
(2012) 02 CAL CK 0043
In the Calcutta High Court
Case No : CRA No. 747 of 2008

Shri Dilip Kumar Mondal and Another APPELLANT
Vs
The State of West Bengal RESPONDENT

Date of Decision : 13-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 302, 326, 34

Citation : (2012) 02 CAL CK 0043

Hon'ble Judges : Tarun Kumar Gupta, J; Girish Chandra Gupta, J

Bench : Division Bench

Advocate : Sardar Amjad Ali, Mr. Sardar Shahin Imam and Mr. Rajat Sarkar, for the Appellant; Siladitya Sanyal and Mr. Navanil De, for the Respondent

Final Decision : Allowed

Judgement

Girish Chandra Gupta J.

1. This appeal is directed against a judgement dated 17th September, 2008 passed by the learned Additional Sessions Judge, Fast Track 1st Court, Lalbagh, Murshidabad, in Sessions Case Serial No. 228 of 2003 connected with Sessions Trial No. 7th February, 2008 arising out of G.R. Case No. 841 of 1998 corresponding to Raninagar P.S. Case No. 92 of 1998 dated 22 November, 1998 by which the learned trial Court found the appellants Dilip and Dinesh guilty of the offences punishable u/s 302, 326 and read with Section 34 of the Indian Penal Code. Accused Arjun Mondal was acquitted of all the charges. By an order dated 18th September, 2008 the learned trial Court sentenced the convicts to imprisonment for life as also to pay fine of a sum of Rs. 2,000/- each in default to suffer simple imprisonment for one year each for the offence punishable u/s 302/34 of the Indian Penal Code. The convicts were also sentenced to suffer simple imprisonment for three year as also to pay fine of a sum of Rs.1,000/- each in default of payment to suffer further simple imprisonment for a period of one year each for the offence punishable u/s 326/34 of the Indian Penal Code.

2. The case of the prosecution is as follows:-

On 22nd November 1998 Nripen and his son Nikhil in the morning at about 10 am were going towards their field with a bullock cart for the purpose of bringing the bundles of the harvested paddy. In order to reach the field they had to cross the border of the field belonging to the accused persons. No sooner the cart of Nripen and Nikhil touched the border of the field belonging to the accused than an exception was taken by the four accused persons namely Dilip, Dinesh, Arjun and Bipod; an altercation ensued and thereafter wounds were inflicted by weapons like haso, dau, Lathi etc.. Fatik and his sons working in the field of Nripen ran to rescue them. In the process the two sons of Fatik were also injured. All the four injured persons were removed to local Godhonpara public health Centre. Santosh son of Fatik and Nripen brother of Fatik were referred from the Public Health Center to the Baharampore hospital while Ranjit and Nikhil were discharged after first aid. Fatik lodged a written complaint at about 15.35 hrs.. which was scribed by the pradhan of the village (P.W.1). Nripen died on the way to the Baharampore hospital. The prosecution has examined Santosh (P.W.12), Nikhil (P.W.10) and Ranjit (P.W.11) who were injured in the transaction. Besides them Mastoram (P.W.8) and Kamal (P.W.13) being the laborers working in the field of the victim at that time were also examined. P.W.13 however turned hostile. The other witnesses are the neighbors. They are Imtazul Hq (P.w.4), Karuna Krishna Sarkar (P.W.5), Anil Kumar Mondal ((P.W.6), Uttam Kumar Sarkar (P.W.7) and Banamali Mondal (P.W.9). Fatik (P.W.3) is the defacto complainant aged about 72 years and by that arithmetic must have been about 62 years old on the date of the incident. Another neighbor Abdul Kayam (P.W.2) was also examined who turned hostile. P.W.14 is the autopsy surgeon, P.W.15 and P.W.16 are the official witnesses including the I.O.. The I.O it appears recovered a blood stained Dau from the stack of straw from the house of the accused Dilip on the date of the incident itself during the investigation.

3. Mr. Ali, learned Senior Advocate appearing for the appellant advanced the following submissions:-

(I) P.W.3 the complainant did not know the contents of the complaint. In support of his submission he drew our attention to the written complaint which does not contain any endorsement that the contents thereof were read over and explained to the complainant. The scribe (P.w.1) deposed that he read over and explained the contents of the complaint drafted by him to the P.W.3. Mr. Ali contended that from the following evidence of P.w.3 it would appear that the complainant was expressing surprise that such a complaint had been written "subsequently I attended P.S. with Pradhan for lodging of complaint. "Ami pradhan ke bollam pradhan amon ki kora likhlo, janina". This is my signature.

