

Maria S.

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.15 OF 2022

Vijay Karbotkar,
s/o Tulshidas Karbotkar,
aged 33 years,
r/o. H. No.187/2,
Coelhowado, Brittona,
Bardez-Goa
presently in judicial custody
at Colvale Jail, Bardez

...Appellant

Versus

1. STATE

(Through Porvorim Police Station)

... Respondent

*Mr S. D. Lotlikar, Senior Advocate with Mr Jayant Karn,
Advocate for Appellant.*

Mr S. G. Bhobe, Public Prosecutor, for the Respondent.

**CORAM: M. S. SONAK &
BHARAT P. DESHPANDE,JJ.**

Reserved on : 11th January, 2023

Pronounced on: 18th January, 2023

JUDGMENT: (Per. Bharat P. Deshpande, J)

1. Accused no.2/appellant challenges judgment/order and conviction dated 11.05.2022 passed by the learned Additional Sessions Judge, Mapusa in Sessions Case No.66/2013 wherein the appellant is found guilty for an offence punishable under Section 302

and accordingly sentenced to suffer imprisonment for life and to pay fine of ₹1 lac and in default to undergo further imprisonment for a period of 3 years.

2. The appeal was admitted and a private paper-book has been furnished by the appellant. Similarly, Records and Proceedings have been called from the learned Sessions Court, for the purpose of taking up the matter for final disposal.

3. We have heard learned Senior Counsel Shri Suresh Lotlikar alongwith Shri Jayant Karn, learned counsel for the appellant and Shri S. G. Bhole, learned Public Prosecutor for the State at length.

4. Shri Lotlikar canvassed mainly the following aspects:-

- (a) All eye-witnesses' testimonies are very tentative and are not reliable.
- (b) No witnesses including eye-witnesses stated that the appellant/accused no.2 is the author of such injuries.
- (c) Depositions of eyewitnesses are full of major contradictions and omissions.
- (d) Alleged incident occurred on the spur of the moment which culminated in a sudden fight.
- (e) Recovery panchanama of the weapon and clothes is not fully established.
- (f) Accused was denied his right to lead defence evidence.

5. While elaborating above aspects, Shri Lotlikar would submit that though there are eyewitnesses No.2 to 5 and 8, all are not convincingly disclosing the overt act on the part of the appellant. Thus, their presence at the site is highly doubtful. The eyewitnesses failed to describe the knife allegedly used by the appellant. No eyewitnesses disclose as to who used the knife at the time of the alleged incident. Mere recovery of the knife without eye-witnesses stating as to who used it, cannot be used against accused no.2/appellant. Even otherwise, such recovery of the knife is highly doubtful as it was conducted after a period of 10 days from the date of the incident. Pancha Witness for the recovery panchanama and the Investigating Officer has given different versions as to who pointed out the knife. The post-mortem examination report though discloses 6 stab injuries, only injury no.1 is shown as fatal and that too, because of loss of blood.

6. Shri Lotlikar, in the alternative, would submit that even if it is considered that the accused is the author of such injury, there was no premeditated overt act so as to presume that the appellant had the intention to kill or had knowledge that such injury would cause death in normal circumstances. The incident happened in the spur of the moment and due to a sudden fight. Thus, at the most, the case would fall under exceptions no.1 and 4 of Section 300 of IPC. He would, therefore, submit that even this case would not fall under Part I of Section 304 of IPC and would be under Part II of Section 304 of IPC.

7. Shri Lotlikar then would submit that a valuable right of leading defence evidence was denied without any proper and sufficient reason even though he filed an application to that effect. He submitted that quoting the wrong provision in the application is not at all the ground to deny such a valuable and important right of leading defence evidence. Appellant/accused disclosed in his application that he wanted to examine 2 persons who were actually present at the site when the alleged incident took place. In this respect Shri Lotlikar heavily placed reliance on the provisions of Sections 232 and 233 of Cr.P.C and claimed that the learned trial Court failed to call upon the accused to lead defence evidence. According to him, questions put to the accused under Section 313 Cr.P.C as to whether he wants to lead any defence evidence, has no relevance while exercising the powers under Section 232 of Cr.P.C as such stage comes only after recording evidence of the prosecution, examining the accused under Section 313 of Cr.P.C and after hearing the parties. If the Court comes to the conclusion that there is evidence against the accused and he cannot be acquitted, then only the Court is duty bound to call upon the accused to lead defence evidence if any.

8. Shri Lotlikar placed reliance on the following decisions:

a) *Jafarudheen & ors Vs. State of Kerala*¹

b) *Koli'Trikam Jivraj & Ors v/s. The State of Gujarat*².

1 (2022) 8 SCC 440

2 AIR 1969 Guj 69

- c) *Shri Agnelo Fernandes v/s. State*³
- d) *Kansa Behera v/s. State of Orissa*⁴
- e) *Sivamani & Ors v/s. State of Kerala*⁵
- f) *Bhadran v/s. State of Kerala*⁶
- g) *Kalyani Baskar (Mrs.) v/s. M. S. Sampooram*⁷.
- h) *T. Nagappa v/s. Y. R. Muralidhar*⁸
- i) *Sukhbir Singh v/s. State of Haryana*⁹
- j) *Atul Thakur v/s. State of Himachal Pradesh & Ors.*¹⁰
- k) *Rama Narang v/s. Ramesh Narang And Others*¹¹.
- l) *Lal Behari Das Ranga Mohas Das @ Ranga_Das v/s. State of Tripura*¹².
- m) *Rambir v/s. State (NCT of Delhi)*¹³
- n) *Satish Chandrakant Dixit v/s. State of Maharashtra* with
*Suyash v/s. State of Maharashtra*¹⁴

9. Per contra, the learned Public Prosecutor would submit that evidence of eye-witnesses clearly goes to show that there was some

3 1989 (2) GLT (11)

4 (1987) 3 SCC 480

5 MANU/KE/0211/1992

6 ILR 1993 (3) Ker 586

7 (2007) 2 SCC 258

8 (2008) 5 SCC 633

9 (2002) 3 SCC 327

10 (2018) 2 SCC 496

11 (1995) 2 SCC 513

12 (1998) SCC OnLine Gau 90

13 (2019) 6 SCC 122

14 2021 SCC OnLine Bom 60

sense of fear amongst them and therefore though they have disclosed about the presence of the accused and the victim at the site as well as the scuffle between them, they reluctantly avoided to disclose about the use of the knife by accused no.2. However, some of the witnesses firmly state that they saw the knife in the hand of accused no.2 during the scuffle and simultaneously they saw the deceased with a stab injury on his stomach. He would therefore submit that the only inference which can be drawn from such statements of the eye-witnesses is that accused is the author of such injury. He then submitted that during the scuffle, accused no.2 and the deceased were close to each other and therefore it is quite possible that the witnesses did not realise as to when and how the knife came into the hands of accused no.2 and from where. For this purpose, the witnesses cannot be blamed. He, thereafter submitted that it is not the case of either prosecution or the defence that such a knife was kept nearby which the accused lifted during a sudden fight and thereafter deceased sustained injuries. According to him, the only probability is that the accused no2 carried such a knife on his person and when a fight broke out, he removed it and used it causing injuries to the deceased.

10. Shri Bhobe then would submit that the post-mortem examination report and the evidence of the doctor clearly show that the death of the victim was homicidal. Therefore, it is necessary to find out the author of such injury and evidence of the prosecution without any doubt prove on the basis of eye-witnesses' statements that

accused no.2 only is the author of such injury which resulted in causing death.

11. Shri Bhobe then would submit that even if the recovery of the knife is not considered or discarded, the statements of eye-witnesses which are consistent and cogent cannot be thrown away only because the weapon of assault is not recovered from the accused or such recovery is not proved in evidence. He, thereafter, submitted that the presence of accused no.2 at the said spot is not at all disputed. Some of the eyewitnesses saw a knife with blood on it in the hand of accused no.2 immediately after the scuffle and also injury to the stomach of the deceased. According to him, this evidence is sufficient enough to prove that in a fight, accused no.2 used a knife and inflicted injuries on the deceased.

12. Shri Bhobe then would submit that it is not a case of sudden fight as can be seen from the evidence of the prosecution. Accused no.2 was certainly carrying with him a knife and he instigated the deceased without any provocation. Similarly, when the deceased questioned accused no.2, he slapped the deceased which started the scuffle. He then submitted that the deceased was not armed with any weapon and therefore it is not a case of self-defence of accused no.2 for allegedly using such a knife.

13. Shri Bhobe then would submit that the case of the prosecution is clearly made out under Section 302 of IPC as there are 6 stab

injuries though out of which, injury no.1 is considered to be a fatal injury, however, the other injury on the back of the head and on the upper portion of the chest cannot be considered as superficial injuries. Similarly, the injury on the thigh is quite deep which shows the use of force by which such an injury was caused.

14. In the alternative, Shri Bhobe would submit that at the most the case would fall under Section 304 part I of IPC as the injury was caused with an intention to cause death or with the knowledge that it would likely cause death. He submitted that this case would not fall under Section 304 (Part II) as there is sufficient material to show intention and knowledge.

15. Rival contentions fall for our consideration.

16. First of all, in Sessions Case No.66/2013 chargesheet was filed against 2 accused persons for the offence punishable under Section 302 read with 34 IPC. Accused no.1 Shailesh Naik was convicted by the learned Sessions Court for the offence punishable under Section 323 of IPC by separate judgement and order dated 23.07.2018 and 26.07.2018. Said accused no.1 Shailesh Naik was acquitted for the offence punishable under Section 302 read with 34 IPC. It is a fact that during the said trial, present appellant/accused no.2 attended partly but thereafter remained absconding. When the judgment and order were passed on 26.07.2018 by the learned Additional Sessions Judge, Mapusa, present accused no.2 was absconding and the matter

was proceeded under Section 299 of Cr.P.C.

