Esha

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 50 OF 2016

Zenito Cardozo, S/o Vincent Cardozo, 30 years of age, r/o St. Augustinwaddo, Morad, St. Cruz, Goa. ... APPELLANT

VERSUS

State, Through P.P., Hon'ble High Court of Bombay ... RESPONDENT

WITH
CRIMINAL APPEAL NO. 52 OF 2016

Sachin Padgaonkar, son of Bala Padgaonkar, 30 years, resident of House No. 184, 1st Bairro, St. Cruz, Goa, presently lodged as Convict Prisoner at Central Jail, Colvale. ... APPELLANT

VERSUS

1. State (Through P.I. Agacaim Police Station, Agacaim, Tiswadi, Goa).

2. Public Prosecutor, High Court of Bombay at Goa, Altinho, Panaji, Goa. ... RESPONDENTS

WITH
CRIMINAL APPEAL NO. 53 OF 2016

Prasad Kubal, son of Sadashiv Kubal, 36 years, resident of House No. 133, Near Laxminarayan Temple, Headland Sada, Mormugao, Goa. Presently lodged as Convict Prisoner at Central Jail, Colvale. ... APPELLANT

VERSUS

1. State (Through P.I. Agacaim Police Station, Agacaim, Tiswadi, Goa). ... RESPONDENTS

2. Public Prosecutor, High Court of Bombay at Goa, Altinho, Panaji, Goa.

*****

Mr. S.D. Lotlikar, Senior Advocate with Mr. Arun Bras De Sa, Mr. Mark Valadares and Mr. Sahil Sardessai, Advocates for the Appellant in Criminal Appeal No. 50 of 2016.

Mr. Rohan Desai with Ms. Arya Parrikar and Ms. Ashwini Bandekar, Advocates for the Appellants in Criminal Appeal Nos. 52 and 53 of 2016.

Mr. Pravin Faldessai, Additional Public Prosecutor for the State in all the Appeals.

CORAM:	**BHARATI DANGRE, J.**
RESERVED ON:	**18th JULY 2025**
PRONOUNCED ON:	**10th OCTOBER 2025**

JUDGMENT:

1. These three Appeals arising out of the same incident, but resulting in two Sessions Cases, trying the Accused persons in distinct sets of allegations, are tagged together in the wake of the commonality of the incident.

Criminal Appeal No. 50 of 2016 filed by the Appellant, Zenito Cardozo, arraigned as Accused No. 1 in Sessions Case No. 41/2009, being charged for committing an offence under Sections 304, 307, 326 read with Section 34 of IPC along with two other Accused persons, namely, Mahavir Nadar and Domnic Nazareth.

On conclusion of the trial, the Additional Sessions Judge at Mapusa by judgment dated 29.07.2016 convicted Zenito Cardozo, the Appellant before me in Criminal Appeal No. 50 of 2016, for the offence under Section 304 Part II of IPC and sentenced him to

undergo three years rigorous imprisonment along with his conviction under Section 326 of IPC by directing him to undergo rigorous imprisonment for three years and to pay a fine of Rs.10,000/- and in default to undergo rigorous imprisonment for three months, both sentences having been directed to run concurrently.

As far as Accused No. 2, Mahavir Nadar and Accused No. 3, Domnic Nazareth are concerned, in the absence of any evidence establishing their involvement, they stood acquitted of the charges levelled against them.

Criminal Appeal No. 50 of 2016 is Admitted on 04.08.2016.

2. In a counter case registered with Agassaim Police Station arising out of the same incident, which took place on 10.05.2009, FIR No. 32/2009 was registered on a complaint of Mr. Judas Fernandes, which arraigned five persons as Accused, namely, Mr. Francis D'Souza @ Miranda, Mr. Minguel D'Silva @ Kasti, Mr. Prasad Kubal, Mr. Sachin Padgaonkar and Mr. Prakash Naik. The aforesaid Accused persons were charged by the Additional Sessions Judge at Mapusa in Sessions Case No. 15/2010 under Sections 143, 147, 148, 307, 323 read with Section 149 of the IPC.

As far as Accused No. 2 is concerned, since he was absconding, the trial proceeded against him by invoking Section 299 of Cr.P.C.

On conclusion of the trial, the three Accused persons i.e. Accused Nos. 1, 3 and 4, were convicted for committing an offence under Section 326 of IPC and were acquitted for the offences under Sections 143, 144, 147, 148, 323, 307 read with Section 149 of IPC. Accused No. 5 stood acquitted of all the charges.