(ii) From the inquest report marked ext 4 it would appear that there was no injury in the abdomen whereas from the evidence of the autopsy surgeon (P.w.14) it would appear that there was in fact of an injury in the abdomen. He, therefore, contended that the prosecution was not sure of its own case nor are

the pieces of evidence adduced in the case compatible with each other.

(iii) Assailing the sketch map marked ext. 9. Mr. Ali contended that in the sketch map three fields have been shown. Fields marked "A and C" belong to the deceased Nripen and the field marked "B" belongs to the appellant Dilip. But there was no indication in the sketch map as regards the other contiguous fields nor in there any indication as regards existence of any pathway in or around the fields marked A,B and C.

(iv) The written complaint does not disclose that the injured persons were first taken to the police station and thereafter to the Godhonpara Public Health Center which appears to have been done from the evidence of the complainant and the other witnesses.

(v) Assailing the evidence of the witnesses Mr. Ali contended that P.w.4 was not examined u/s 161 Cr.P.C. therefore his deposition has little or no evidentiary value. With regard to the deposition of P.W.5 he submitted that this witness claimed to have seen the incident from the garden in his house, whereas P.W.6 deposed that the house of the P.W.5 is surrounded by other houses. Mr. Ali as such contended that it was not possible for the P.W.5 to have seen anything. With respect to the deposition of P.W.7, Mr. Ali contended that the evidence of this witness was materially contradicted by the P.W.16 (I.O.). Therefore, the narration given by this witness has no evidentiary value. With respect to the deposition of P.Ws 8,9 and 10 Mr. Ali drew our attention to the contradiction obtained by defence during cross-examination of the I.O and on that basis he submitted that the evidence of the P.Ws 8,9 and 10 was also not believable. With respect to the deposition of P.W.11 he submitted that the evidence of this witness is that the local people had taken the injured to the Police Station whereas deposition of the P.w.3 is that he took them to the P.S. and hospital. This witness also introduced the presence of other witnesses, which he had not disclosed during his examination u/s 161 Cr.P.C as would appear from the evidence of P.W.16. With respect to the deposition of the P.W.12 Mr. Ali contended that although the witness claims to have been injured during the incident, there is clear admission to show that he had reached the place of occurrence after the incident. P.w.13 is a hostile witness and the P.W.14 is the autopsy surgeon. Mr. Ali contended that the autopsy surgeon found injury in the abdomen whereas in the inquest report there is clear indication that there is no injury in the abdomen. Mr. Ali further contended that the prosecution did not succeed in proving its case considering the conflicting pieces of evidence.

(vi) Mr. Ali drew our attention to the following findings of the learned Trial Judge:

I have read both chief and cross-examination together of each and every prosecution witnesses for correct appreciation to find out the truth. On due assessment of evidence of witnesses excepting a few omissions in the evidence of P.W.2,7,8,9,11 and 12 there are sufficient corroborated believable evidence in this trial. About omissions of those witnesses as pointed out from defence had

been duly assessed by this Court and it appears that those are minor discrepancies and all those definitely will not go to shake root of prosecution case as a whole. I do admit that there are some minor variations in chief and cross-examination of some of the witnesses from prosecution side. But in true sense such variation does not affect the credibility of the witnesses. In this context I have perused 1981 Cr.L.J. (S.C.) 9 in the matter State of Maharashtra Vs. Krishna Murthi.

He contended that the learned Trial Court appears to have convicted the appellants on the basis of the evidence of the P.Ws 2,7,8,9,11 and 12 but there is no indication or at any rate there is no sufficient indication as to why was the evidence of these witness believable. In fine Mr. Ali contended that the evidence of these witnesses was not properly assessed by the learned Trial Court.

