

---

**(1996) 07 CAL CK 0001**  
**In the Calcutta High Court**  
**Case No : Criminal Appeal No. 72 of 1992**

|                          |    |            |
|--------------------------|----|------------|
| Dablu Sheikh and Another | Vs | APPELLANT  |
| State of West Bengal     |    | RESPONDENT |

---

**Date of Decision :** 26-07-1996

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 148, 149, 300, 302, 304

**Citation :** (1997) CriLJ 3228

**Hon'ble Judges :** R. Bhattacharyya, J;D.P. Sircar-I, J

**Bench :** Division Bench

**Advocate :** Amit Talukdar, Md. Yasin Ali and Md. Ibrahim, for the Appellant; Arun Kr. Mukherjee and Tapan Dutta Gupta, for the Respondent

**Final Decision :** Dismissed

---

## Judgement

R. Bhattacharyya, J.—This criminal appeal is directed against the order of conviction and sentence passed by the Additional Session Judge in Session Trial No. 1 (10) of 1990, wherein the learned Court below did not convict Dana Sk. and Najir Hossain as they were found not guilty. But the learned Trial Court found Dablu Sk. and Anarul guilty of an offence committed under Sections 302/34 of the Indian Penal Code. Both Dablu & Anarul were accordingly, convicted under Sections 302/34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life which gave rise to the initiation of the instant appeal for reversal of the order of conviction and sentence.

2. Put it briefly, the case of the prosecution is that on 21 -11 -83 at about 7-30 a.m. Moinul, since deceased, was attacked by the accused persons on way home, who suffered a number of assaults of which Salim, Dablu and Anarul were the authors, who employed Jhabas to do away with him. Islam a poor Rickshaw paddler came to rescue who was not spared by Salim. In consequence of the injuries suffered by him as inflicted by Jhaba, the index finger of his right hand chopped off, Harunal Rasid, a witness to the occurrence immediately rushed in. The loud cry of his drew some persons of the village who immediately poured in

amongst which Saratulla Sk., the informant was one. Ajimuddin and others removed Moinul and Islam to the Beldanga PSC, where Moinul breathed his last on way to hospital. But Islam was referred to Baharampur Hospital from the PSC for his treatment.

3. An information was laid at the PS Beldanga when the law was immediately set into motion. In accordance with the information, the investigating agency recorded statements of the witnesses, held inquest of Moinul followed by autopsy conducted by the surgeon.

4. On conclusion of investigation, the police submitted chargesheet against Anarul, Dablu, Dana, Kader and Najir. Unfortunately, Salim who was the author of the assault of Moinul had been murdered after the institution of the case.

5. The learned SDJM committed the case and the accused to the Court of sessions to stand the trial.

6. The Court of session framed charges against Kader, Dana, Dablu, Najir Hossain and Anarul u/s 148. and Sections 302/149 of the Indian Penal Code, who pleaded not guilty and claimed to be tried. Kader breathed his last during the currency of the case. Only four accused persons, therefore, left who stood the trial.

7. The case of the defence, as can be gathered from the trend of the cross-examination and other materials, revealed spoke of innocence of the accused persons, who, according to their own version, are absolutely immune.

8. The prosecution, in this case, has examined as many as 15 witnesses and none has been examined on behalf of the accused persons to stall the case of the prosecution. The learned Court below, as it appears, on consideration of the evidence on record, found the accused persons Dablu and Anarul guilty and passed the order of conviction and sentence under Sections 302/34.

9. The order of conviction and sentence has pushed the appellants to the Court of appeal for redressal of their grievances, since pivoted on innocence of the appellants which, they claim" the learned Court below over-looked.

10. Mr. Talukdar in assailing the order of conviction and sentence has made emphatic submissions, apart from the minority of Dablu, that the evidence has not been appraised by the (learned Trial) Court in its proper perspective. The evaluation of evidence and assessment has raised a gulf. The learned Trial Court, according to the learned counsel, failed to scrutinise the evidence With abundant care and caution, as the local witnesses examined in this case are highly interested and not independent witnesses, who have come to canvass the cause of the prosecution. The contradictions, appearing in the evidence of PWs. 1, 4 & 12, have demonstrated the falsity of the prosecution case.