Pursuant to the conviction under Section 326 of IPC, the Trial Court sentenced Accused Nos. 1, 3 and 4 to undergo rigorous imprisonment for four years and to pay a fine of Rs.10,000/- each or in default to undergo rigorous imprisonment for three months, the fine amount being directed to be paid to the injured, Zenito Cardozo.

During the pendency of the Appeal, Accused No. 1, Francis D'Souza demised and the Appeal stood abated against him and I have passed a separate order on 18.07.2025 in that regard.

The two Appeals i.e. Criminal Appeal No. 52 of 2016 filed by Sachin Padgaonkar and Criminal Appeal No. 53 of 2016 filed by Prasad Kubal, raise a challenge to the finding of the conviction and imposition of sentence in the criminal trial, the Appeals being Admitted on 05.08.2016.

3. I have heard the learned Senior Counsel, Mr. Lotlikar appearing with Mr. Arun Bras De Sa, Mr. Mark Valadares and Mr. Sahil Sardessai for the Appellant in Criminal Appeal No. 50 of 2016 and Mr. Rohan Dessai appearing with Ms. Arya Parrikar for the Appellants in Criminal Appeal Nos. 52 and 53 of 2016 and the learned Additional Public Prosecutor, Mr. Pravin Faldessai for the State in all three Appeals.

With the able assistance of the respective Counsel, I have perused the paperbook in the respective Appeals and before I appreciate the contentions advanced on behalf of the Appellants, I deem it necessary to refer to the prosecution case in brief.

4. It is the case of the prosecution that on 10.05.2009, PW-1, Joe Almeida (Complainant in FIR No. 31/2009), received a phone call from his friend, proposing to have a party and he along with his cousin, Christopher proceeded to a Bar known as 'Lesles Place' near Sozi, Goa Velha and sat inside the Bar. One Kasti also joined them along with Hazel and his three friends. After having snacks and beer, they left the Bar at 14:00 hours and he along with Hazel, Christopher and Kasti proceeded to Siridao beach and was sitting in the shack, where he found Francis Miranda sitting on another table along with a group of his friends, amongst whom he recognized Johnny and Santosh @ Micku (the deceased persons).

After a while, after consuming beer and on payment of bill, a red colour Mahindra Jeep arrived behind the shack and three to four persons alighted from the jeep and came inside the shack, one of whom was identified as Zenito Cardozo accompanied with Mahavir and Domnic and thereafter, some verbal tiff occurred between Zenito and Francis Miranda, which promoted Zenito to push Miranda, who fell on the ground and a scuffle occured between them. According to the prosecution, Mahavir and Domnic were encouraging Zenito to assault and therefore, Zenito removed a knife from his person and stabbed Miranda. In the meantime, Johnny and Santosh intervened, but since Zenito was in a violent mood and uncontrollable, he stabbed both of them, who received bleeding injuries and fell down. The Complainant was frightened and he along with Hazel and Christopher fled from the spot on their motorcycles. Thereafter, a phone call was received by one of them from Kasti informing that Miranda, Johnny and Santosh were taken to GMC, Bambolim and it was also informed that Santosh had succumbed to the injuries and even Miranda and Johnny had received serious injuries in the assault and were in serious condition.

The above accusation was the basis of FIR No. 31/2009 registered with Agassaim Police Station against three Accused including Zenito, the Appellant before me.

5. Another version of the said incident surfaces through a complaint filed by Judas Fernandes, resulting into registration of FIR No. 32/2009, invoking the offences under Sections 143, 147, 148, 307 and 323 read with Section 149 of IPC.

As per the version of this witness, on 10.05.2009, he along with his wife, Julia and his aunt, went for a picnic at Siridao beach and his other relatives joined them on the beach and he called Cynthia, sister of Zenito Cardozo from his mobile and offered her to join them, but was informed, that she is unable to do so, as she was with her family and relatives. However, she requested for his jeep as they wanted to take food to the beach and therefore, she was told that she should send Zenito to collect the jeep.

At around 12 noon, Zenito and his friend came on a motorcycle to Siridao beach and took his jeep. In the afternoon, he called Zenito to bring the jeep back as they wanted to go to the residence and around 3:30 to 4:00 pm., Zenito came along with his two friends, Mahavir and Domnic and they were asked to wait as the things were being packed.

As per the version of Judas, the Accused persons were sitting inside the shack at Siridao and consuming liquor. At that time, Accused No. 1, Francis called Zenito in the shack and forced him to sit and after questioning him as to why he was dictating terms, all the Accused persons started assaulting Zenito with soda

bottles and beer bottles and Johnny (Accused No. 6) assaulted Zenito with a knife. As per the Complainant, the Accused persons assaulted Zenito repeatedly and Accused No. 4, Sachin, who was having a broken bottle in his hand, tried to cause injury to the Complainant, Judas by stabbing him in his stomach, and hence he ran away from the spot. Thereafter, he phoned Cynthia and informed that Zenito had been assaulted and requested her to come on the spot and the Complainant also visited the Hospital, to learn that Zenito was under treatment.