(vii) Mr. Ali contended that the story of seizure and production of the offending weapon is fake and cannot be relied upon and this also demolishes the case of the prosecution that Nripen was assaulted with the weapon recovered from the house of the accused Dilip. Elaborating the submission he contended that the Heso (sharp weapon) which allegedly was recovered, contained blood stain and the same was also labeled by the I.O. But the Heso (sharp Weapon) produced in court was neither blood stained nor contained any label. He submitted that the theory of recovery of the offending weapon thus became weaker. From the fact that the I.O. deposed that he had sent the offending weapon and the blood stained earth to the Forensic Science Laboratory but the report was not received, he contended that if the report could not be received it is difficult to believe that the weapon sent for Forensic examination was received back from the Forensic Science Laboratory. He also questioned as to why was the report not insisted upon from the Forensic Science Laboratory.

(viii) He sharply commented upon absence of any of the doctors who may have treated the injured persons either at the Godhonpara Public Health Center or at the Baharampore Hospital.

(ix) He contended that the prosecution had failed to adduce any evidence with regard to motive behind the alleged crime.

(x) He concluded by saying that the prosecution is bound to adduce unblemished evidence in respect of each of the links of its case and the failure on its part to do so would be fatal. He as such prayed for setting aside the judgment and the order under challenge.

4. Mr. Sanyal, learned Additional Public Prosecutor appearing for the state submitted that the F.I.R was promptly lodged disclosing the names of the accused persons; the nature of injury and the cause of death. There is dependable evidence adduced by the autopsy surgeon and, therefore, omission to examine the S.I who had prepared the inquest report is not really material. According to him the witnesses examined by the prosecution are trustworthy. Some embellishments here and there and some omissions in the statement u/s

161 Cr.P.C made by the witnesses pointed out by Mr. Ali cannot destroy the case of the prosecution so long as the evidence of the witnesses is not wholly robbed of its credibility. He relied on a judgment in the case of Alamgir vs. State (NCT. Delhi) reported in 2003 SCC (Cri) 165 for the following proposition:-

The circumstances noticed above, if read with the evidence of P.W.6 Shamima Bano as to the date of departure of the accused with his wife Hazra@ Halima from Bombay to Delhi and the telephonic message after two days that Halima had died in a bus accident and that she had been cremated at a cremation ground in Nizamudding this piece of evidence, as noticed above, if read along with the circumstances noticed above, would form a chain without there being any snap. Strenuous submissions have been made as regards the admissibility of the handwriting expert's opinion as also a challenge thrown to the non-admissibility of the entire evidence of Shamima Bano, P.W.6. This evidence of Shamima Bano has been challenged on two counts: on the first, Shamima Bano, being the sister of Halima, was an interested witness and secondly, she did not say so in a statement before the police u/s 161 CrPC. Interested witness by itself cannot possibly be a ground to reject the evidence on record. The test of creditworthiness or acceptability, in our view, ought to be the guiding factor and if so, question of raising an eyebrow on the reliability of the witness being an interested witness would be futile - in the event the evidence is otherwise acceptable, there ought not to be any hindrance in the matter of the prosecutor's success. The evidence must inspire confidence and in the event of unshaken credibility, there is no justifiable reason to reject the same. It is on this score the issue of interested witness thus stands negated, as raised by the appellant. The second limb pertains to the statement u/s 161 CrPC. Admittedly, this piece of evidence was not available in the statement of the witness u/s 161 CrPC, but does it take away the nature and character of the evidence in the event there is some omission on the part of the police official? Would that be taken recourse to as amounting to rejection of an otherwise creditworthy and acceptable evidence -the answer, in our view, cannot but be in the negative. In that view of the matter, the evidence of PW 6 thus ought to be treated as creditworthy and acceptable and it is to be seen the effect of such an acceptability.

5. He also relied on a judgment in the case of Gurpreet Singh Vs. State of Haryana reported in 2003 SCC (Cri) 186 paragraph 19 for the proposition that " in the event of a portion of evidence not being consistent with the statements given u/s 161 and the witness stands declared hostile, that does not, however, mean and imply total rejection of the evidence. The portion which stands in favour of the prosecution or the accused may be accepted but the same shall be subjected to close scrutiny."

6. He also submitted that the S.I who had prepared the inquest report had expressed the opinion as regards the nature of injury with the clinical bandages on whereas the autopsy surgeon expressed his views after removing these

bandages. Therefore the difference of opinion is not material. He concluded by saying that the guilt of the appellants has been adequately proved by thoroughly trustworthy evidence. He, therefore, prayed for dismissal of the appeal.

