.5 submitted that it is the quality and not the quantity of the witness to be taken into consideration by this Court. According to him evidence of P.W.3 should be

given intrinsic value because he sustained injury due to the occurrence of the incident. It is further submitted by him that the oral dying declaration made by the victim to P.W.1 and P.W.5 and the dying declaration made by the victim at the S.S.K.M. Hospital recorded in writing should be believed by this Court and there are sufficient materials on record which the Court should take into account to sustain conviction of the appellant. Learned P.P., with reference to the decisions cited by the learned Advocate for the appellant, submitted that conviction of the appellant u/s 302 of IPC who faced joint trial with other accused persons without framing any specific charges is maintainable unless it is shown that there was miscarriage of justice causing prejudice to the appellant. In this connection learned P.P. relied upon three decisions reported in (1) 2003 SCC 514 Chittarmal v. State of Rajasthan and Moti v. State of Rajasthan (2) 2006(1) SCC 661 Radha Mohan Singh and Anr. v. State of U.P. and Kaushal Kishore Singh and Anr. v. State of U.P. and (3) Bolineedi Venkataramaiah and Others Vs. State of Andhra Pradesh, . It is further submitted by him that the decisions as cited by the learned Advocate for the appellant is not applicable in this case and there is no irregularity and/or illegality in the judgment passed by the Trial Court convicting the appellant u/s 302 of IPC without framing any specific charge as pointed out by the learned Advocate for the appellant. According to Mr. Safiullah the judgment passed by the learned Trial Court is well-reasoned supported by convincing evidence adduced by the prosecution and therefore the conviction of the appellant should be sustained by this Court.

10. Mr. Basu in reply drawing our attention to Chittarmal's case (supra) cited by the learned P.P., submitted that the said decision did not decide the question raised by him and, therefore, the said decision is not applicable in this case. In this connection he referred to the paragraph 13 of the said decision. Mr. Basu further submitted before us that Bolineedi Venkataramaiah's case (supra) cited by the learned P.P. has also no application in this case because the facts and circumstances of this case are different. However, Mr. Basu referring to Radha Mohan Singh's case (supra) as cited by learned P.P. drew our attention to paragraph 20 of the said decision. In that case, the learned Sessions Judge had framed charge u/s 302 read with Section 149 IPC against all the accused persons, In view of Section 464 Cr. PC it is possible for the Appellate or Revisional Court to convict an accused for which no charge was framed unless the Court is of the opinion that failure of justice would, in fact, occasion. In order to judge whether a failure of justice has been occasioned it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got fair chance to defend himself. Mr. Basu relying upon the observation made by the Apex Court in this regard submitted that in this case there is no iota of evidence against the present appellant that he hurled bomb and thereby killed the victim. There is nothing in his examination u/s 313 of Cr. PC that he alone hurled bombs to the victim which ultimately took away his life. On the contrary, the evidence-

on-record as well as the examination of the appellant u/s 313 of Cr. PC clearly established that he faced joint trial and his activity showed joint responsibility. It is further submitted by him that the appellant who faced joint trial with other accused persons were acquitted of the charges and no appeal has been preferred by the Government against the order of acquittal. Therefore, conviction of the present appellant only u/s 302 of IPC without framing any specific charge against him, deprived him of availing an opportunity to cross-examine the prosecution witnesses concerning the offence and, therefore, there was failure of justice which caused serious prejudice to the appellant. Mr. Basu, therefore, submitted in the circumstances, conviction of the appellant only u/s 302 of Cr. PC without framing any specific charge against him is not permissible under the law and accordingly the order of conviction passed against the appellant is not maintainable.

11. Learned P.P. left the matter to be argued by Mr. Swapan Mullick on behalf of the State. Mr. Mullick appearing on behalf of the State in reply conceded the argument advanced by the learned Advocate for the appellant. It is submitted by him that this Court after considering the evidence-on-record and attending circumstances of the case should decide this appeal.