6. In light of the two cross FIRs being registered arising out of the same incident, with two versions being presented, two separate chargesheets were filed. In the first chargesheet, Zenito along with Mahavir and Domnic faced accusations under Sections 302, 307 and 326 read with Section 34 of IPC, whereas in the second chargesheet, seven persons including Johnny Fernandes and Santosh Kalel (the two deceased) were arraigned as Accused.

In the chargesheet filed against Zenito and two others under Section 302 of IPC, the Additional Sessions Judge at Mapusa, while trying these Accused in Sessions Case No. 41/2009 charged them for committing an offence punishable under Section 304 of IPC by framing the charge as below:-

> *"That you on or about 10th day of May 2009, at 16.00 hours at Anastacia Beach Shack at Siridao*

Beach, with your common intention committed culpable homicide not amounting to murder by causing death of Shri Santosh Kalel and Shri Jhonny Fernandes and thereby committed offence punishable under section 304 IPC and within my cognizance.

Further you on the same date, time and place as mentioned in the first charge with your common intention, did an act to Shri Francis Miranda with such intention and under such circumstances that if by that act you had caused the death of Shri Francis Miranda, you would have been guilty of murder and you also caused hurt to him and thereby committed an offence punishable under section 307 of IPC and within my cognizance.

Further you on the same date, time and place mentioned in the first charge with your common intention, voluntarily caused grievous hurt to Shri Francis Miranda by means of knife which is an instrument for cutting and thereby committed an offence punishable under section 326 of IPC and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge on 28th day of the month of July of the year 2010."

7. In Sessions Case No. 15/2010, the Additional Sessions Judge framed the charge against the five Accused persons as below:-

"That you all accused alongwith the deceased accused Johnny Fernandes and Santosh Kale on

10.5.2009 at about 16.00 hours at Anatasia Beach Shack, Siridao Goa were members of an unlawful assembly, the common object of which was to kill Zenito Cardozo and thus you thereby have committed an offence punishable under section 143 of IPC and within my cognizance.

Secondly, you all the accused alongwith said deceased accused on the same date, time and place as mentioned in the first charge, being armed with deadly weapons were members of unlawful assembly, the common object of which was to kill Zenito Cardozo and thus you thereby have committed an offence punishable under section 144 of IPC and within my cognizance.

Thirdly, you all the accused alongwith said deceased accused on the same date, time and place as mentioned in the first charge, were members of unlawful assembly and in prosecution of the common object of such assembly, namely to kill Zenito Cardozo committed an offence of rioting punishable under section 147 of IPC and within my cognizance.

Fourthly, you all the accused alongwith said deceased accused, on the same date, time and place as mentioned in the first charge, were members of unlawful assembly and did in prosecution of the common object of such assembly, namely to kill Zenito Cardozo committed an offence of rioting with deadly weapons and thereby committed an offence punishable under section 148 of IPC and within my cognizance.

Fifthly, you all the accused alongwith said deceased accused, on the same date, time and place as

mentioned in the first charge, you all accused in prosecution of the common object of such assembly, assaulted said Zenito Cardozo with knife and broken beer and soda bottles with intention and under such circumstances that if by that act, you had caused the death of said Zenito, you would have been guilty of murder and also caused hurt to said Zenito and thereby committed an offence punishable under section 307 r/w section 149 of IPC and within my cognizance.

Lastly on the same date, place and time mentioned hereinabove, you all the accused alongwith said deceased accused voluntarily caused hurt to Shri Domnic Nazareth with slaps and thereby committed an offence punishable under section 323 r/w section 149 of IPC.

And I hereby direct that you both be tried by this Court on the said charge on 12th day of the month of July of the year 2011."

8. The two sessions cases were tried by the Additional Sessions Judge and in Sessions Case No. 41/2009, the prosecution examined 20 witnesses to establish the charge under Sections 304, 307 and 326 read with Section 34 of IPC.

The key witnesses examined include the Complainant, Joe Almeida (PW-1), Hazel Mendes (PW-7), Francis D'Souza (PW-10), Prakash Naik (PW-11), Sachin Padgaonkar (PW-13), Prasad Kubal (PW-14), apart from the Doctors, Panchas and the Investigating Officers.