11. The learned counsel appearing for the State has strongly contended that the evidence is sound and convincing, as the local witnesses examined in this case

have assured their presence at the time of the occurrence, who are PWs. 1, 4 & 12.

12. In the background of the above, the findings of the learned Trial Court do not warrant any interference from the Court of appeal. The injuries inflicted on Sk. Islam and Moinul fortified by the medical evidence and local witnesses afford an irresistible conclusion of their (local witnesses) being present during the occurrence, who saw the assault by Dablu, Salim and Anarul on Moinul and Islam. Since Salim is no longer in the land of living and since Dablu was adjudged as minor on the date of occurrence, for which, our decision would be restricted to Anarul alone and none else.

13. Reverting back to appraising the evidence with relation to the prosecution case, it is notorious to find from the evidence that Salim, Dablu and Anarul inflicted injuries by Jhaba with the aid of sharp cutting weapons. Anarul dealt Jhaba blow on the hand of Moinul which has been assured by PW-1 Harunal Rashid, PW-4 Islam Sk. and PW-12 Rabiul. Their evidence about the assault did not suffer from any contradiction on material point and the minor wear and tear in their evidence do not inflict any casualty on the prosecution case. The post occurrence witnesses PW-2 Chhapatulla Mandal and PW-3 Ajimuddin Sk., largely assured the case of the prosecution. They, by their evidence, gave a consistent testimony that they found the index finger of Islam Sk. (PW.4) chopped off which was lying on the ground. Islam (PW-4), the injured narrated the occurrence to them. Both the post occurrence witnesses have given an account that Moinul had no power to speak for the injuries sustained by him. But, Islam Sk. gave an account of the occurrence, the assault and the authors of the, crime. The injury of Islam Sk. has been corroborated by other evidence on record. Their presence at the scene of occurrence, cannot be doubted and Sk. Islam being an injured victim would not leave out the real assailants and substitute them for innocent persons.

14. Salim was an injured witness, who suffered assault during the occurrence. He intervened and tried to stop the assault on Moinul and the evidence of such person, in the back-ground of injury sustained by him, could not be disbelieved.

15. PW-1 and PW-12, as already indicated, have given a faithful account of occurrence, who never withered away during the ordeal of cross-examination. They held the ground but never titled nor they were drifted away.

16. In the context of principle of law as laid down by the Apex Court about the evidence of the injured witness in *Bonkya v. State of Maharashtra* 1995 SCC (Cri)1113 : (1995 AIR SCW 4029) adds flavour to our view.

17. We have also examined the evidence of other local witnesses who according to Mr. Talukdar are interested witnesses, but their evidence cannot be discarded outright on that score alone as the law laid down in *State of Punjab and Gurmej Singh Vs. Jit Singh and others*, etc., It has been forewarned and cautioned by the Apex Court about the law to be applied in regard to appraisalment of evidence of

interested witnesses, which must be examined in the light of probabilities and surrounding circumstances. In our view, they have not made any embellishment nor made any improvement of their version from stage to stage. They have given proper explanation for their presence at the scene of occurrence which, in our view, does not render their presence doubtful. That they removed the injured to the hospital is also a weighty fact, which cannot be disbelieved, since the Doctor at the PSC did not record the names of the assailant, though given out by the party accompanying the injured. It did not impair the prosecution case. The evidence of the eye-witnesses and the post occurrence witnesses cannot be disbelieved. The learned Court below has taken a correct view of the evidence. His approach and treatment to the case are not wrong, who never made any undue assumption of facts. He appraised the evidence with due care and caution to which we cannot but agree. The offence against Anarul has been established beyond reasonable doubt.

18 At the risk of repetition, we leave on record that we have not adjudged the guilt of Dablu which is the domain of the Juvenile Court. His conviction, therefore, cannot be sustained while hearing the appeal. But the offence has been well established, by the prosecution against Anarul.