12. Admittedly the incident occurred on 14th September, 1994 at about 10.00 a.m. firstly near a welding shop at Budge Budge Trunk Road while the victim Ashim @ Rabi Mazumder along with Buno @ Bimal Hazari, P.W.3 were returning from Khalpole and proceeding towards Mollah Gate near a welding shop they were attacked with bombs etc. and thereafter second attack was made upon the victim Ashim @ Rabi near Mollah Gate by the side of Saha's house shown in the index, Exhibit 11 without any sketch map prepared by the first I.O., P.W. 19. When the first attack was made P.W. 3 was riding bicycle carrying the victim Ashim @ Rabi in the back seat and after the attack both of them fell to the ground with injury and at that time P.W. 3 found the victim running to save his life. He also heard the sound of bombs and firing and he thought that the miscreants did this. P.W. 3 as he was injured rushed to S.S.K.M. Hospital by hiring a taxi and admitted there but, he did not disclose the names of the assailants who attacked him. Soon after hearing sound of bomb and a hue and cry, P.W.1, Kalimohan Mazumder, father of the victim rushed to the place near Mollah Gate and found his son, the victim lying with bleeding injuries and his left hand was separated from his body and it was hanging. He did not go to the hospital nor his relation went to the hospital and the victim after arrival of the police was sent to S.S.K.M. Hospital by a taxi for treatment where he was admitted but, the victim could not disclose the name of the assailant at the time of admission. The victim was admitted on 10.30 a.m. at S.S.K.M. Hospital in semi-conscious state with severe injuries on left arm, left leg and neck and he was gasping and as such, the doctors attending the victim did tracheotomy and it was done by P.W. 17 assisted by P.W. 18 in order to overcome the crisis and to facilitate ventilation. According to P.W. 17 the patient was under saline and he was in deep coma. The patient was admitted at S.S.K.M. Hospital under P.W. 10,

Dr. T. Sen and P.W. 16 who proved the admission form of the victim also found multiple lacerated injuries with compound fracture of left leg, left arm and neck and he confirmed death of the victim on 14th September, 1994 at 12.50 p.m.

13. So the victim died at S.S.K.M. Hospital on 14th September, 1994 at 12.50 p.m. The written complaint in this case was submitted by P.W.1 on 14th September, 1994 at 13.15 hours at the P.O., Exhibit 1, to P.W.19, S.I.S.N. Roy, and after receiving the same P.W. 19 sent it to P.W.7 through P.W. 12 for registering a case and P.W.7 on the basis of the written complaint filling up the formal FIR vide Exhibit 3 series and registered Mahestala P.S. Case No. 255 dated 14th September, 1994 at 1.45 p.m. i.e. 13.45 hours under Sections 148, 149, 326, 307/34 of IPC read with Sections 25 and 27 of the Arms Act and Section 9(B) of I.E. Act. P.W. 19 made arrangement for sending the victim to S.S.K.M Hospital, examined witnesses, some witnesses on 14th September, 1994 and Bimal Hazari @ Buno, P.W. 3 on 15th September, 1994. He prepared index of P.O. without any sketch map and he did not examine any witness nearby the P.O. and ultimately on 28th March, 1995 he made over charges of this case and thereafter P.W. 20, Partha Mazumder took up the investigation but he did not prepare any sketch map. However, he collected bed head ticket of Buno @ Bimal Hazari, discharge certificate of P.W.3, affected seizure and collected death certificate of victim, other necessary papers and thereafter submitted charge-sheet No. 69 dated 22nd May, 1995 against the accused persons under Sections 148, 149, 326, 302 and 307 of IPC. A supplementary chargesheet was submitted by him bearing No. 75 dated 15th June, 1995. The inquest was held on the dead body of the victim by S.I. D.K. Aich, of Park Street P.S. at S.S.K.M. Hospital and on 15th September, 1994 at 1.30 p.m. P.W. 11, Dr. D.P. Das held P.M. examination on the dead body of the victim being identified by Constable T84, D. Goswami and he proved the P.M. report of the victim vide Exhibit 5.

14. P.W. 11 during P.M. examination found the following:

1. One crushed smashed and gaping bomb blast injury over left side back, left scapular region, left shoulder, left axial and left arm upto elbow measuring 14" x 6" bone deep.
2. One crushed and smashed gaping bomb blast injury over middle of left leg measuring 6" x 5" bone deep.
3. One lacerated wound over right side chest wall 2" above right nipple measuring ?" x ?" muscle deep.
4. One lacerated wound over right side neck lower part measuring 1? inch x ? inch muscle deep.
5. One lacerated wound over left side of neck lower part measuring 2 inch x ? inch muscle deep.
6. Fracture ribs on the left side from 1st to 5th ribs on backside.