PW-1, Joe Almeida, the Complainant, who filed the complaint on 10.05.2009 pursuant to which the FIR was registered, did not however, support the case of the prosecution and since he was resiling from the contents of the complaint, the Prosecutor sought permission to cross examine the witness. When confronted with the complaint, he deposed that the complaint was written by the Police without him telling about the incident and he denied the entire prosecution case that an argument occurred between Zenito and Miranda, which resulted into a scuffle and thereafter, Zenito by a knife stabbed Miranda. He also denied the suggestion that when Johnny and Santosh intervened, Zenito also assaulted them.

On cross examination by the Public Prosecutor, he deposed that the names of the Accused persons in the complaint were given to him by the Police and he denied the suggestion that he knew the names of the Accused before filing of the complaint. This witness, therefore, in any case, did not aid the prosecution.

The next witness on which the prosecution relied upon is Hazel Mendes, the friend of the Complainant being examined as PW-7, who also did not support the case of the prosecution and was cross examined by the Public Prosecutor and there is a complete denial of the suggestions indicating the involvement of the Accused in the crime. However, on cross examination by the

Advocate for Accused Nos. 1 and 2, it is stated by this witness that there were some bottles in front of Miranda's table, but the witness is unable to state who had assaulted whom.

9. Another key witness of the prosecution is PW-10, Francis D'Souza, also an injured and Accused in the cross case, who demised during the pendency of the Appeal.

In his deposition before the Trial Court, he deposed that when he was present at Siridao beach, Accused No. 2, Minguel Kasti along with Hazel and Joe joined them in the shack and some hot discussion took place between Mahavir and Johnny and even Zenito was present and thereafter, Johnny got up and slapped Mahavir and Francis inquired with Zenito as to why he was spoiling his name and thereafter, a verbal spat occurred, which resulted into Zenito pushing him and he ran out of the shack towards the beach and except him, Johnny and others, sitting and taking drinks in the shack, ran after Zenito. Johnny and Santosh threw soda bottles towards Zenito, which was followed by Zenito removing a knife from his pants and he assaulted Johnny and even stabbed Francis with a knife twice in his abdomen. Santosh and Johnny were assaulting Zenito and were pelting soda bottles towards Zenito. As per this witness, he was then taken to GMC, where he felt unconscious.

In the cross examination, Francis admit that the Police chargesheeted him as Accused No. 1 for an attempt to murder and the case is pending. He is also confronted with various offences registered against him along with the chapter cases, with an aim to cause disrepute.

10. PW-11, Prakash Naik also did not support the case of the prosecution except that he saw knives in the hands of Miranda and Johnny, but he is not a reliable eyewitness as he did not support the case of the prosecution.

The two other witnesses, Sachin Padgaonkar and Prasad Kubal, the Accused in the counter case, are also examined as witness nos. PW-13 and PW-14, respectively.

These two witnesses are the Appellants in the two other Appeals before me i.e. Criminal Appeal Nos. 52 and 53 of 2016, being convicted in Sessions Case No. 15/2010.

11. As far as PW-13, Sachin Padgaonkar, is concerned, he has deposed in sync with PW-10, Francis D' Souza, that when he reached Siridao beach and went inside the shack where the two deceased persons, Johnny and Santosh along with Francis (Miranda), Hazel and Kasti were present and he joined them in drinking liquor. He deposed that at 3:30 to 4:00 p.m., the Accused

persons, Zenito, Mahavir and Domnic arrived and some argument took place between Mahavir and Johnny and at that time, Zenito pushed Miranda, who fell down and a scuffle erupted between Johnny and Santosh. Thereafter, Miranda fell down and Johnny and Santosh came to his rescue and Zenito assaulted Miranda with his hands, so Johnny and Santosh brought beer bottles and started assaulting Zenito. Thereafter, Zenito removed a knife from his pant pocket and stabbed Miranda, and Johnny and Santosh also brought more glass bottles to assault Zenito and Zenito stabbed Johnny on his chest and Santosh on his thigh. However, since Zenito was also being assaulted with bottles, he fell down on the floor and it is PW-13 who carried Johnny to the hospital in his own car and asked Prasad i.e. PW-14 to shift Santosh to the hospital.

In cross examination, PW-13, Sachin admit that the beer bottles with which Johnny and Santosh assaulted Zenito, the assault was on the back side, though he cannot give the exact number of bottles broken. However, in cross examination he reiterated that Zenito removed the knife from side pocket of his pants and he was confronted with his statement given to the Police that Johnny and Santosh assaulted Zenito with bottles on his head. Much serious effort is taken to affect the credibility of this witness, but on all material particulars, he remained consistent with his version in examination in chief and he also deposed in

sync with PW-10, Francis Miranda, but he admitted that there was no knife in the hands of Miranda and he did not stab Zenito.