7. Considering the submissions made by the learned Advocates appearing before us we are of the view that following point arises for determination: -

(a) Whether charges u/s 326 and 302 both read with Section 34 of the Indian Penal Code were adequately proved against the appellants considering the various shortcomings pointed out by Mr. Ali during his submissions indicated above?

8. During cross-examination of Banamali (P.w.9) the following suggestions were given on behalf of the defence.

I did not say to police over that incident there had been a Maramari. Not a fact that I said to I.O. due to that incident Dilip and dinesh sustained injuries.

9. The I.O. in that regard during his cross-examination deposed inter alia as follows:-

Witness Bonomali Mondal did not say to me that there had been maramari and due to that incident Dilip and Dinesh sustained injuries.

10. The above line of cross-examination suggests that the defence wanted to run a case that there had been an incident of maramari in which Dilip and Dinesh had sustained injuries. Both Dilip and Dinesh are the appellants before us. The following line of cross examination of Nikhil (P.W.10) is also significant.

In one portion myself and my father with bullock cart where in another portion Fatik and his two sons and a labour were creating bundles of paddy. In counter portion there were four persons in number. Said incident took place upon the land of accused persons. In that incident many persons injured and Bipad, Arjun also sustained some injuries. Not a fact that in our possession there were several weapons like Pasli. Henso etc. We were also not armed with any lathi. Accused persons were guarding their land so that anybody may not enter to their landed property. Not a fact that accused persons were denying to any other to enter into their land or that we have noticed that since long distance. Prior to our entry in the land of accused persons for our proceeding to our own land with bullock cart, accused persons never objected us. I have given statement to police. Not a fact that I did not say to police as regards threatening of accused persons at the time of entry to their landed property. Immediately after we enter into the landed property accused persons and then we started receiving assault. My father became senseless but I was with full sense just we have proceeding 10 cubits from the spot. All other villagers took us to local hospital. My father and me and Sontosh were taking to hospital. Not a fact that Dinesh did not cause hurt to my father with henso or that Dilip did not cause hurt to my father with any Dau or that Bipad and Arjun did not cause hurt to Fatik and his two sons. Not a fact that I did not say to Police that Dilip caused hurt with Dau. Not a fact that incident as

alleged never took place in that manner, time and at place or that we caused hurt to accused persons and they sustained injuries or that I have deposed falsely.

11. The case of the defence emerging from the aforesaid cross-examination is that they had been objecting to the user of any part of their field for the purpose of egress and ingress of the bullock carts. In spite thereof the party of the complainant armed with deadly weapons tried to pass their bullock cart through their field as a result whereof a free fight ensued in which all the four accused persons namely Dilip, Dinesh, Arjun and Bipod sustained injury. Although the aforesaid case was hinted at during the cross-examination of the witnesses for the prosecution, the accused persons themselves during their examination u/s 313 of the Code of Criminal Procedure did not advert to that. The fact that a maramari took place has also surfaced from the following evidence.

(a) P.w.6 Anil Deposed inter alia as follows :-

I heard one jhamela, and as such I attended the place where Maramari took place.

(b) P.W.16 the I.O. deposed during his examination-in-chief that "I forwarded accused Dilip Mondal before Court after his recovery from hospital."

(c) During his cross examination the I.O. deposed inter alia as follows:-

On 22.11.1998 accused Dilip was admitted in hospital. On the same day I arrested him from hospital.

12. From the aforesaid analysis it is fairly established that on 22nd November 1998 the incident took place in the adjacent field of Nripen belonging to the appellants which claimed the life of Nripen and left many others including the appellant Dilip injured.

13. Commenting upon the evidence of P.W.11 Mr. Ali contended that he introduced the presence of the local people namely Imtazul (P.W.4), Anil (P.W.6), Uttam (P.w.7) and Banamali (P.W.9) at the place of occurrence, although the presence of these persons was not disclosed by him during his examination u/s 161 Cr.P.C. to the I.O. (P.W.16). This criticism of Mr. Ali is no doubt true but the fact remains that presence of these witnesses was also deposed to by the P.W.12 Santosh Debnath, during his cross-examination. The learned Trial Court has taken care to reproduce the question and the answer which we shall notice in extenso. The questions and the answers when rendered in english would read as follows: -

(Q) Which other persons were present in the aforesaid portion of the village ?