17. A standing warrant was issued against the appellant and thereafter he appeared before the learned Sessions Court which then conducted further proceedings in the said Sessions matter and then the impugned judgment and conviction was delivered.

18. In this backdrop of the matter, submissions of both sides need to be taken into account.

19. First of all, contentions of Mr Lotlikar that all the eye-witnesses are tentative in nature and did not describe relevant aspects and therefore their presence at the spot is doubtful needs to be considered in detail. In all, 25 witnesses were examined by the prosecution during the entire trial. Out of these, PW 2 to 5 and 8 are the so-called eye-witnesses.

20. Dr Mandar Kantak/PW10 conducted the post-mortem examination alongwith Dr Sunil Chimbolkar on 15.08.2013 at the request of PI Nilesh Rane of Porvorim Police Station in connection with Porvorim Police Station Crime No.115/13. While conducting the post-mortem examination, he observed in all 13 injuries out of which injuries no.1, 2, 3, 5 and 6 were caused by sharp-edged penetrating weapon/object whereas injuries no.4, 7, 8, 9, 10, 11, 12 were caused by blunt force impact. Injury no.13 was caused by a pointed hospital injection needle. Injuries no.1 to 12 were ante-

mortem, fresh and red and injury no.13 was perimortem in nature. Dr Kantak/PW10 described all these injuries in his deposition starting from page no.2 which reads thus:-

1. Stab penetrating wound oblique, over right hypochondrial fossa, 3 cms length x 1 cm maximum breadth, gaping x abdominal cavity deep with omental fat tissue of abdomen protruding out. The opening of the injury has inverted clean-cut edges and sharp margins with the outer upper angle more acute than the inner angle which is slightly lower. The injury is just below the midright subcostal margin. On dissection of the abdomen, the opening of the surface continues to form a path of depth of 11 cms from the skin, abdominal wall tissue, abdominal muscles, peritoneum to end with incision path of 2 ½ cms length x 0.5 cms width x 3 cms depth for lower border of right lobe of liver lateral two-thirds-medial one thirds junction with clotted blood in the liver tissue which is cut. The injury is directed upwards, backwards and medially, No foreign body was seen in the injury path. The medial angle is 10 cms from midline front (medial), 116 cms from heel of right foot and outer angle is 28 cms below the mid right clavicle.

2. Stab wound: oblique, gaping, 3 cms length x 1 cm maximum width x 4 cms depth, seen in the 2nd intercostal space in right upper medial region of chest front, with clean-cut inverted edges, sharp margins and outer upper angle more acute than lower medial angle. The injury forms a depth of a 4 cms dissecting clean-cut the skin to subcutaneous tissues and chest muscles with antemortem extravasation of blood. The underlying pleurae are not incised. The lower medial angle of the injury is 5 cms medial from midline chest front and 135 cms from heel of right foot and upper outer angle is 7 cms above and medial to right nipple and 5cm perpendicular below medial third right clavicle. The injury is directed upwards, backwards and medially. No foreign body was seen in the injury path.

3. Stab wound: oblique, gaping, 4 cms length x 1 ½ cms

maximum width x 4 ½ cms depth, seen at outer aspect upper two-thirds-lower one thirds aspect of the right thigh with inverted clean-cut edges and sharp margins, extending by clean-cut tissues from skin, subcutaneous and thigh muscles for 4 ½ cms depth. The upper more acute angle of the injury is 31 cms below and medial to the anterior superior iliac spine of the right hip bone and lower less acute angle is 12 cms above and lateral to midfront knee joint and 58 cms from heel of right foot. The injury is directed upwards, backwards and medially. No foreign body was seen in injury path.

4.(Bruise : 3 x 2 cms area, over medial front right thigh) at junction of upper two-thirds and lower one-third right thigh.

5.(Incised wound: 3 cms length, x 1 cms maximum breadth x 0.5 cms depth. Oblique, with clean-cut sharp margins and both acute angles, over midback left arm.) The upper inner angle is 15 cms below the outer upper shoulder prominence of the left shoulder and lower outer angle is 16 cms below the left elbow prominence and 134 cms from heel of left foot.

6. Stab perforating wound : oblique, over lower back scalp,) through and through wound of length of track 10 cms seen. The upper outer entry wound is larger of 3 cms length x 0.5 cms width and lower angle is 2 cms behind the right mastoid. The lower outer angle is less acute than the upper angle. The edges are clean-cut and inverted and margins are sharp. The entry wound extends in the form of a track in scalp from front to back, lateral to medial and slightly from top to down and crosses the midline back of scalp from right to left to form the exit wound 1 cms to the left of midline back. The exit wound has 2cms length x 0.5 cms breadth and is everted with sharp margins and clean-cut edges. Extravasation of blood is seen in clean-cut scalp tissues. No skull fractures are seen. No foreign body is present.

*7. (Bruise : 4 x 3 cms seen for midleft temporal scalp)
just medial to left ear.*

*8. Abrasion : 1 x 0.5 cms, 2 cms above midleft eyebrow)
over left forehead.*

*9. Abrasion : 1 x 0.5 cms, with underlying bruise 2x 1 1/2
cms, 0.5 cms above midright eyebrow over right
forehead.*

10. Abrasion = 1 x 0.5 cms over base of right ala of nose.

*11. Abrasion : 0.5 x 0.5 cms over outer aspect of left
eye 1 1/2 cms lateral to outer canthus.*

*12. Bruise : 1 x 0.5 cms over inner mucosal aspect of left angle
left lower lip corresponding to left lower canine tooth.*

*13. Injection prick mark : in 0.5 cms x 0.5 cms area for
midback right wrist after removing hospital intravenous
needle in situ with minimal extravasation of blood.*

21. On internal examination of the body, he observed antemortem, fresh extravasation of blood was seen underneath the scalp injuries as described. No fractures for the skull vault and base bones were seen. He observed antemortem extravasation of blood in the 2nd right intercostal space. All internal organs were pale. The abdominal cavity contained 200 gms of clotted and 02 litres of fluid blood. As per their opinion, the cause of death was due to haemorrhagic shock consequent to a stab penetrating wound vide injury no. (1) caused by sharp-edged penetrating weapon/object, antemortem and fresh at the time of death and necessarily fatal. While deposing before the Court, MO Exhibit 12 (Exhibit 9, i.e. knife) allegedly recovered at the instance of accused no. 2 was shown to him in order to obtain his

opinion and after seeing the said knife he opined that injuries found on the deceased could have been caused by such a knife. During cross-examination, he described the term haemorrhagic shock is meant that shock on account of loss of blood.

22. Thus prosecution, first of all, succeeded in proving that the death of deceased Lavu was due to injury no.1 caused by a penetrating sharp object like the knife recovered at the instance of accused no.2 and hence his death is certainly homicidal. Thus, the question which now needs to be answered is that who is the author of such injury. According to the prosecution, accused no.2 caused such penetrating injury on the vital part of the deceased that too, in a scuffle.

23. Fredy Vaz/PW8 was the friend of the deceased Lavu. He had come from Kuwait. On the day of the incident, i.e. on 14.08.2013, he had gone to Reis Magos. The deceased Lavu came on his motorcycle alongwith one Vijay. After their visit to Reis Magos, they had gone to Sunshine Bar to buy cigarettes. The said bar is situated in Green Hills, Porvorim. When he was inside the bar, the deceased Lavu called him to come out. When he came out, he saw both the accused persons having a fight with Lavu/deceased. Accused no.2/appellant herein was assaulting Lavu mainly with glass bottles. Lavu was also assaulted with a knife. PW8-Fredy then deposed that he did not know who assaulted Lavu with the knife and from where the knife came. He then went to intervene however one Suresh pulled him out. Lavu sustained stab injuries on his stomach and his intestines had come out. He then

deposed that he cannot say how he had suffered the stab injury but it was caused by a knife. He then took Lavu to JMJ Hospital at Porvorim on his Pulsar motorcycle and then the elder brother of Lavu came to the said hospital. The doctor was not present in the said hospital. Lavu died in the JMJ hospital itself. He deposed that said incident took place at around 6 PM whereas Lavu died within a period of 15-20 minutes after reaching the hospital. During that night he had shown the place of the incident to the Police. He described that Lavu was wearing a T-shirt which he had gifted to Lavu and had horizontal stripes. He then deposed that he identified accused no.2 during the Test Identification parade. This witness was cross-examined in detail.

24. PW2-Suresh Parsekar deposed that he was knowing Lavu from Sangolda since his childhood. He also knew accused no.1. According to him, on 14.08.2013 at around 17.30hrs he alongwith his friend Koendas Naidu went to Porvorim to have liquor at Sunshine Bar at Porvorim. They were sitting outside the bar consuming liquor. Accused no.1-Shailesh Naik and accused no.2 Vijay were sitting together outside the Sunshine Bar and consuming liquor. After some time Lavu alongwith Vijay Jadhav and Fredy came near Sunshine Bar. Fredy came to the bar and bought one cigarette whereas Lavu and Vinay Jadhav were standing on the road in front of the bar. At that time there was loud talk between accused no.2 and deceased Lavu. Then he saw accused no.2 alongwith accused no.1 fighting with Lavu by giving fist blows. He saw a knife in the hands of accused no.2 and

therefore, he ran away out of fear. Permission was granted to the learned Public Prosecutor to cross-examine this witness, who admitted to seeing the intestines of Lavu which came out and said Lavu was in a pool of blood. He also saw blood on the knife which was in the hands of accused no.2. He then admitted to identifying accused no.2 during the T.I. Parade held in presence of the Executive Magistrate.