12. Another witness, PW-14 Prasad Kubal, who also accompanied Sachin to the shack at Siridao Beach, gave exactly same version as Sachin, when he deposed that they were not knowing Zenito, but Miranda called Zenito and told him to sit with him by calling him by his name and there was some enmity between Johnny and Mahavir, who entered into hot arguments, then Johnny slapped Mahavir. Thereafter, Zenito got up, though Miranda told him to sit, but Zenito pushed Miranda and he fell down. Thereafter, Santosh and Johnny got angry and a free fight began when Zenito was assaulted by fist blows and kicks and he became uncontrollable and removed a knife and he stabbed Miranda on the stomach and he also stabbed Santosh and Johnny. He stated that the intestines came out of the stomach of Miranda and Johnny sustained stab injuries on the left side of his chest, whereas Santosh sustained injuries on his thigh and he was thrown back. He also deposed that Johnny and Santosh assaulted Zenito with broken soda bottles and liquor bottles, as a result of which, he became unconscious.

Being subjected to cross examination, largely he remained consistent on material particulars, but he deposed that after

pushing Miranda, Zenito ran away from the shack and Santosh and Johnny ran after him for about 10 to 15 meters, when he removed the knife and stabbed Miranda 15 to 20 meters away from the shack and even Santosh and Johnny were stabbed at the same place.

13. Apart from the aforesaid witnesses examined by the prosecution in Sessions Case No. 41/2009, wherein Zenito, Mahavir and Domnic faced accusations under Sections 304, 307 and 326 of IPC, the prosecution relied on the medical evidence and this includes PW-9, Dr. E.J. Rodrigues, who performed a post-mortem on the body of deceased Santosh Kalel whereas PW-12, Dr. Andre Fernandes conducted a post-mortem on deceased Johnny Neves.

PW-9 proved the autopsy report along with the notes (Exhibit-109), which was forwarded by him to the Investigating Officer. By stepping in the witness box, he spoke of the injuries sustained by deceased Santosh and by describing injury no. 1, he opined it to have been caused by a sharp, pointed, penetrating cutting weapon, whereas injury nos. 2 to 8, according to him, were caused by a blunt weapon.

According to PW-9, the cause of his death was due to hemorrhagic shock caused by injury no. 1 as a result of a sharp,

pointed, penetrating cutting weapon, which was sufficient to cause death in the ordinary course of nature.

He also opined about the approximate time of death being within 24 hours prior to preservation. When specifically asked whether injury nos. 2 to 8 could have been caused two days prior to the conduct of post-mortem, he answered that the injuries were caused within 24 hours of death and injury no. 1 could have caused death within a short span. The witness also identified the clothes worn by deceased and seized before the post-mortem was conducted, which included his underwear, a pair of shoes and pants.

14. PW-12 who conducted a post-mortem on deceased Johnny Neves, deposed about the injuries sustained by him and he refer to six ante-mortem injuries. According to PW-12, the cause of death was hemorrhagic shock due to injury no. 1 caused by sharp, pointed, penetrating, cutting weapon and injury no. 1, was located on the left side lateral outer aspect of the chest and on removing the stitches he found 5.5 cms x 1 cm. x chest cavity deep incised penetrating wound vertically obliquely placed in 7th IC space on the outer aspect of left side of chest.

He specifically deposed that the extra vasation was more than what was seen in the surgical extension. On being confronted

with the weapon (Exhibit-18), the doctor opined that injury no. 1 can be caused by a sharp, pointed, penetrating, cutting weapon like a knife and he described injury no. 1 as a comprehensive injury where this incised penetrating wound can be caused by the knife shown to him.

15. The two witnesses, PW-13, Sachin Padgaonkar and PW-14, Prasad Kubal have categorically deposed upon the assault on Francis alias Miranda and since he himself stepped into the witness box, he had categorically deposed that Zenito was carrying a knife and removed his knife and started blindly swinging it. He first assaulted Johnny with a knife and according to Miranda, he was even stabbed twice by the side of his abdomen and he was stopped by Prakash and told not to move ahead. He was taken by Prakash to Goa Medical College and as per this witness, he fell unconscious in the hospital. The credibility of this witness is tried to be brought into question by referring to his various FIRs registered against him along with the chapter cases, but for me this itself cannot be a ground to disbelieve the witness and who is found to be corroborated by PW-13, Sachin and PW-14, Prasad.