(A) Uttam Sarkar, Anil Mondal, Imtazul Hq., Karuna Sarkar, Banamali Sarkar were there.

(Q) Did these persons named by you also witness the incident?

(A) Yes, they did.

14. With regard to these two questions and the answers thereto Mr.Ali did not make any submission. His submission was that the P.W.12 reached the place of occurrence after the occurrence. This witness reached the place of occurrence after hearing a hue and cry as would appear from his cross-examination. But that does not negate the fact that he saw Uttam Sarkar (P.w.7), Anil Mondal (P.W.6), Entajul Hq. (P.w.4), Karuna Krishna Sarkar(P.W.5) and Banamali Mondal (P.W.9) at the place of occurrence. Even the I.O has not contradicted this part of the evidence of P.W.12 during his cross-examination. Therefore, the presence of P.W.4,5,6,7 & 9 at the place of occurrence cannot legitimately be doubted.

15. Nikhil (P.W.10) is the son of the deceased Nripen. Nikhil (P.W.10) was accompanying his father in the bullock cart. Therefore Nikhil is the best person to depose about the incident. We already have noticed above the entire cross-examination of Nikhil (P.W.10) we shall presently notice the entire examination-in-chief of Nikhil, which is as follows: -

Deceased Nripen Debnath was my father. My father has been killed, about 9 years and 3 months back on 5th Agrayan at about 10 a.m on the material date and time Fatik, Sontosh, Ranajit and Mostoram were tying paddy bundles in their land and I along with my father was proceeding to that land for carrying bundles of paddy. On the day of our proceeding to our land with our bullock cart entered to the land of Dilip, Dinesh etc then Dinesh and his other brothers restrained our pathway "sala todar gari jata dabo na" (Rascal we shall not allow your cart to pass). When my father came down from bullock cart then Dinesh caused hurt to my father in his backside with a henso. Dilip also caused hurt to my father with Dau for two times. When I rushed to P.O. for saving life of my father then Dilip caused hurt to me to the left portion of my backside with a dau. I also sustained bleeding injuries. (witness shown his mark of injury removing his shirt from his person). I attempted to flee away from the spot then Fatik (P.w.3), Ranajit (P.w.11), Santosh (P.w.12) came to the spot then they were also assaulted by lathi by Arjun and Bipad. On my raising alarm many people attended there and they all took me, Sontosh, Nripen etc to Thana and there from we were taken to Godhanpara Hospital. My father and Sontosh were shifted to Baharampore Hospital. Today 3 accused persons are present in Court while another has died.

16. It would appear from the aforesaid evidence of Nikhil that he also was injured in the transaction and he had shown the mark of his injury to the Court. What is significant is that the injury shown by the witness to the Court during his examination-in-chief remained unchallenged. During the cross-examination it was not even suggested that Nikhil did not suffer any injury. This neutralizes the effect of Mr. Ali's comment that neither any doctor from the Godhonpara Public Health Center nor any doctor from Baharampore Hospital was called as a witness. When the injury is not disputed the absence of the doctor from the box may at best affect the nature of the injury as to whether it was simple or

grievous but the factum of the injury cannot be discarded.

17. Ranjit (P.W.11) another injured witness deposed with regard to the incident inter alia as follows:-

On 22.11.98 incident took place at 10 a.m. On the material date and time I along with Fatik, Santosh, Mastoram were tying bundles of paddy in our land. Landed property of accused persons adjacent to our land and they all were in their own land at that time. Nripen and his son were coming to our land with bullock cart through land of accused persons for carrying bundled paddy. The moment bullock cart entered to the land of accused persons then Dinesh, Dilip etc-threatened them saying "Saladarka aj sosana pathabo"(We shall send the rascals today to the crematory). When Nripen came down from the very bullock cart Dinesh caused hurt to him with henso, and Dilip also caused hurt to Nripen with a dau. When Nikhil rushed to the P.O. for saving life of his father then Dilip also caused hurt to Nikhil with a dau and as such Nikhil fell down in the ground just at a distance of 20 cubit. When I along with Fatik, Santosh were proceeding towards the P.O then Bipad and Arjun caused hurt to us with lathi.

18. Only contradiction drawn to our notice by Mr. Ali with respect to evidence of this witness was that" this witness did not say to me about any dau. He did not say in the fashion that Dilip caused hurt to Nikhil with a dau."