25. PW3-Parashar Sawant was running Sunshine Bar and Restaurant at Green Hill, Porvorim on a rental basis. He deposed that on 14.08.2013 at 17.00 hrs he opened the bar and after some time accused no.1 came in a Santro car alongwith accused no.2 and two more persons. Accused no.1 and 2 alongwith two more persons were standing outside the bar. Accused no.1 ordered beer and he gave them chairs to sit. After some time two more persons came to his bar and out of them one was Koendas Naidu. They sat outside the bar. He was busy attending customers in the bar. After some time one Fredy came outside the bar on his motorcycle and then entered the bar and took one cigarette from him. Alongwith Fredy one Vijay and one Lavu also came near the bar. After some time he heard loud shouts outside the bar. He, therefore, rushed outside and saw Lavu bleeding from his stomach. Out of fear, he closed the shutters of his bar.

26. At the request of the learned Public Prosecutor, this witness was also cross-examined by the State and necessary contradictions were brought on record. During such cross-examination, he admitted that

Fredy took Lavu on his motorcycle for medical treatment. Similarly, he admitted that the shutters of the shops beside his bar were brought down due to the incident of assault and he also closed his bar due to fear of Mr Vijay, ie. Accused no.2/appellant herein. He further admitted that he identified accused no.2 during the T. I Parade conducted before the Executive Magistrate at Mapusa. He then admitted that after the incident he saw Vijay/accused no.2 leaving the said place on a black motorcycle alongwith his friends. After some time police reached the spot and he told the police that Vijay/accused no.2 sometimes used to come to his bar with Shailesh to have liquor.

27. Koendas Naidu/PW4 deposed that he is a childhood friend of deceased Lavu and he knew accused no.1 since long as said accused no.1 is having a grocery shop at Sangolda where he used to visit for purchasing his household articles. He then deposed that on 14.08.2013 at around 17.30hrs he alongwith his friend Parsekar had gone to Porvorim and visited Sunshine Bar to have liquor. At that time he saw accused no.1 along with his friend sitting on chairs outside the bar and having liquor. After about 10 minutes or so one Fredy came on a Splendor motorcycle and alongwith him came Lavu/deceased and one Vijay Jadhav who came on another motorcycle. Fredy then went to purchase a cigarette from the bar counter whereas Lavu and Vijay Jadhav were outside. Lavu then started calling Fredy and telling him that they should leave from the said place. At that time one person with accused no.1 started asking Lavu as to what is his problem if

Fredy sits with them. The said person told Lavu that he would show him and then slapped Lavu on his face.

28. PW4-Koendas Naidu identified accused no.2 as the same person who slapped Lavu on his face. He then deposed that thereafter accused no.2 and Lavu/deceased started fighting with fist blows. Accused no.1 then joined accused no.2 in assaulting Lavu with fist blows. Fredy and Suresh tried to intervene however, both accused pushed them aside. He then saw accused no.2 and Lavu falling on the ground and then Lavu was bleeding from his stomach and his intestines had come out. At the same time, he saw accused no.2 Vijay holding a knife full of blood. On seeing this he immediately left the spot alongwith Suresh. After ½ an hour he came to know that Lavu expired. His statement was recorded by Porovroim Police on 16.08.2013.

29. Vijay Jadhav/PW5 deposed that he was knowing the deceased Lavu since his childhood. He knew accused no.1 Shailesh and accused no.2 by face as he had seen them in Porvorim. He then deposed that on 14.08.2013 he had gone to Lavu's residence and thereafter at around 17.00hrs one came to the house of Lavu who wanted to give one parcel at Sangolda. Lavu requested not to go but he left. Then Lavu requested him that since came from abroad, they should go to the bar to drink. Lavu requested him to come alongwith him and bring back. Thus, he went alongwith Lavu on his Pulsar motorcycle, to Sunshine Bar at Green Hill, Porvorim. On reaching there, they

noticed had reached there and was smoking. He then borrowed Rs.10/- from as he wanted to buy a cigarette. He bought a cigarette from the bar counter. Then Lavu requested to leave the said place. At that time accused no.2 asked Lavu why he was bothered about . Lavu then questioned accused no.2 as to who he is to question him. Accused no.2 then came to Lavu and slapped him on his face. Accused no.2 then started assaulting Lavu with fist blows. Accused no.1 joined accused no.2 and there was a fight. and Suresh tried to separate them. He then saw accused no.2 remove a knife. On seeing the knife he got frightened. Other persons also got frightened upon seeing the knife. He then noticed Lavu was bleeding from the stomach. Lavu then fell down on the road. Due to fear, he left the said place.

30. According to Mr Lotlikar, even if the chief examination of these eye-witnesses is considered without looking to their cross-examination, no one deposed against accused no.2 as far as the use of a knife is concerned. No witness disclosed seeing accused no.2 inflicting stab injuries on the person of Lvhv with the said knife. Thus, he would contend that depositions of these witnesses cannot be believed as all these witnesses are planted by the prosecution.

31. We are not in agreement with such submissions. First of all, admittedly, PW8 took the deceased from the spot to the hospital with a bleeding injury. His reaction is but natural. On seeing his friend with such a bleeding injury, it is obvious that he was in a shock and in such a condition, the behaviour of PW8 cannot be doubted. Similar is the

contention of PW2 to PW5 who seem to be natural eye-witnesses. Only because none of them specifically disclosed about the use of a knife by accused no.2 while inflicting injuries on Lavu, it cannot be presumed that all these witnesses are planted or to be completely disbelieved. The situation at the said site has been described by all the witnesses where Lavu was standing outside whereas accused no.1 and 2 were sitting on chairs enjoying drinks. There was no provocation from deceased Lavu either to accused no.1 or accused no.2 in any manner. He only asked to leave the said place which was objected to by accused no.2 and the matter started flaring up. It is also brought on record that accused no.2 slapped Lavu on his face and then exchange of fist blows started. It is, therefore, necessary to visualise that while giving the fist blows, the deceased and accused no.1 and 2 were close by to each other wherein these witnesses were at some distance. All these witnesses are consistent about this fact. Immediately and within a few seconds, some of these witnesses saw a bleeding injury to the stomach of Lavu and specifically two witnesses saw a knife in the hands of accused no.2. One witness, i.e. Koendas Naidu specifically states that he saw a knife in the hands of accused no.2 with blood on it whereas deceased Lavu sustained blood injury to his stomach. Therefore, the contention that no one deposed as to how the knife came into the hands of accused no.2 and how many blows were given by him, seems to be hyper-technical. In such a moment, a normal prudent man would not be able to concentrate on the number of blows or how the stabbing took place when a scuffle is going on. The

inference which can be drawn from the above testimonies is that after some exchange of words, a scuffle took place between accused no.2 and Lavu/deceased. Accused no.1 also joined them and then suddenly deceased was found with bleeding Injury and a knife with blood in the hands of accused no.2.

32. The knife which is recovered at the instance of cause no.2 is admittedly a knife having two blades on either side. It is possible to carry such a knife to conceal on the person or in a pocket. Thus, depositions of these witnesses and more particularly, their examination-in-chief would therefore show that the presence of these witnesses at the spot is established and whatever they deposed is genuine and without any exaggeration. In fact and as rightly pointed out by Mr Bhobe, that there was some fear in the minds of these witnesses while deposing against accused no.2. This possibility of fear cannot be ruled out due to the overt act of the accused as alleged in the present matter and the fact that he used a knife for such trivial dispute. This further shows that the accused was carrying the knife on his person. No doubt carrying a such knife cannot be considered as adverse against such accused however it can be one of the circumstances going against the accused no.2.

33. It is very interesting to note that though PW2/Suresh Parsekar did not fully support the prosecution, he was cross-examined on behalf of the learned Public Prosecutor wherein certain facts as disclosed above are brought on record. He specifically deposed that he

had seen the intestines of Lavu which came out and he was in a pool of blood. At the same time he saw blood on the knife which was in the hand of accused no.2. This witness was then cross-examined by accused persons and on page 4 he deposed firmly that both accused had come together to assault deceased Lavu. Though he thereafter stated that he does not remember if he has stated to the police in his statement that accused no.2 started assaulting Lavu with fist blows and in the meantime accused no.1 intervened and then accused no.1 started assaulting Lavu. Both the accused were assaulting Lavu with fist blows. Since this portion has been brought on record during cross-examination and that too by inviting the attention of the witness to the statements made by him under Section 161 CrPC, his answer is neither in the negative nor in the affirmative but he claimed that he does not remember correctly. It is clear from the record that this specific so-called contradiction was not put to the police officer who recorded statements of PW2.

34. Similarly, PW2 firmly deposed on page 5 that he knew accused no.2 even before the date of the incident. Similar is the case with PW3-Parashar Sawant, the owner of the bar. He partially supported the case of the prosecution and then he was cross-examined by the learned Public Prosecutor on certain aspects by inviting his attention to statements made by him before the police under Section 161 CrPC. He admitted to the recording of his statement by the police on 15.08.2013. During the cross-examination conducted by accused

no.2, he specifically deposed that he knew accused no.2 even prior to the date of the incident.