19. Now the question arises whether Anarul could be convicted u/s 302 of the Indian Penal Code.

20. A serious question is posed up for decision as to whether conviction under Sections 302/34 in the state of evidence on record is in consonance with the provisions of the Indian Penal Code and whether the commission of offence of the accused comes within the fold of Section 302.

21. Mr. Talukdar, the learned Counsel-for the appellants has begun his campaign that the case of the appellant does not verge on Section 302 of the IPC as the culpability of the offence u/s 302 cannot be determined, in the instant case, with regard to the blow inflicted by Anarul on Moinul. The argument at the first blush seems to be attractive, but when we taste the bottom of it, the argument loses its sting. If we shift our glance and take a glimpse of the evidence of the Doctor (PW-13), who held the autopsy has given an untrammelled account of the evidence about the cause of death. According to him, "the death was caused out of shock and haemorrhage as a result of the injuries stated above which were ante-mortem and homicidal in nature.

22. In the background of the aforesaid evidence of the Doctor, since not disputed or contradicted, it will be legitimate for the Court to hold that it is one of the injuries inflicted by Anarul along with the associated injuries inflicted by others which were the result of death.

23. Thus, the infliction of injury of Anarul cannot be considered in isolation of others when the doctor assigned the injuries being the cause of death.

24. To distinguish the culpability, it is only the evidence which could answer the

questions. It is notorious to find from the record that both Dablu and Anarul inflicted blow by Jhaba on the right hand about which, the evidence is not stricken with falsehoods. The evidence of the Doctor who held the autopsy and the evidence of PWs. 1 to 4 are ensured with accuracy about the reality of the prosecution case. From the trend of evidence and the established circumstances. it is very difficult to hold with certainty that the accused appellant intended to cause the death of the deceased as the accused inflicted Jhaba blow on the right hand. It also gathers support from the evidence that the accused did not indiscriminately use the Jhaba signifying that he had no intention to do away with Moinul.

25. The principle contained in Section 304 IPC to be applicable to the case. In our view. the appellant can only be clothed with the knowledge that the injury which the accused caused was likely to cause death, but without any intention to, cause death or to cause such bodily injury as is likely to cause death. The offence under the circumstances would be one which falls on the premises of Section 304-311 of the IPC. Therefore, we alter the conviction from 302/34 to 304-II.

26. We have safely excluded the adjudication of claim of Dablu as the Court has found to its satisfaction that Dablu was a minor as on the date of occurrence and, therefore, he could only be tried by Juvenile Court. His (Dablu) conviction under Sections 302/34 is not sustainable in law, which is accordingly set aside with a direction to produce him before the Juvenile Court for trial in accordance with the provision of law.

27. We have perused ourselves the evidence of the PWs who gave a simple version of the occurrence. It is not necessary to give every details spoken to him by the injured as they themselves saw the occurrence. Coming to clause thirdly of Section 300 of the IPC which is relevant and it is an obligation to prove by the prosecution that he intended to cause the particular injury which unfortunately had resulted into his death. So far as the intention is a part of it under clause thirdly, the circumstances must subjectively prove that he intended to cause that particular injury. However, by infliction of the Jhaba blow, he must have the knowledge that it is likely to cause death in which case it will be a case of culpable homicide not amounting to murder. Accordingly, the conviction and sentence of the accused under Sections 302/34 are hereby set aside and in its stead he is convicted u/s 304 (Part II) read with Section 34 of the IPC and sentenced him to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 1,000/- in default, six months R.I. more.

28. Subject to modification of the order of conviction and sentence, the appeal is dismissed in respect of Anarul. We also direct the learned Court below to remit the Court record to the Juvenile Court and Dablu Sheikh to appear before the said Court where the Juvenile Court will dispose of the case and conclude the trial of the Juvenile offender Dablu Sheikh in accordance with the provision of law. If Anarul is on bail, the bond is discharged. If not, he must surrender to custody to serve out the rest of the sentence.

D.P. Sircar-I, J.

29. I agree.