16. PW-19, Dr. Rajesh Patil attached to GMC Bambolim, deposed that he had examined Francis D'Souza in his unit when he was admitted on 10.05.2009 and he was discharged on

06.07.2009. According to him, the patient was admitted with a history of assault i.e. stab injury on the abdomen, and he described the condition of the patient as below:-

> *"The said patient had suffered stab injury on the abdomen, laceration of 4 x 2 x 6 cms with small bowel pouting out of abdomen, another laceration 5 x 3 x 6 cms present on the interior abdominal wall. Patient was operated. Small intestine repair was done and the wounds were closed in layers. Patient improved and discharged on 06.07.2009. Nature of injuries dangerous. I say that the aforesaid injuries can be caused by sharp objects. Shown to me knife and glass pieces. I say that the said injuries can be caused by the aforesaid sharp objects."*

The medicolegal certificate in respect of Francis D'Souza (Exhibit-146), refer to the stab injuries on the abdomen and contain reference to the operative treatment undergone by him. The diagnosis in the medico legal certificate note thus:-

> *"Penetrating injury to the abdomen with perforation of abdominal viscus with Acinetobacter septicemia."*

17. Another witness who had examined the victim, Francis D'Souza is PW-6, who issued the hurt certificate, while he was in casualty in GMC hospital and the hurt certificate issued by her (Exhibit-54) referred to the stab injury on the left side of abdomen, being described as grievous injury along with the

incised wound 10 cms. below and lateral to the first stab injury being described as simple injury. All the injuries are opined to be inflicted by a sharp object. The hurt certificate also has also recorded the history given by the patient's relative being assaulted by a knife and broken bottles at Siridao beach.

18. In addition to the aforesaid witnesses, the pancha witnesses, including PW-2 and PW-4, who acted as panchas on the attachment of clothes of the Accused and the victim, Francis were also examined. However, the clothes being sent for analysis, the CFSL did not yield any support to the case of the prosecution. However, PW-8, the panch on the spot panchanama conducted on 11.05.2009 in the presence of the Complainant, gave the description of the shack as well as the area outside the shack. He noticed some blood stains and pieces of beer and soft drink bottles lying on the spot. A knife was seen lying near the log with some blood stains. The knife was described as having a sharp edge on one side and on the other side, having 'V' shaped cut like a saw. The knife was seized, packed and sealed in an envelope and he signed the sketch panchanama and in his presence, the seals were put including on the knife (Exhibit-18).

Apart from this, the Investigating Officer who conducted the arrest and attachment panchanama, PW-16 and PW-20, were examined as the Investigating Officers.

19. It is in light of this evidence being placed before the Sessions Judge, during the trial in Sessions Case No. 41/2009, who tried the Accused for an offence punishable under Section 304 of IPC as they faced a charge levelled by the prosecution that all the Accused persons, with their common intention committed culpable homicide not amounting to murder by causing death of Santosh and Johnny Fernandes and thereby committed an offence punishable under Section 304 of IPC and with their common intention they also assaulted Francis Miranda and with such intention and under such circumstances that if by that act, they had caused the death of Francis Miranda, they would have been guilty of murder and causing hurt to him and therefore, they have committed an offence punishable under Section 307 read with Section 326 of IPC.

The Accused, having pleaded not guilty, were confronted with the evidence brought on record by the prosecution and on appreciation of the evidence, the Trial Court acquitted Accused Nos. 2 and 3 as no evidence of their involvement emerged during the course of the trial. However, relying upon the eyewitnesses,

PW-10, who himself suffered injuries as well as PW-13 and PW-14 read with the evidence of PW-6, Laura D'Souza and the evidence of the Doctors who conducted a postmortem on the body of the deceased, the Trial Judge reached the following conclusion:-

> *"Taking into consideration the aforesaid fact and the fact that accused no.1 started stabbing Johnny Fernandes, Santosh Kalel and Francis D'Souza alias Mirand only when accused no.1 was being brutally assaulted by aforesaid persons alongwith other persons who started pelting empty beer and soda bottles on accused no.1 after chasing accused no.1 who had run away from the shack, it is clear that the accused no.1 started stabbing the said persons more out of sudden provocation. In Sessions Case No.15/2010, the medical report pertaining to accused no.1 shows grievous injuries suffered by the accused on his body due to stabbing with knife and broken glass bottles. Hence, the conclusion which emerges is that not only the accused no.1 stabbed both the deceased persons without any premeditation, in a sudden fight, in the heat of passion upon a sudden quarrel and without having taken undue advantage as per Exception 4 of section 300 IPC but also that accused no.1 whilst deprived of the power of self control by grave and sudden provocation, caused the death of the persons who gave the provocation and thus acted within the purview of Exception 1 of section 300 IPC. The aforesaid offence comes within the purview of section 304 Part II IPC since the evidence does not show that the accused no.1 had stabbed the deceased*

persons with the intention of causing death or of causing such bodily injury as is likely to cause death but on the other hand the evidence on record shows that with the aforesaid stabbing with knife, the accused had knowledge that he was likely to cause death but without any intention to cause death."