35. PW4/Koendas Naidu deposed firmly about the entire incident and there was no need for the prosecution to cross-examine this witness. However, he was cross-examined by the learned counsel appearing for both accused at length. Interestingly, not a single suggestion was put to this witness that he did not witness the said incident or that he was not present at the said place and specifically at the time of the alleged incident. This aspect is of much importance as much stress was placed while arguing the matter contending that these witnesses were planted by the prosecution against accused no.2. Though there are omissions and contradictions in the testimony of these witnesses, to our mind, such omissions and contradictions are not going to vitiate their entire testimony nor wipe out what they have stated before the Court. It is natural that after witnessing such an incident and more specifically bleeding injury, each person will react in a different manner. One such reaction is fear in the mind. The second reaction is that no one wants to get involved in such criminal matters and therefore such a reaction of not informing the police or not telling about it to anyone cannot be termed as adverse thereby terming such a witness as a planted witness. The presence of these witnesses at the spot and more particularly at the time of the alleged assault on Lavu cannot be disputed.

36. The question is still required to be considered whether their

testimonies could be taken into account for the purpose of proving the charge against accused no.2, due to the so-called omissions and contradictions recorded in their testimony. However, fact remains that the presence of these witnesses is fully established by the prosecution. The version given by all these witnesses up to the scuffle, fist blows and also slaps on the face of Lavu by accused no.2 is very consistent. All witnesses deposed that incident took place only because Lavu called and asked them to leave the said place, upon which accused no.2 got flared up. They deposed that there was no direct talk or discussions between accused no.2 and deceased Lavu prior to it. Therefore, it shows that accused no.2 alongwith accused no.1 and others were having liquor outside the bar. The start of arguments is from the side of accused no.2 when he questioned Lavu about his problem of being there. Such questioning of Lavu was reciprocated by Lavu and then the incident of slapping happened. It is clear from the record that Lavu was not the aggressor or even had any weapon with him. This action shows the nature and the attitude of accused no.2 in unnecessarily questioning Lavu. The entire incident happened in a very short time as tried to be projected by the prosecution witnesses. Therefore, omissions which are recorded in the testimony of these eyewitnesses, firstly by the prosecution and then by the accused persons need to be considered in light of the above circumstances.

37. PW-19 Nilesh Rane, PI of Porvorim Police Station disclosed in detail the stabbing incident as well as the investigations carried out by

him. On receipt of information about the stabbing incident and death of the victim, he recorded a complaint of Shri Dhaku Apa Parsekar-PW1, being the brother of deceased Lavu. On 15.08.2013, we recorded statement of witnesses namely Fredy Vaz/PW8, Shashikant Shirodkar, Suresh Parsehkar, Prashar Sawant, Babu Bagewadi and Shilpa Pandit. He recorded the statement of Vijay Jadhav, Koendas Naidu on 16.08.2013. The necessary contradictions recorded in the deposition of PW3/Parashar Sawant are found recorded on page no.9. Similarly, contradictions marked in the deposition of PW2/Vijay are also put to Investigating Officer on page no.9.

38. At this stage, it is further necessary to note that PW1/Dhaku, who is the brother of Lavu, deposed that on 14.08.2013 during evening hours he received a phone call from his friend Pradeep asking him as to what happened to Lavu and further informed him that Lavu has been taken to JMJ hospital at Porvorim. He, therefore, rushed to the hospital and saw Lavu having injuries on his chest, stomach, neck and was bleeding. Internal organs from his stomach came out and he was gasping for breath. Similarly, Fredy Vaz was found asking the hospital staff to admit Lavu and to start treatment. Someone put Lavu on the trolley and then the doctor started treatment but he expired on the trolley itself.

39. PW1/Dhaku then inquired with Fredy Vaz/PW8 as to what happened, upon which, said Fredy told that they had gone to

Sunshine Bar where some people were sitting outside the bar and then there was a fight and one person assaulted his brother Lavu during which he sustained stab injuries with some sharp weapon. Fredy further told him that he was helpless and when the assailants had gone away, he with the help of others brought Lavu to the hospital on his motorcycle. Fredy was in a state of shock when he spoke to PW1/Dhaku. Accordingly, PW1 lodged his complaint at Porvorim Police Station against unknown assailants for causing murder of his brother Lavu which is at Exhibit 19.

40. It is necessary to note here that PW8 Fredy did not know accused no.2 at that time by his name and therefore he intimated PW/Dhaku that some unknown person assaulted Lavu. In such circumstances, a complaint/FIR was lodged against an unknown assailant. Though an attempt was made to take mileage about such FIR against an unknown person, the circumstance explained by PW8 and PW1 is sufficient enough to show that rightly FIR was lodged against unknown assailants by PW1 as Fredy/PW8 did not disclose the name of the assailant.

41. Deposition of PW1 shows that he received information from Fredy/PW8 when Fredy was trying to admit Lavu to the hospital for treatment. Therefore, the statement of PW/Dhaku and subsequently filing of FIR against an unknown person for causing the death of Lavu with stab injuries has to be considered as a relevant fact and the fact

for the purpose of introducing or explaining the relevant facts. In this case, the relevant fact is that Lavu sustained stab injuries and was taken to the hospital. This fact was told to PW1/Dhaku by PW8/Fredy and accordingly, FIR was lodged.

42. The post-mortem examination and deposition of Dr Mandar Kantak-PW10 confirm this aspect.

43. Dr Sanjeev Juwarkar is examined as PW16 who was attached to JMJ hospital Porvorim on 14.08.2013. He deposed that when he was leaving the hospital at around 6:30 PM, one person stopped him who was shouting and asking for help and requested him to see one person who was lying in front of the hospital.

44. The person was not breathing, pulseless and cold. He looked for the pulse but was unable to notice. The said person was having stab injuries on his chest and abdomen. There was no sign of life however at the request of the other person he tried to revive the said person by giving IV cannulation but to no effect. At the same time, an ambulance, as well as police, arrived and they took the body of the said person to GMC. Thus, the deposition of PW16/Dr Sanjeev fully corroborates the version of PW8/Fredy and PW/Dhaku. It also shows that the deceased Lavu expired outside JMJ hospital itself, due to the injuries he sustained near the said bar.

45. Though it is clear from the record that there were other persons

present inside and outside of the said bar, it is not necessary for the prosecution to examine all these witnesses before the Court. It is well settled that the evidence has to be evaluated on the basis of its quality and not on the basis of the quantity of witnesses. Even a single eyewitness who is considered to be trustworthy and reliable is sufficient for recording a conviction.

46. It has been strenuously urged that all these eyewitnesses failed to describe the knife. To our mind, such an aspect is again of no substance for the simple reason that the entire fight took place in the spur of the moment and immediately thereafter it was found that bleeding injury to Lavu and the knife in the hands of the accused no.2 with blood. It clearly goes to show that the entire incident happened in a short span and unless something drastic is happening, normally the persons around it are not going to concentrate on what is going to happen at the said moment.

47. In the present situation, where there is a bar and people are sitting outside the bar enjoying drinks, the possibility of an exchange of words and even sometimes a scuffle is not at all ruled out. It happens due to the influence of alcohol consumed by such persons. Thus, only because the witnesses did not specifically depose/describe the knife found or seen in the hands of accused no.2, they cannot be disbelieved at all.

48. Secondly, it has been claimed that no witness stated, from where

accused no.2 allegedly took out the knife. It is again, to our mind, too technical as immediately after the exchange of words, deceased Lavu was assaulted with slaps and even blows by accused no.1 and 2. For doing so, both the accused persons and deceased Lavu ought to have been in close proximity to each other. In such a situation, the possibility of the witnesses witnessing any of the accused removing a knife suddenly and stabbing another person, is remote. All these witnesses who were present there were not expecting such an event or such an overt act to happen and, therefore, non-disclosure by these witnesses as to how and when and from where accused no.2 allegedly took out the knife, is, to our mind, not necessarily to be considered as fatal to the case of the prosecution and more particularly, to disbelieve these eye-witnesses.

49. It was then forcefully submitted that no eye-witness deposed that accused no.2 stabbed deceased Lavu. In this respect and as observed earlier, there is clear evidence on record to show that 2 witnesses deposed about the knife in the hand of accused no.2 immediately on noticing stab injury to the stomach of Lavu. It is also seen by one witness that the said knife in the hand of accused no.2 was full of blood. These witnesses deposed that such an incident took place when the scuffle was going on between accused no.1 and 2 on one side and Lavu on the other side. Thus, only because these witnesses did not depose about the actual use of the knife by accused no.2 in the said assault, the fact stands proved that immediately on noticing injury on

the stomach of Lavu, 2 witnesses saw accused no.2 holding knife and that too, with blood. It is to be kept in mind that at that stage, accused no.2 was near Lavu and it happened immediately after slapping and fist blows. It is not the case of these witnesses that during the said scuffle and apart from accused no.1 and 2, any other person was involved in it though some of them tried to separate the accused no.1 and 2 from Lavu. The fact remains that accused no.2 was found holding a knife in his hand with blood and at the same time deceased was found having bleeding injuries to his stomach is a relevant factor and sufficient evidence to hold that during the scuffle, accused no.2 used the knife causing bleeding injury to deceased Lavu.