19. From the aforesaid evidence of the P.w.11 presence of all the four accused persons including the appellants is fairly corroborated. Assault by all the four accused persons including the appellant is also corroborated. Whether Dilip assaulted with Dau or used any other weapon may be in doubt. But the fact that he also facilitated the crime and contributed to the killing of the deceased Nripen cannot be doubted.

20. The injuries appearing to have been inflicted by the appellants amongst upon the deceased Nripen and found by the autopsy surgeon (P.W.14) are as follows:-

I found the followings: -

(1) One incised injury over back near midline near D.10 about 10 Cm. X 2cm. X abdominal cavity with injury to D.10 vertebra and spinal cord.

(2) One incised injury over back just below right scapula about 5cm. X 1 cm. X chest cavity, causing injury to right lung and pleura.

As per my opinion cause of death was due to shock and blood loss as a result of injury mentioned above which was ante mortem and homicidal in nature. This is my report and it bears my signature. Let the P.M report be marked as Ext.6.

21. The cross-examination of the autopsy surgeon is also set out herein below in extenso: -

Such type of injury is not possible in the front side if a person falls down facing the sky. Such types of injury are only possible from the backside. As there was

spinal cord injury so immediately after injury victim should lost his sense.

22. We shall now notice the evidence of the local people who had witnessed the incident. Mr. Ali contended that P.w.4 was not examined u/s 161 Cr.P.C. We do not really agree with him but to be on the safe side we shall not notice the evidence of the P.W.4. Similarly, we shall not notice the evidence of the P.w.5 because according to Mr Ali he may not have been able to grasp the situation from the garden of his house, which is situated at some distance.

23. Anil Kr. Mondal (P.w.6) about whose evidence Mr. Ali did not make any adverse comment deposed during his examination-in-chief as follows:-

I know accused persons. I know Fatik Debnath on 22.11.1998 occurrence took place at 10 a.m. probably. At that time I was busy in my own land. Nripen Debnath was proceeding through land of accused persons by their own bullock cart I heard one Jhamela, and as such I attended the place where Maramari took place. I have seen Dinesh Mondal to cause hurt to Nripen with henso when Nripen came down from his bullock cart. Dilip caused hurt to Nripen with a dau. Dilip also caused hurt to the son of Nripen when he came down from the bullock cart. I have seen also Fatik, his sons Sontosh and Ranajit to rush to the spot. When Fatik and his two sons attended P.O then Bipad and Arjun charged lathi at them. Bipad is no more. Injured persons were taken to Raninagar P.S and then P.S sent them to Godhanpara hospital. Doctor of said hospital sent Nripen, Sontosh to Baharampore hospital. But on the way of Baharampore Nripen Debnath succumbed to his injuries.

24. There is no significant cross-examination with respect to the evidence of this witness as regards the incident in question nor did the I.O. during his cross-examination point out any omission or contradiction arising out of the statement u/s 161 Cr.P.C.

25. Considering the comments made by Mr. Ali we shall not take into consideration the evidence of Uttam (P.W.7) except for the fact that he is a witness to the recovery of a blood stained Heso (sharp weapon) from the house of Dilip and Dinesh in respect whereof Mr. Ali did not make any adverse comment. Mr. Ali contended that a blood stained Heso (Sharp weapon) allegedly recovered from the house of the accused Dilip was sent according to the I.O to the Forensic Science Laboratory but the report was never received. His contention is that Heso (sharp weapon) which was produced in Court cannot be the same Heso (sharp weapon) because the same did not contain either stains of blood nor did the same contain any label. Whether the same Heso (sharp weapon) was produced in court or some other Heso (sharp weapon) was produced in Court may be a debatable issue. But the fact that a blood stained Heso (sharp weapon) was recovered from the house of the appellant Dilip cannot be doubted. The recovery of a blood stained Heso (sharp weapon) from the stack of straw in the house of the accused Dilip by itself is a circumstance relevant for the purpose of trial.