With the aforesaid reasoning, Accused No. 1, Zenito was found guilty of committing an offence under Section 304 Part II and Section 326 of IPC

20. While handing over the sentence, the Court took into consideration that the Accused Zenito was aged 20 years when the offence took place, he himself sustained grievous injuries, was sentenced to undergo three years of rigorous imprisonment for the offence under Section 304 Part II and also sentenced to undergo three years of rigorous imprisonment for being convicted under Section 326 of IPC. Both sentences are directed to be run concurrently.

21. Let me now turn to Sessions Case No. 15/2010 arising out of FIR No. 32/2009 filed against five Accused persons, they being charged for committing offence under Sections 143, 147, 148, 307 and 323 read with Section 149 of IPC and as they along with the two deceased persons, Johnny and Santosh, faced accusation of

being members of unlawful assembly, thus, committing an offence punishable under Section 143 of IPC and on being armed with deadly weapons, to achieve the common object of killing Zenito Cardozo as the charge read thus:-

> *"Fourthly, you all the accused alongwith said deceased accused, on the same date, time and place as mentioned in the first charge, were members of unlawful assembly and did in prosecution of the common object of such assembly, namely to kill Zenito Cardozo committed an offence of rioting with deadly weapons and thereby committed an offence punishable under section 148 of IPC and within my cognizance.*
>
> *Fifthly, you all the accused alongwith said deceased accused, on the same date, time and place as mentioned in the first charge, you all accused in prosecution of the common object of such assembly, assaulted said Zenito Cardozo with knife and broken beer and soda bottles with intention and under such circumstances that if by that act, you had caused the death of said Zenito, you would have been guilty of murder and also caused hurt to said Zenito and thereby committed an offence punishable under section 307 r/w section 149 of IPC and within my cognizance."*

They also faced charge under Section 323 read with Section 149 of IPC for causing hurt to Domnic Nazareth.

22. We have two Appeals arising out of judgment in Sessions Case No. 15/2010 i.e. Criminal Appeal No. 52 of 2016 filed by

Sachin Padgaonkar (Accused No. 4) and Criminal Appeal No. 53 of 2016 filed by Prasad Kubal (Accused No. 3).

In order to bring home the guilt of the Accused, the prosecution in this case examined 15 witnesses including the Complainant, Judas Fernandes (PW-6) and other witnesses present on the spot being examined are Mahavir Nadar (PW-1), who is Accused No. 2 in Sessions Case No. 41/2009, Domnic Nazareth (PW-2) i.e. Accused No. 3 in Sessions Case No. 41/2009 and Zenito Cardozo (PW-3), Accused No. 1 convicted in Sessions Case No. 41/2009, PW-7, Ms. Julia Dias (wife of the Complainant) and PW-9, Anand Kauthankar. In addition, PW-14, Dr. Rajesh Patil is examined to establish the injuries sustained by Zenito.

23. I have perused the evidence lead before the Sessions Judge in support of the charges levelled against the five Accused persons. The Complainant, Judas Fernandes, PW-6, who had lodged the complaint on 10.05.2009, deposed that he, along with his wife and aunty, had gone for a picnic at Siridao beach and he had phoned the sister of Zenito asking whether she would like to join, but she refused and asked him to spare the jeep. Further, Zenito collected the jeep and, on his request, returned back with the jeep along with Mahavir and Domnic. According to the Complainant, Francis alias Miranda, called Zenito inside the shack and he was

reprimanded and as per his version, all the Accused persons started assaulting Zenito with soda bottles, beer bottles and Johnny, the deceased, assaulted him with a knife. Accused No. 1 was also armed with a beer bottle and knife and when this witness attempted to rescue Zenito, even he was attacked and he sustained injury on his stomach with the bottle and he ran away from the spot when he called Zenito's sister and informed her about the assault. His extensive cross examination has brought in some contradictions as compared to his version in the complaint, but it do not affect the case of the prosecution. His complaint categorically assigns a role to Miranda, Kasti, Johnny, Santosh and three other persons, as it mention that they started assaulting Zenito with a knife and broken beer bottles and he went to rescue Zenito and even one boy from the group came to assault him with a broken bottle, but due to fear, he ran away.