50. From the above oral material and the facts deposed by these eye-witnesses, prosecution has sufficiently brought on record that these witnesses were present at the spot and they saw the scuffle between deceased and accused no.1 and 2 and immediately thereafter they saw bleeding injury to the stomach of the deceased and at the same time a knife in the hands of the accused no.2 having blood on it. In such circumstances, the contention of the prosecution that accused no.2 is the author of injury no.1 found on the person of the deceased stands established. It also proves the other injuries found on the body of Lavu which were caused by a sharp weapon like a knife. It is not the case that such injuries were caused to Lavu subsequently. The witnesses have deposed about the injuries found on the body of Lavu and the same has been confirmed by PW-16/Dr Sanjeev. These injuries were

also confirmed by PW10/Dr Mandar in his deposition as well as from the post-mortem examination report.

51. PW-12/Ankush acted as Pancha Witness at the time of Inquest Panchanama at Exhibit-79. He described the injuries found on the deceased in detail, which was conducted on 15.08.2013 at GMC.

52. In the case of *Agnelo Furtado v/s. State* (supra), this Court in paragraph no.11 observed thus:-

'11. We have been unable to accept this criticism of Mr. Lotlikar against the testimony of these two witnesses. It is not permissible for a Court to throw away the testimony of a witness because there are in that testimony certain infirmities or weaknesses. In the instant case, the criticism has been made that P.W.1 Pascoal has been bold enough to say in Court something which he has not seen. This is so because his recital is that accused no.1 was having a knife or to that effect. This criticism is justified but that itself in our opinion is not sufficient to throw away the testimony of this witness. We are satisfied that he was a natural witness inasmuch as he was staying about 4 meters away from the house of accused no.1. It was also natural for him as a neighbour and as a owner of the house to be on the scene. We do not see why we should not accept his testimony that he was present at the time of the incident and he was removed from the house of accused no. 1 by the latter. Accepting at least this part of testimony of P.W.1 Pascoal, we hold that he had come on the scene but he was not a witness to the assault. We are fully justified in accepting the presence of P.W.1 Pascoal on the scene because there is adequate evidence on record to show that this witness went to the house of Minguel to inform the wife of Minguel and thereafter he has proceeded to the police station to lodge a complaint treated as F.I.R. There is a mention of the fact of his visit to the hospital. That supports his claim that he was present near the house of the

accused no. 1 around the time when the incident took place.'

53. The above observations that it is not permissible for a Court to throw away the testimony of a witness because there are in that testimony certain infirmities and weaknesses, is clearly applicable to the facts in the above matter.

54. From the oral material on record with regard to these eyewitnesses and the injuries found on deceased Lavu, there is sufficient material to prove that accused no.2 is the author of such injuries found on deceased Lavu. The contradictions and omissions which were highlighted are not going to distract us from the fact that the testimony of these eyewitnesses are found to be genuine and trustworthy and therefore, such omissions and contradictions are, to our mind, not considered to be major contradictions.

55. The second limb of the argument is that recovery of the alleged knife at the instance of the accused is not established. In the alternative, it is claimed that even if such a knife is considered to be recovered at the instance of accused no.2, such a recovery itself would not be sufficient enough to prove the charge as the witnesses did not disclose the use of such a knife by accused no.2 specifically.

56. In this respect, our attention was drawn to the deposition of PW11/Krishna Redkar, PW14/Ratesh Parsekar and PW19/Nilesh

Rane, the Investigating Officer. It was submitted that all 3 witnesses are giving different versions of how the knife was recovered.

57. Shri Lotlikar places reliance on the case of ***Jafarudheen & ors Vs. State of Kerala*** (supra) to claim that recovery under Section 27 of the Evidence Act has to be proved by cogent and convincing evidence as it is the exception to Sections 24 to 26 of the Evidence Act. In the said case, the Supreme Court discussed recovery under Section 27 of the Evidence Act from paragraph 37 onwards and observed in paragraphs 37 and 38 as under:-

'37. Section 27 of the Evidence Act is an exception to Sections 24 to 26. Admissibility under Section 27 is relatable to the information pertaining to a fact discovered. This provision merely facilitates proof of a fact discovered in consequence of information received from a person in custody, accused of an offence. Thus, it incorporates the theory of 'confirmation by subsequent facts' facilitating a link to the chain of events. It is for the prosecution to prove that the information received from the accused is relatable to the fact discovered. The object is to utilise it for the purpose of recovery as it ultimately touches upon the issue pertaining to the discovery of a new fact through the information furnished by the accused. Therefore, Section 27 is an exception to Sections 24 to 26 meant for a specific purpose and thus be construed as a proviso.'

'38. The onus is on the prosecution to prove the fact discovered from the information obtained from the accused. This is also for the reason that the information has been obtained while the accused is still in the custody of the police. Having understood the aforesaid object behind the provision, any recovery under Section 27 will have to satisfy the court's conscience. One cannot lose sight of the fact that the prosecution may at times take advantage of the custody of the

accused, by other means. The court will have to be conscious of the witness's credibility and the other evidence produced when dealing with a recovery under Section 27 of the Evidence Act.'

58. From the reading of the above observations, it is clear that this provision merely facilitates proof of a fact discovered in consequence of information received from a person in custody and it incorporates the theory of confirmation of subsequent facts facilitating a link to the chain of events. The object behind the said provision regarding any recovery will have to satisfy the Court's conscience. Keeping in mind the above proposition, evidence of these 3 witnesses requires to be carefully assessed. It is also required to note that Mr Bhobe, learned Public Prosecutor submitted that even if the recovery under Section 27 of the Evidence Act is not established, this Court cannot ignore the testimonies of eyewitnesses and only because recovery is not proved, the accused is not entitled to acquittal.

59. We are in agreement with the submissions advanced by Mr Bhobe as above for the simple reason that eye-witnesses' depositions are necessary to be kept on a higher pedestal than circumstantial evidence. Recovery of a weapon at the instance of the accused is certainly a circumstance to link the accused with the said crime. It only shows the knowledge of the accused of the places where such a weapon was either concealed or thrown immediately after the alleged incident. Only because the weapon of assault is not recovered, the

deposition or testimonies of eyewitnesses otherwise found reliable, cannot be discarded.

60. PW11/Krishna Redkar deposed that on 26.08.2013 he acted as Pancha Witness alongwith one Ritesh Parsekar/PW14, at the request of the police officer. At that time in the cabin of PI, the accused by name Vijay Karbotkar/accused no.2 was escorted by the police. Apart from disclosing his name, accused no.2 told them in Konkani that he is ready to show the knife and the place where he has thrown the knife and the clothes. This witness has specifically deposed the words in Konkani uttered by accused no.2 and found recorded on page 2 of his deposition.

61. PW11/Krishan then deposed that thereafter accused led them from Sunshine bar towards the bushes which are near the National Highway and after walking towards such bushes accused no.2 removed one knife and gave it to P.I. The said knife was having blades on both sides and one side he could see brown stains. The measurements of the knife were recorded and then it was packed and sealed. Thereafter, accused no.2 led them to Calangute beach and from the bushes, he removed clothes, i.e. one shirt of checks with white, black and brown colour long sleeves having brown stains. Accused no.2 then showed blue colour jeans pants having brownish stains. All these articles were packed and sealed during the Panchanama.

62. PW14/Ritesh Parsekar was the second Pancha Witness for the

recovery panchanama. He deposed that one person was produced before them at the police station who informed them that he is ready to show the weapon and the clothes pertaining to the case. This witness did not disclose the specific words uttered by the accused no2 in Konkani but claimed that such words were recorded in the panchanama. This witness was then cross-examined by the learned Public Prosecutor for the State by refreshing the memory but did not support prosecution. Thus, it is clear that PW14 is not of much help to the prosecution as far as recovery is concerned.

63. The Investigating Officer examined as PW20/Manoj Mardolkar who took over the case from PW19, deposed that on 17.08.2013 after much effort he arrested accused no.2. On 26.08.2013 during interrogation, accused no.2 volunteered to show the weapon and the clothes. He, therefore, immediately secured the presence of 2 Pancha Witnesses and in their presence accused no.2 made a disclosure that he is ready to show the knife and clothes worn by him at the time of the commission of the offence. Thereafter, all of them proceeded alongwith accused no.2 who took them near the Sunshine Bar and thereafter towards the bushes and showed the place where he had thrown the knife. On minutely, checking they found one knife. After writing the necessary details the knife was attached. The words spoken by accused no.2 in Konkani are also disclosed by PW20 in detail in his deposition.

64. The first submission of Mr Lotlikar is that there is much delay in conducting the recovery Panchanama. In this respect, it is necessary to note that accused no.2 was arrested by PW20 only on 17.08.2013. No doubt the disclosure was made on 26.08.2013 i.e. after a period of 9 days. However, it needs to be noted here that accused no.2 was absconding from the time of the alleged incident which took place on 14.08.2013. Only because disclosure made by accused no.2 after of period of 9 days, cannot be a ground to completely discard such theory put forth by the prosecution. The only fact which needs to be taken into account is the disclosure made by the accused in custody leading to recovery of the material/weapon which is relevant and directly connected to the offence. The Pancha Witness categorically disclosed that accused no.2 made the disclosure in their presence while in the custody of the police. Such disclosure was made in Konkani language and recorded in the Panchanama. The Investigating Officer/PW20 confirmed this fact. Such disclosure led to the recovery of the knife as well as clothes and that too at the instance of accused no.2. Thus, the disclosure in fact is of the proof of the fact discovered consequent to the information received from the person in custody. Only because there is some variation in the words uttered by the Pancha Witness, he cannot be doubted. His testimony on this ground cannot be completely discarded. The knife recovered at the instance of the accused was having brown stains and therefore it was referred to Chemical Analyser for the purpose of opinion. Report of the Commercial Analyser is produced on record at Exhibit-51 wherein at

serial no.11, a knife (Exhibit 9), a shirt and the pant of accused no.2 at Exhibit 10 and 11 are mentioned. The result of the examination is in paragraph 12. The Commercial Analyser reported that blood was detected on Exhibits 9, 10 and 11. He confirmed that human blood was detected on Exhibits 9, 10 and 11. He further confirmed that blood group B was detected on Exhibit 11. Exhibit 11 is the long Jeans pant recovered at the instance of accused no.2. The blood group of deceased Lavu was B+ve. This itself is an incriminating circumstance which has been brought on record by the prosecution and specifically against accused no.2.