7. Compound exposed separated fracture of left humerus.

8. Compound exposed fracture of all bones of left leg? bones found broken into pieces.

15. According to him all the injuries showed the evidence of vital reaction and in his opinion death was due to effect of the bomb blast injuries as stated above, anti-mortem and homicidal in nature. He has further opined that injury No. 1 can be sustained by hurling of bomb either from left side or from back side. On seeing the injury on left leg he opined that the deceased was not in a position to run away. He has further opined considering the impact of all the injuries on the body of the deceased, the victim was not in a position to speak after sustaining injuries. It is because of these injuries as opined by P.W. 11, the victim could not tell the names of the assailant at the time of admission at S.S.K.M. Hospital and, therefore, the names of the assailants are found absent in the admission form prepared by the attending doctors at the said hospital on 14th September, 1994 at 10.30 a.m.

16. It transpires from the evidence of attending doctors of the S.S.K.M. Hospital, namely, P.W.10, P.W.14, P.W.15, P.W.16, P.W.17 and P.W.18 that the patient was admitted in semi-conscious state and he was gasping and in order to give some relief to him Tracheotomy was done in order to facilitate ventilation. It further transpires from the evidence of the doctors that the patient was under saline and he was in deep coma with severe injuries on his body. As a whole, the patient was in crisis. The learned Trial Judge practically on the basis of the entries at page 72 of the bed head ticket came to a conclusion that it was the appellant Bablu Das who killed the victim by hurling bomb etc., as in the said statement the name of Bablu Das appeared. But this document could not be proved by the prosecution by adducing cogent and convincing evidence that the victim made any dying declaration implicating the appellant as assailant. It transpires from the evidence adduced by doctors of S.S.K.M. Hospital that the patient was operated upon in order to facilitate ventilation and he was given saline and that he was in deep coma. The testimonies of doctors as a whole go to show that the patient with multiple injuries was in crisis and fighting for life. As regards the entries made at page 72 of bed head ticket, P.W. 16 Dr. Ashim Kr. Biswas stated in his evidence that he does not know who wrote the bed head ticket of the patient Ashim @ Rabi and even he does not know who wrote the bed head ticket of the patient as to how he was injured and by whom he was injured. P.W. 17, Dr. A.K. Ghosh, RMO, E.N.T. Department, S.S.K.M. Hospital has stated in his evidence that the entries made at page 72 of bed head ticket was neither written by him nor it was signed by him. P.W. 18, Dr. S.K. Gupta, House Surgeon of S.S.K.M. Hospital who attended the victim and assisted P.W. 17 for the purpose of Tracheotomy has stated in his evidence that the bed head ticket of the patient is not in his handwriting and it does not bear his signature. He could not say the name of the patient examined by him. So the prosecution in this case has failed to prove who made the entries at page 72 of the bed head ticket. It is not proved

by the prosecution by whom the dying declaration was recorded and who made such dying declaration. Therefore, entries at page 72 of the bed head ticket as produced by the prosecution cannot be said a part of the bed head ticket of the victim and it cannot be said a dying declaration of the victim. So the attempt made by the prosecution to forestall the entries at page 72 as dying declaration of the patient is not proved in this case. Therefore, it is not accepted as dying declaration of the victim. So the conviction on the appellant on the basis of the entries made at page 72 not proved in this case in accordance with law by the Trial Court cannot be sustained.

17. It appears from the FIR Exhibit 1, and the testimony of P.W.1, father of the victim that his son Ashim @ Rabi told him the names of the accused persons involved in the incident while he was being taken to the hospital. P.W. 1 did not see the incident of assault upon his son and hearing a hue and cry and sound of bomb he rushed to the place of occurrence and he found that his son lying with bleeding injuries and his left hand was separated from his body and it was hanging. It is stated by him that his son told the names of the accused persons to him before his arrival to the hospital. It is claimed by P.W.4, Prabir Debnath, that he also heard the names of the accused persons from P.W.1 but the evidence of P.W.1 disclosed that he did not tell the names of the accused persons to P.W.4 and, therefore, the evidence of P.W.4 disclosing the names of the accused persons being the assailant of the victim becomes hear-say and it is not admissible in evidence. This witness is not an eye-witness to the incident. The evidence of P.W.1 does not show that P.W.5 met him at the P.O. on the date of the incident and from his evidence it transpires that neither he nor any of his relation accompanied the victim Ashim @ Rabi to the hospital. Therefore, the evidence of P.W.5 to the effect that he went to the P.O. and met his father on the date of the incident is a myth. However, P.W.5, Ashok Mazumder, son of P.W.1 has stated in his evidence that from his brother, Rabi, he came to know at about 11.00 a.m. on 14th September, 1994 the names of the accused persons at hospital and his brother Rabi expired on the same day at 12.30 p.m. at the S.S.K.M. Hospital. Now, the question is whether Rabi @ Ashim Mazumder was in a position to tell the names of the accused persons either to P.W.1 at the P.O. or to P.W.5 on 14th September, 1994 at the S.S.K.M. Hospital. It is evidently clear that at the time of admission of the victim the names of the assailant were not disclosed in the admission form. That apart, the patient was in semi-conscious state and he was gasping due to multiple injuries with compound fracture and to revive his condition tracheotomy was done at the O.T. of S.S.K.M. Hospital to facilitate ventilation and he was under saline and in deep coma. This critical condition of the victim has been depicted by all the attending doctors of the said hospital. Now if we take into account the evidence of P.W. 1 in the light of the condition of the patient depicted by the doctors of the S.S.K.M. Hospital we cannot but accept the opinion of P.W.11, Dr. P.B. Das, who held P.M. examination on the dead body of the victim that after sustaining such injuries the victim was not in a position to run away and he was not in a position to speak. Therefore,