26. Mastaram (P.W.8) is a most natural witness because he is a laborer, who on the relevant day was engaged in the field of the deceased for the purpose of packing the crop. According to him he saw Dinesh and others causing injury with Haso (sharp weapon) to the deceased. This part of his evidence was not contradicted by the I.O. (P.w.16) during his cross-examination,

27. Banamali Mondal (P.W.9) during his examination-in-chief deposed inter alia as follows:-

I know this accused persons. I knew Nripen Debnath. About 9 years and 3 months ago in the month of Aghrayan at about 10 am Nripen Debnath was going to their field to carry paddy of their own landed property with a bullock cart through the land of Dilip Mondal. While bullock cart just touched the land of Dilip Mondal then dinesh caused hurt to nripen with a Haso. While Nikhil son of Nripen came and rushed to save his father then Dilip caused hurt to Nikhil with a Dau. While Sontosh, Fatik, Ranajit rushed to the spot then Arjun and Bipad caused hurt to them with a lathi.

28. The only omission brought to our notice by Mr. Ali is that Banamali during his examination u/s 161 Cr.P.C. did not disclose to the I.O that Nripen was assaulted with any dau. This omission in our view is not a material one, which can take away the evidentiary value of the evidence of this witness.

29. From the evidence of the host of witness discussed above, we have no manner of doubt in our mind that all the four accused persons combined together to attack Nripen and his son Nikhil when their bullock cart touched the field of the accused persons. The fact that the accused persons were ready with deadly weapons and all of them pounced upon the victim and fatally wounded the deceased Nripen go to show unmistakably a well planned determination on their part. The learned Trial Court chose to tread cautiously. The accused Arjun was acquitted because the learned trial Judge thought that participation of the accused Arjun in the fight with a lathi in his hand had not been proved by any medical witness. Therefore, for the lack of medical evidence an appropriate concession has already been made by the learned trial Judge. The defence during the cross examination hinted at a free fight although the same was not clearly put forward by the accused persons during their examination u/s 313 of the Code of Criminal Procedure. Even assuming that a free fight took place in which all the 4 accused persons suffered injury, which appears to be the case of the defence as indicated above, there is no evidence coming forth before us that the party of the complainant were the aggressors. On the contrary preponderance of the evidence is that the accused persons including the appellants in the garb of taking exception to the supposed trespass to their field, found an excuse to pounce upon Nripen and his son. The sons of Fatik who reached to rescue them also appear to have been assaulted but due to lack medical evidence we are unable to ascertain the nature thereof. But as regards the assault upon Nikhil the case is different which we already have indicated above. As regards assault upon Nripen no further proof is required because he died within less than a couple of

hours on the way to Baharampore Hospital. The injury received by the accused persons including the appellants was probably inflicted by the party of the complainant in self defence. We do not have any evidence before us as regards the nature of the injury suffered by the accused including the appellants. The appellant Dilip was in hospital according to P.w.16 but the duration of hospitalization was not deposed to by him nor by the appellants during their examination u/s 313 Cr.P.C. There is evidence to show that the sons of Fatik went to rescue the deceased and his son. It is only natural that in order to prevent the accused persons they must have done something which may have resulted in injury to the appellants and their companions. But that does not change the complexion of the charge u/s 302 of the Indian Penal Code for reasons already indicated. We are as such of the opinion that the conviction recorded by the learned Trial Court was well deserved.

30. We shall now take into account the submission made by Mr. Ali in order to test whether any deviation from the aforesaid view is possible.

31. The first submission advanced by Mr. Ali did not impress us. The written complaint contains a summary of the case of the prosecution and nothing more is required in law. P.W.3 the defacto complainant is a villager. He took the assistance of the Pradhan of the village for the purpose of drafting the written complaint. P.W.3 during his examination-in-chief deposed that he told entire incident to the Pradhan. How was the incident reproduced in the written complaint, he could not say. Fact remains that the written complaint was duly supported by him during his examination-in-chief. Only infirmity in his evidence which we have been able to find is that he may have reached the place of occurrence after the incident started. But that does not take away the value of his evidence because his case is that he was working in his field and seeing the incident he and his sons rushed to rescue the victims. Therefore when he deposed that he saw his brother lying in the field it cannot be said that he is not an eyewitness.

32. The Second submission of Mr. Ali is also without substance. It would appear from the evidence of P.W.14, the autopsy surgeon, that the injuries were caused from the backside but the perforation reached the abdominal cavity. The inquest was made by the S.I when the body of the deceased was clinically bandaged. Therefore, if he opined that the abdomen was intact it is difficult to find any fault with him.