65. It was forcefully submitted that the Pancha Witnesses stated that accused no.2 was taken with his face covered and therefore the witnesses were unable to identify him. Such submission is of no substance. Both the witnesses and the Investigating Officer clearly deposed that accused no.2 was shown to the witnesses at the police station and thereafter his face was covered while he was taken out for the simple reason that a test identification parade was yet to be conducted.

66. In our considered opinion, recovery of the knife and clothes at the instance of accused no.2 cannot be doubted only because it was conducted after 9 days from the date of arrest of accused no.2. There is sufficient material to show that the accused made the disclosure while in custody which resulted in the recovery of knife and the clothes.

There is no material to show that such a knife and clothes were tampered with before forwarding it to the laboratory. Report from the Chemical Officer as discussed above prove the presence of human blood on the knife and the shirt as well as the blood of B group on the pant of accused no.2. These incriminating circumstances were not explained by accused no.2 when put to him under Section 313 Cr.P.C. Thus, from the oral suggestions and the depositions of eyewitnesses, the prosecution succeeded in proving the charge against accused no.2.

67. In the case of *Kansa Behera* (supra), the Supreme Court observed that recovery of a shirt or a dhoti with blood stains according to the serologist's report were stained with human blood but there is no evidence in the report of the serologist about the group of blood and, therefore, it could not positively be connected with the deceased, are not applicable to the matter in hand since in this case the pant of the accused recovered at his instance found human blood with 'B' group and the report of Serologist disclose about it. Similarly, the deceased blood group was also B and thus, the accused was duty-bound to explain how the blood of the B group appears on his pant when in fact he had no bleeding injury on his person.

68. Mr Lotlikar would then submit that the learned trial Court failed to conduct a fair trial and refused to grant permission to the accused to lead evidence in defence. In this respect, he submitted that first of all the mandate of Section 233 of Cr. P.C. was not followed.

Secondly, when the accused filed an application for permission to lead evidence in his defence, it was rejected on the grounds which are extraneous to the facts and circumstances. Though the accused filed an application under Section 315 Cr. P.C. for permission to lead defence evidence by examining 2 witnesses, it was the duty of the trial Court to consider the correct provisions of law and by denying such opportunity, the valuable right of the accused has been taken away.

69. In support of the above contentions, Mr Lotlikar would place heavy reliance on 2 decisions, i.e. ***Sivamani & Ors*** (supra) and ***Bhadran*** (supra) both from Kerala High Court. In order to understand the submissions of the learned counsel Shri Lotlikar on the above subject, provisions of Sections 232 and 233 of Cr. P.C read thus:

'232. Acquittal.-If, after taking the evidence for the prosecution, examining the accused and hearing, the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.'

'233. Entering upon defence.-(1) Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.'

70. Chapter XVIII of the Code of Criminal Procedure deals with proceedings before the Court of Sessions. After evidence of the prosecution is over, the provisions of Sections 232 and 233 stand attracted. However, these 2 Sections cannot be read in isolation.

71. The Kerala High Court in the case of **Sivamani** (supra) was dealing with a case of burglary together with the murder and stabbing of one person. The police filed a chargesheet against 3 accused persons though only 2 of them could be put to trial as the third one remained absconding. The Sessions Judge convicted both accused persons for the offence punishable under Section 457 and 394 of IPC and acquitted them for murder. The State of Kerala as well as the convicted persons filed appeals against the said judgment. While dealing with these appeals and mostly the appeal filed by the accused, Kerala High Court observed that the learned Sessions Judge failed to consider the provisions of Sections 232 and 233 of the Cr. P.C and in that context, it is observed in paragraph 9 thus:-

'9. We have absolutely no doubt that this is not a case where any of the appellants could have been acquitted on the ground that "there is no evidence." Learned Sessions Judge should necessarily have proceeded to the stage provided in Section 233 of the Code. We cannot treat the answer given by the appellants (that they have no evidence) as good enough for the stage envisaged in Section 233 of the Code also since appellants could legitimately contend that they did not want to adduce evidence if the Sessions Judge was disposed to acquit them at the stage of Section 232 itself. In fact learned counsel for the appellants submitted that if the case has to proceed further to the stage after Section 232, appellants may have to consider whether defence evidence is necessary. '

72. In the case of **Bhadran** (supra), the Kerala High Court observed that "the accused must be informed of his right by the trial Judge and an effective and meaningful opportunity to adduce evidence in his

defence must be extended to him, when necessary by giving reasonable adjournments. While acting under Section 233 the Court must tell the accused that he has a right to enter on his defence, even if he is represented by counsel. Then, the Court must also tell him that he can adduce evidence in support of his defence. If he needs time for that, he is entitled to have such time. Section 233 embodies a deep-rooted principle, recognized in trials, namely that, no man shall be condemned, in his defence without hearing him." It is no doubt true that Kerala High Court in clear terms observed that provisions of Section 232 and 233 are mandatory and if not followed, would certainly affect valuable right accrued in favour of the accused thereby depriving him to exercise his right to lead defence evidence on the ground that Judge considers that there is no ground to acquit him under Section 232 of the Code.

73. However, the Bombay High court in the case of *Sangappa Nigappa Malabadi v/s. The State of Maharashtra*¹⁵ considered in detail provisions of Section 232 together with Section 465 of the Code of Criminal Procedure. In that case, seven accused persons were charged with the offence punishable under Sections 147, 148, 302 read with Section 149, etc. In all, 3 Sessions cases were tried together and a common judgment was passed by the Court. Accused no.1 to 6 were acquitted and accused no.7 Sangappa was found guilty for an offence punishable under Section 302, 353 and 332 r/w 34 I.P.C and

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sentenced to suffer imprisonment for life. The said accused no.7 Sangappa carried the matter before the High Court challenging conviction. Similarly, the State being aggrieved with the acquittal of other accused persons preferred separate appeals. All the said appeals were taken together. It was argued on behalf of some of the accused persons that the learned Sessions Judge did not follow the procedure laid down in Sections 232 and 233 of the Code by recording a finding that it was not the case where there was no evidence that the accused committed the offence thereby calling upon the accused to enter defence evidence. It was further contended that the learned Sessions Judge did not hear the prosecution and the defence immediately after completing the recording of prosecution evidence and examining the accused and did not record findings as required under Section 232 of Cr.P.C. before calling the accused to enter on their defence and thus the whole trial stands vitiated.

74. While dealing with such submissions, the Division bench of this Court after elaborate discussions in paragraph 16 has observed thus:

'16. We propose to take the last submission of the learned Counsel Mr Pradhan that the judgment and order passed by the learned trial Judge, in this case, is vitiated by non-compliance with the provisions of sections 232 Cr. P.C. and as such, they are liable to be set aside and the matter requires to be sent to the trial Court for retrial. Section 232 Cr. P.C. reads as follows:—

“232. If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that

there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.”

Section 233 Cr. P.C. reads as follows:—

“233. (1) Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.”

The corresponding provisions in the Code of Criminal Procedure, 1898 (V of 1898), were embodied in section 289. The said section reads as follows:—

“289. In every case in which a commission is issued under section 284, the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.”

The provisions of section 289 of the Code of Criminal Procedure, 1898 came for consideration before the Supreme Court in 4(Pati Ram v. State of U.P.)(1970) 3 SCC 703. At page 706 of the report their Lordship observes as follows:—

“It was next urged that section 289, Cr. P.C. had been contravened and, therefore, the conviction of the appellant cannot be sustained. This contention is based on the assumption that only after coming to the conclusion that an accused is guilty the trial Judge can call upon him to enter into his defence. This is clearly a misreading of the section. What that section requires is that if the trial Judge comes to the conclusion that there is evidence to show that the

accused had committed the offence, then the accused should be called upon to enter upon his defence. The value to be attached to that evidence is not to be considered at that stage. In this connection it was also urged that the question whether the accused had defence evidence or not should not have been put to him in his examination under section 342, Cr. P.C. but it should have been put to him separately. What has been done is as is usually done in all such cases. After putting the questions that are required to be put under section 342, Cr. P.C., the accused was asked whether he had any defence evidence. We do not think that procedure in any way conflicts with section 289, Cr. P.C.”