considering the evidence of doctors and the attending facts and circumstances, it cannot be said with definite degree of certainty beyond any shadow of doubt that the victim in that critical condition was in a position to speak and tell the names of the assailants, i.e. the accused persons. Therefore, the oral dying declaration made by the victim to P.W. 1 and P.W.5 cannot be accepted as trustworthy and convincing. There is no eye-witness to the incident, even P.W.3 who was admitted to S.S.K.M. Hospital with injury could not disclose the names of his assailants as also the victim. Since evidence adduced by the prosecution in this regard was not convincing, the learned Trial Judge acquitted Babul Das, Dulal Das, Sanjoy Dutta, Kamal Dutta and Dijen Dutta from all the charges framed against them, for which no appeal has been preferred by the State. However, the learned Judge convicted the appellant u/s 302 of IPC and sentenced him accordingly relying upon the entries made at page 72 of bed head ticket which according to us was not proved in accordance with law. In this case the prosecution has failed to prove the oral as well as written dying declaration of the victim and it is crystal clear that the victim was not in a position to speak sustaining injuries soon after the incident till his death at 12.50 p.m. on 14th September, 1994, and he was not in a position to run as opined by Dr. P.B. Das, P.W. 11 buttressed by the evidence of doctors at S.S.K.M. Hospital which falsifies the evidence of P.W.3 that the victim ran away with injuries to save his life.

18. It is crystal clear that the appellant Bablu Das was acquitted of charges u/s 148/307 of IPC by the Trial Court. The other five accused persons have been acquitted of all the charges brought against them and the State did not prefer any appeal against that order. However, on the basis of same evidence disclosed during trial against the appellant who was tried jointly with others, the Trial Court convicted the appellant u/s 302 of IPC and sentenced him accordingly without framing any specific charge against him u/s 302 of IPC. Now, the question arose for consideration as to whether there was any miscarriage of justice, which caused serious prejudice to the appellant. We have discussed in the foregoing paragraphs that there was no eye-witness to the incident and the stand taken by the prosecution that there was oral as well as written dying declaration made by the victim implicating the appellant has not been accepted by us as convincing, trustworthy and probable considering the critical condition of the victim observed by the doctors. All these facts and circumstances perhaps influenced the mind of Trial Judge and as there was no evidence showing individual involvement of the appellant he hesitated and ultimately hurriedly convicted the appellant u/s 302 of IPC on the same set of evidence without framing specific charge u/s 302 of IPC.

19. Be that as it may, in this case, the prosecution has failed to prove beyond any shadow of doubt that it was the appellant who actually killed the victim by hurling bomb and therefore conviction of the appellant u/s 302 of IPC cannot be sustained and it should be set aside by this Court. Thus, we find merit in the appeal calling for interference by this Court. The appeal is accordingly allowed. Conviction and sentence imposed upon the appellant Bablu Das u/s 302 of IPC by a judgment dated 26th June, 1997 passed by the learned Additional Sessions

Judge, 2nd Court, Alipore, in ST. No. 2(1) of 1997 and S.C. No. 3(1) of 1996 is hereby set aside. The appellant Bablu Das is found not guilty to the charge and he be acquitted and released from bail bond.

20. Let a copy of this judgment be sent to the learned Additional Sessions Judge, 2nd Court, Alipore, 24 (P) South, for his information and taking necessary action.

Amit Talukdar, J.

21. I agree.