33. The third submission of Mr. Ali is factually correct. He is also correct in contending that the sketch map does not indicate whether there was any path way but this at best is an inefficient handling of the investigation by the I.O. The sketch map could have been more elaborate and informative. But the sketch map, as it is, gives enough indication as to the place of occurrence, which was the primary object of the sketch map. There is no question of any existence of any pathway. Because the case of the prosecution is that the bullock cart was taken through the fields and when it reached the aile (earthen border of the

field) belonging to the accused they pounced upon the victims. Therefore it is not the case of the prosecution that bullock cart was proceeding through any pathway.

34. The fourth submission advanced by Mr. Ali is equally without any substance. The omission to disclose that the victims were taken first to the P.S and thereafter to the public health center does not in the least contradict the case of the prosecution. It is at best an omission. This omission is not vital which may affect the case of the prosecution.

35. The fifth submission of Mr. Ali has already been taken into account by us while assessing the evidence of the witnesses and we have taken care to discard the evidence of those witnesses who according to Mr. Ali may not have told the truth or may not have witnessed the incident.

36. The sixth submission of Mr. Ali may to some extent be correct. But the fact remains that the learned trial Judge, who had the benefit of watching the demeanor of the witnesses examined before him, reached a correct finding. He may not have been able to give his reasons very clearly or cogently but the finding arrived at by him according to us is unimpeachable. The learned trial Court as a matter of fact has been over cautious and very conservative. That precisely was the reason why the accused Arjun was let off. Only finding of the learned trial Court with which we are unable to agree is conviction of the appellants u/s 326 of the Indian Penal Code. There is nothing on the record to show the nature of injuries suffered by the witness Nikhil was grievous. Admittedly no doctor was examined. Admittedly he was not referred to the Baharampore hospital. In the circumstances conviction of the appellants u/s 326 of the Indian Penal Code according to us was not proper.

37. The seventh submission of Mr. Ali has already been dealt with by us. At the cost of repetition, it can be pointed out that the seizure of a blood stained weapon from the stack of the straw from the house of the appellant Dilip is well proved both by oral and documentary evidence. We have already indicated that this is a circumstance, which goes against the appellants. They have also not explained during examination u/s 313 CrPC as to why was the blood stained weapon kept concealed in the stack of straw in the house of Dilip. We already have indicated that whether the same blood stained Heso (sharp weapon) was produced in Court may be debatable. We are not proceeding on the basis that the offending weapon was recovered. Nor did we take into account that the same Heso (sharp weapon) was produced in Court.

38. The eighth submission of Mr. Ali has already been taken care of while assessing the evidence of the witnesses and at the cost of repetition it can briefly be pointed out that the injury suffered by Nikhil was shown by him in the open court and the same was never disputed during his cross-examination. The injury suffered by deceased Nripen is self-evidence. Therefore, the absence of the doctors could not change the complexion of the case of the prosecution.

39. The ninth submission of Mr. Ali is factually correct. In law however it is not required. Motive is locked in the mind of the assailants. When the assault has been proved by adequate evidence, motive is not a necessary ingredient for the purpose of success of the case of prosecution u/s 302 of the Indian Penal Code.

40. The last and the tenth submission of Mr. Ali according to us is very wide. The prosecution is no doubt obliged in law to prove its case beyond any reasonable doubt. But the settled position in law is that court has to remove the chaff from the grains. It is not the requirement of law that all witnesses must be absolutely truthful. Nor is it the requirement of law that all possible evidence should be adduced. To insist upon all possible evidence would be asking for too much. Court is concerned to see that an innocent is not punished and a guilty is not spared. The presumption of the innocence of the appellants in this case has adequately been rebutted and they have been proved guilty of the charge u/s 302/34 of the Indian Penal Code. Nothing more is required.

41. In the result the appeal partly succeeds in that the conviction u/s 326 of the Indian Penal Code is set aside but the conviction u/s 302/34 of the Indian Penal Code is upheld.

42. The appellants are directed to forthwith surrender to serve out the sentence inflicted by the learned trial court for the offence punishable u/s 302/34 of the Indian Penal Code. The learned trial court is directed to take coercive measures if the appellants fail to surrender within a month from date.

43. Lower Court Records with a copy of this judgment be sent down to the learned Trial Court forthwith for information and necessary action.

44. Urgent Xerox certified copy of this judgment, be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.