In the present case also the learned trial Judge, after the prosecution closed their case, examined the accused under section 313, Cr. P.C. and at the end he asked, “Do you want to led evidence in your defence?”. “Do you want to examine yourself on oath?” and “Do you want to say anything more?” and recorded the answers of the accused to these questions. It appears that before asking the accused whether they wanted to lead evidence in defence the learned trial Judge did not hear the prosecution and the defence and did not consider whether the accused should be acquitted for want of evidence. As per the provisions of section 232 Cr. P.C. reproduced above, after taking the evidence of the prosecution and examining the accused, it is necessary for the trial Judge to hear the prosecution and the defence and in case he finds that there is no evidence that the accused committed the offence, he has to record an order of acquittal. In case he does not acquit the accused under section 232 Cr. P.C., he has to call upon the accused to enter-into his defence. We are unable to agree with the learned Counsel Mr. Pradhan that the learned trial Judge before ordering the accused to enter into his defence should find the accused guilty on appreciating the evidence adduced by the prosecution. What is required of the trial Judge is that he should hear the prosecution and the defence after the prosecution evidence is completed. On

such hearing in the case he finds that there is no evidence against the accused, he has to pass an order of acquittal and in case he finds that there is evidence to be appreciated, he must call upon that accused to enter into his defence and adduce evidence. In view of the new provisions of section 232 introduced in the Code of Criminal Procedure, 1973, it is better that the trial Judges hear the prosecution and the defence and record that it was not a case of no evidence and thereafter call upon the accused to enter into his defence. However, the irregularity, if any, in not recording that it was not a case of no evidence and acquittal of the accused on that account, before calling upon the accused to enter on his defence, is not a material irregularity which would vitiate the trial. It can be cured under section 465 Cr. P.C.'

75. In the case of ***Hanif Banomiya v/s. State of Maharashtra***¹⁶, this Court discussed the scope of Section 232, 233 and 465 and then observed in paragraphs 30, 31, 32, 33, 34 and 35 as under:-

'30. Now the object of Section 232 of the Criminal Procedure Code (new) is to expedite the conclusion of the Sessions trial and, at the same time, to avoid unnecessary harassment to the accused by calling upon him to adduce evidence or to avoid the waste of public time when there is no evidence at all. The accused will have to be acquitted under Section 232 of the Code if there is no evidence at all. If there is some evidence, no order of acquittal can be recorded. The court is not to embark upon the question at that stage whether the evidence is sufficient or is reliable. If, however, the Court finds that there is no evidence at all, the order of acquittal has to follow. Such an order would be subject to appeal. The learned Judge passing such an order may have to give some reasons as to why he came to the conclusion that there was no evidence at all as his order of acquittal would be ordinarily subject to appeal. However, if there is no acquittal, ordinarily a small order on the order sheet or somewhere in the proceedings indicating

¹⁶ (1981) CRI. L.J. 1622

that that was not a case of 'no evidence at all' and that the accused has not been acquitted and that he is called upon to enter on his defence would be sufficient. An unnecessarily long order, as happened to be made in Arun's case(1978 Cri LJ 1168) (Bom) would cause an apprehension in the mind of the accused that the learned Judge has already made up his mind as to the guilt of the accused. It is clear from the wording of Section 232 that the question whether the accused wants to lead evidence in defence would not arise when the trial is at the stage of Section 232 of the Criminal Procedure Code. It would be necessary to put that question to the accused when the trial enters the stage of Section 233.'

'31. The question, however, is whether the absence of any order or absence of any indication in the order sheet or anywhere in the proceedings that the accused is called upon to enter on his defence would vitiate the trial and the subsequent conviction. The question, in our view, would have to be decided with reference to provision of Section 465 of the Criminal P.C. That section, as is well settled has not the effect of curing material irregularities and absolute illegalities. But the mere fact that a certain provision in the Code is couched in imperative language does not in itself indicate that a breach of the provision would vitiate the whole proceedings. The test to be applied in considering whether a particular infringement of the provision of the Code does or does not fall within the purview of Section 465 would be whether the error goes to the root of the trial or whether the Court has broken vital rule of procedure. The mere fact that an imperative statutory rule of procedure has been broken is not enough to vitiate the trial or proceeding. The court has to consider the gravity of the irregularity and omission and whether it caused or would have the effect of causing injustice to the accused. A distinction has to be made between a positive enactment in the Code that a certain trial shall not take place without certain pre-requisites and a positive enactment that in the course of such a trial, the prescribed procedure should be followed. Though both are imperative provisions, in the former case an infringement of the negative injunction amounts to an assumption of the

jurisdiction and vitiates the trial from the very beginning. In the latter case, an infringement merely amounts to error, omission or irregularity in the procedure adopted in the course of the trial.'

'32. It is also necessary to bear in mind the provisions in sub-section (2) of Section 465, which provide that in determining whether any error, omission or irregularity in any proceeding under the Code has occasioned a failure of justice, the Court has to consider the fact whether the objection could and should have been raised at an earlier stage in the proceedings.'

'33. We may make it clear that it would not be proper for the courts not to follow the procedure laid down by the Code, due to negligence or in order to have a short cut merely because Section 465 could be invoked and the irregularity could be cured. When a Code lays down certain procedure, it has to be followed, whether failure of justice has been occasioned as a result of non-compliance with certain provisions as laid down by the Code would depend upon the facts of each case] For example, if an accused in a particular case is undefended or is not defended by a sufficiently experienced lawyer, it would be open for the accused to make a grievance that because of the non-compliance of a particular provision, he was, misled and that has resulted in the prejudice to him and that provision in Section 465 of the Code could not be invoked.'

'34. Now coming to the facts of this case, it appears from the Roznama that, the evidence of the prosecution was over on 7th January, 1976. The case was adjourned for recording the statement of the accused to 8th January, 1976. On that day the statement of the accused was recorded, and the case was adjourned for arguments to 9th January, 1976. As the prosecutor in charge of the case was sick, the case was adjourned to 16th January, 1976 for arguments. On that day, the arguments were heard. The judgment was delivered on 28th January, 1976.'

'35. As is pointed out above, the statement of the accused was recorded on 8th January, 1976. There is no endorsement or indication in the order sheet, nor there is any separate order

showing that after the arguments were heard on 16-1-1976, the accused was called upon to enter on his defence. The case was posted for judgment to 21st January, 1976. It would, however, appear from the statement of the accused recorded on 8th January, 1976 that a question was asked at the end of that statement whether the accused had any witness to produce in his defence. The reply was in the negative. It is true that this question should not have been put before the trial entered the stage of Section 233. It may be mentioned that the judgment in the case was delivered about a fortnight thereafter i.e. on 28th January, 1976. Before delivering the judgment the arguments were heard on 16th January, 1976. No any grievance seems to have been made either at the time of the arguments or at any time before the delivery of the judgment that the accused was, in fact, prejudiced or was likely to be prejudiced by his not having been called upon to enter on his defence in terms laid down in Section 233 of the Code. No ground suggesting that any such prejudice has been caused to the accused has been taken in the Appeal Memo. It has not been shown that any prejudice has been caused to the accused because the accused was not formally called upon to enter on his defence. It has not been shown to us that the accused would have led some evidence in the Court which he did not do, because he was not formally called upon to enter upon his defence. The prosecution had examined as many as four witnesses, who claimed to be the eye witnesses, and that, therefore, the learned trial Judge must have been clear in his mind that this could not be a case of "no evidence at all." It does not appear from the record that any argument was advanced on behalf of the accused, when the trial was in the stage of Section 232 of the Code that this was the case of no evidence at all. In view of all this material, we are inclined to hold that in spite of the failure on the part of the learned Sessions Judge to strictly comply with the provisions, of Sections 232 and 233 of the Code, no failure of justice has been occasioned to the accused. We, therefore, reject the contention sought to be urged on behalf of the appellant that the conviction of the appellant has been vitiated.'

76. In the case of *Arun and others v/s. State of Maharashtra*¹⁷, the Nagpur Bench of this Court considered the provisions of Section 232 and observed in paragraphs no.12 and 13 as under:

'12.Although changes have been introduced in drafting S. 232 of 1973 of Cr. P.C. showing the absence of any questioning to the accused regarding whether he means to adduce evidence in defence and an obligation is cast to hear both the sides, the function of S. 232 of the Cr. P.C., to my mind, is very clear. The section is titled "acquittal" and the record of an order is compulsory if the finding is of acquittal. Mr. Salve started attacking the impugned order by saying that the learned Judge has misconstrued the provisions and has virtually misdirected herself when in para 7 she has addressed herself the question "whether there is any evidence to show that the accused had committed the offence", instead of considering whether there is "no evidence". According to Mr. Salve, she has fallen in an error when she started finding out the evidence and elaborating it and even at the end remarking that there is evidence against the accused. It is, however, the way of approach to the expression that should make all the difference. As said by Mr. Garud for the State one cannot reach a conclusion of there being "no evidence" unless the evidence is looked at and considered. According to him, the phrase 'whether there is any evidence', is a converse statement of 'whether there is no evidence' and, therefore, if the Judge has considered the evidence it should not be taken as erroneous.'

'13.I think the point will have to be answered not by looking only to the logical propositions but the stage and the function of the trial. It is no doubt true that to arrive at a conclusion that there is no evidence of having committed the offence 'evidence will have to be looked into, but its purpose will have to be noted, and that is to substantiate the order of acquittal. This introduces the consideration of the degree of evidence, the extent of its insufficiency and not the extent of its

17 (1978) CRI. L.J. 1168

sufficiency in proof of the offence. The Judge has to make up his mind, whether the evidence produced is of such a nature as not at all linking the accused with the offence and not to find out whether it is trustworthy in the ultimate analysis. The moment there is some evidence, some good evidence, no order of acquittal can be passed. In such a case an elaborate order showing how the evidence clinches the accused is not necessary. In other words, appreciation of positive evidence differs in degrees and the moment a conclusion is reached that there is some positive evidence, the case is out of S. 232 of the Code. I do not feel that such a finding ought to be given by writing an elaborate order. Although it would be difficult to accept the contention of Mr. Salve that in all cases no order is necessary under S. 232 if there is no acquittal, because diverse situations may arise, for instance where a number of accused are concerned and conceivably against one or more accused alone there would be absolutely no evidence and such accused insists on an order, surely it can be said that a long order in the nature of a judgment is not at all expected when there is no acquittal. Interpreting S. 232 I find it predominantly showing the mental make up of the Judge trying the case, so that upon all considerations when he has to take up a decisive step, he is to record an order, otherwise he continues the trial. This situation bears close comparison with the provisions in S. 227 of the Code when an order for discharge is to be passed if the Judge after looking to the documents and hearing the submissions of the accused and prosecution comes to the conclusion that there is no sufficient ground to proceed. Otherwise he continues the trial. I do not think any order, other than bare noting of the indication to continue is necessary. Consequently under S. 232 when there is no acquittal almost always a small order on the order sheet or an order merely indicating that the trial has to proceed even inclusive of an order in every clear cases would be sufficient.'

77. In the case of ***Queen Empress v. Vajiram***¹⁸, the Court

18 (1892) ILR Vol. XVI 414

considered the meaning of "no evidence, in connection with the provisions of Section 289 of the Criminal Procedure Code, 1882 and observed that the words "no evidence" in the clauses of Section 289 of Criminal Procedure Code, 1882 must not be read as meaning "no satisfactory, trustworthy or conclusive evidence". If there is evidence, the trial must go on its course, when in a trial by jury, the jury, and other trials, the Judge after considering the opinion of the assessors, has to find out the facts. It is only in the absence of any evidence as to the commission of the offence by the accused that the Court can record an acquittal without allowing the trial to go on, or obtaining an opinion of the assessors, or that the Court can direct the jury without going into the defence to return a verdict of not guilty.

78. In *Krishna Kumar & Ors v/s. The State of U.P.*¹⁹ 2008 it was observed by the Division Bench that while the accused were examined under Section 313, CrPC, the questions regarding the evidence that had come, were put and in the end, it was asked whether they wanted to adduce any defence evidence and the accused replied in negative, would not vitiate the procedure under Section 232 and 233 of CrPC though it is desirable that the trial Court should record findings in the order sheet that accused cannot be acquitted under Section 232 CrPC and then he should be called upon the accused to enter into his defence. But if this procedure has not been followed, it does not vitiate the trial since the question that had come in evidence

19 (2008) CRI. L.J. (NOC) 1016 (ALL).

were put to the accused in his examination under Section 313 and in the circumstance of the case, it cannot be said that any miscarriage of justice has been caused to the accused persons.

79. Be that as it may, the first and foremost aspect in this regard is that no specific ground is found challenging such an order passed by the trial Court in particular and that prejudice was caused to the accused when he was denied such a right to examine 2 witnesses. Since this Court in the case of *Sangappa* (supra), has observed that it is not a material irregularity and can be cured under Section 465 of Cr. P.C., it is necessary for the accused to first of all demonstrate that by denying such right, failure of justice occurred in this matter.

80. The record clearly goes to show that while recording the statement under Section 313 Cr.P. C of the present accused and that too, on two occasions, he was asked specifically whether he wants to lead defence evidence. On both occasions, he firmly answered in the negative. Thereafter, the matter remained pending for long and even arguments from the prosecution side were completed. At this stage accused filed an application, though, quoting the wrong section, for examining two witnesses. The learned Additional Sessions Judge by reasons, rejected such an application. The appellant did not even consider this ground important enough to be raised in the appeal memo. Further, except for urging that the non-compliance caused prejudice, no prejudice as such was demonstrated or even attempted to

be demonstrated. Even the application was filed belatedly without laying any foundation. As noted earlier, on two occasions, the appellant was specifically asked whether he wants to lead any defence evidence and on both such occasions, the appellant emphatically answered that he did not want to lead any defence evidence. Therefore, this ground which was orally urged, cannot be the basis for inferring any miscarriage of justice.

81. Be that as it may, we are very much in agreement with the observations of this Court in the case of *Sangappa* (supra) and there is no reason for us to take another view specifically considering the matter in hand. No doubt procedure as provided in Chapter XVIII of the Code of Criminal Procedure dealing with a trial before a Court of Sessions, normally after evidence of the prosecution is over the examination of the accused under Section 313 Cr. P.C. is taken up for the simple reason that the accused should get a chance to explain the material/evidence brought through the prosecution witnesses and which is basically adverse to him. If there is no material even to frame questions under Section 313(1)(b), the only option with the learned Judge is to record the findings of acquittal. However, when there is material which is adverse to the accused and it is necessary to call upon him to explain it as provided under Section 313(1)(b) of Cr. P.C., it cannot be said that there is evidence against the accused so as to record acquittal. Thus, immediately after the recording of the statement of the accused under Section 313 (1)(b) of Cr. P.C, the Court is asking

the accused as to whether he wants to examine himself or whether he wants to examine any witness in his defence. In normal practice, these questions are formed and appended at the end of questions put to the accused under Section 313(1)(b) of CrPC. To our mind and as provided under Section 313 Cr.P.C, such questioning is put directly by the Presiding Officer to the accused himself. Thus, the Court/Judge is informing the accused and calling upon him to enter on his defence or adduce any evidence he may have in his support, in compliance with Section 233 of Cr.P.C. The purpose of putting these 2 questions at the end of the examination of the accused under Section 313 (1)(b) is with a specific purpose. These two questions cannot be considered as part and parcel of the examination of the accused under Section 313 (1)(b) of Cr. P.C for the simple reason that such examination of the accused under Section 313 Cr.P.C is for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him. Therefore, said last two questions i.e., at the cost of repetition, whether the accused wants to examine himself in defence and whether the accused wants to examine any witnesses in support of his defence, to our mind, are necessary in order to comply with the provisions of Section 233 of Cr.P.C.

82. We, therefore, consider firstly, that there is no ground raised in the present appeal thereby specifically challenging the rejection of the application of the accused for examining defence witnesses and secondly, that no case has been made out with regard to any prejudice

caused to him by such rejection. Thirdly, the accused was specifically asked and that too on two occasions as to whether he wanted to examine himself or lead defence evidence if any, and he answered in the negative. Even otherwise, such defect is not material to vitiate the trial as tried to be projected. Section 465 of Cr. P.C is therefore applicable and when the accused failed to demonstrate that such irregularity is going to the root of the matter and causing severe prejudice or failure of justice, to our mind, is curable. In sum and substance, such ground raised by the accused regarding denial of leading defence evidence and that too without any prejudice needs to be rejected.

83. The last submission is with regard to invoking Section 300 of IPC alongwith exceptions no.1 and 4. In this respect, it has been specifically argued that at the most the present offence cannot be considered as murder. Firstly, it is claimed that there was a grave and sudden provocation and secondly, the incident happened in the spur of the moment and during a sudden scuffle. It is further claimed that exception no.1 and 4 of Section 300 of IPC stands attracted and thus, the case would not fall under the category of murder. Section 300 deals with murder and exception 1 reads thus:-

*'Exception 1.- **When culpable homicide is not murder.**-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.'*

84. Exception 4 of Section 300 reads thus:-

'4 —Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.'

85. The circumstances discussed above in detail would clearly go to show that accused no.2 was the aggressor as he unnecessarily questioned the deceased and when received an answer, charged him and slapped on his face. Thus, it is clear from the entire material that there was no provocation from the deceased at all. In fact, the deceased called upon his friend to leave the said place, which was not properly digested by the accused.

86. Exception 1 is, therefore, not applicable to the facts and circumstances of the case in hand as tried to be projected.

87. However, the above case would fall under exception 4 as it is clear from the material placed on record that the offence or the overt act was committed without premeditation and in a sudden fight in the heat of passion due to a sudden quarrel. Admittedly, there is no material on record to show that there was any previous enmity between the present accused and the deceased. The accused along with his friends was already present and was enjoying drinks. The deceased along with his friends came to the site. Due to a trivial matter, suddenly the fight between the present accused and the deceased

started. There were exchange of words, as well as fists blows and in the heat of passion without any provocation, a knife was used thereby causing bleeding injuries. It is no doubt true that the accused left the said place after the incident. We, therefore, observe that the present case falls within exception 4 of Section 300.

88. In view of the above observation, therefore, we consider that the offence would fall under Section 304 of IPC. The question then needs to be answered is whether it would be covered under Part I or Part II of Section 304 of IPC which reads thus:

'304. . Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.'

89. From the overall material placed on record and findings recorded by us as above, one thing is clear that the overt act by which death is caused was certainly done by causing bodily injury as is likely to cause death. The fact that the accused was carrying a knife with him itself shows that it was not carried only for the purpose of

showing it. The use of a knife by the accused at the time of such a trivial fight however demonstrates that the accused very well knew the implications of causing such injury with the help of a knife. Similarly, the depth of injury no.1 as found in the post-mortem examination report clearly goes to show the use of force by the accused while inflicting such a blow and the part of the body chosen for such a blow, we are convinced that the offence certainly falls under Section 304 Part I.

90. For the above reasons, we hold the present accused guilty of the offence punishable under Section 304 Part I of IPC and consequently acquit him under Section 302 of IPC. The accused/appellant is therefore sentenced to suffer rigorous imprisonment for a term of 10 years and to pay a fine as awarded by the learned trial Court. In default of payment of such fine, the accused shall suffer simple imprisonment for a period of one year. Accused is entitled to a set off under Section 428 Cr.P. C., of the sentence already undergone.

91. The appeal is, therefore partly allowed in the above terms.

BHARAT P. DESHPANDE, J.

M. S. SONAK, J.