24. Corroborating the said version is the evidence of Julia Dias, PW-7, the wife of the Complainant, who deposed that when Zenito came there between 3:30 to 4:00 p.m., they were packing the things and Zenito was called by a group of people in the shack and she also deposed about assault on Zenito with bottles causing injuries to him, but she admit that she was unaware who was assaulting him, since she was standing at a distance, but she

identified Accused No. 1 and one person who expired and according to her, they were assaulting Zenito. She deposed that Zenito was badly injured in the incident and became unconscious, but he was still assaulted and her husband went to rescue him, but ran away from the spot due to fear and thereafter, all persons who assaulted Zenito also ran away from the spot.

25. The key witness in this case is Zenito Cardozo, being examined as PW-3, who is the prime Accused in the counter complaint. PW-3, Zenito in sync with the Complainant, deposed that he went to collect the jeep as per his sister's instruction and when he was asked to return the jeep back to the beach, he was accompanied by Mahavir and Domnic. According to him, he heard someone calling from the shack and when he entered, he saw Miranda who asked him to sit and admonished him in abusive way.

He categorically deposed that besides Accused No. 1, Johnny and Santosh were also present in shack and Johnny slapped Mahavir and at the same time, Miranda caught hold of his collar and pushed him and this act was followed by all Accused assaulting him with kicks, blows and by breaking bottles on his head. As he was trying to run away out of the shack, Miranda caught hold of him and stabbed him on his left thigh and both

buttocks and he received 18 to 19 stab injuries from a knife and bottles. Accused No. 5 was encouraging them and according to Zenito, he received fracture injuries on his head, nose, in between his eyebrows below the eye and he collapsed outside the shack and became unconscious. As per Zenito, he was admitted in GMC for 10 days and was discharged thereafter. As per Zenito, he never knew the reason of the assault as he did not have enmity with the Accused persons and prior to the incident, he knew Miranda, Accused No. 1, Johnny and Poko, Accused No. 5 and during the identification parade, he identified Accused No. 3, Prasad Kubal and Accused No. 4, Sachin Padgaonkar. He identified the clothes worn by him on the date of the incident and he also identified the knife (Exhibit-18) which was used to assault him.

In cross examination, he was specifically questioned about the cases registered against him in different Police Stations and denied the suggestion that Accused No. 1 was not having any weapon. He gave a categorical admission as below:-

> *"I had seen Accused No. 1 even prior to the incident, but I was not knowing him earlier. Prior to the incident I was not knowing the other Accused persons who are present today. I was brought to Agassaim Police Station after 10 days of the incident. Accused Nos. 3 and 4 and myself were in the same judicial custody. It is true that before identification parade, I had seen Accused Nos. 3 and 4 in the judicial custody. It is not*

true to suggest that Accused Nos. 3 and 4 were not present in the shack."

He denied the suggestion that no assault was mounted on him and also denied the sugg estion that he could identify Accused Nos. 3 and 4 only because he had seen them in the judicial custody.

26. Supporting his testimony is the deposition of PW-1, Mahavir Nadar and Domnic Nazareth, PW-2 as they were accompanying him in the jeep when he reached the spot. As per Mahavir, when they reached the shack, all the Accused persons were present and he gave the names of the Accused Nos. 1 to 5. He mentioned that even Johnny and Santosh were in the shack and Accused No. 1, Miranda called him. According to him, Accused No. 5 was also known as Poko.

As per PW-1, Miranda called Zenito and abused him and Prakash instigated Miranda to assault Zenito and verbal altercations took place between them. Accused No. 1, Miranda, thereafter caught hold of the shirt of Zenito and pushed him down and Accused No. 1 was assaulted with a knife and Accused Nos. 2, 3, 4, 6 and 7 assaulted with bottles. Prakash, Accused No. 5 was instigating by supplying bottles of soda and beer and despite praying by Domnic and Judas, the Accused continued the assault

and Accused No. 1 was armed with a knife and therefore, they ran away from the spot. Zenito was left bleeding on the beach and he was shifted to GMC.

Domnic Nazareth, PW-2, deposed in sync with the testimony of PW-1 when he stated that Accused No. 1 was armed with a knife and he assaulted Zenito on his legs. According to this witness, Accused No. 6, Johnny and Accused Nos. 1 to 4 started assaulting him with bottles.

Another witness who was present on the spot is PW-9 Anand Kauthankar, who only refer to a fight between Zenito and Miranda and he deposed that Zenito was attacked by the Accused persons sitting in the Court. Though he did not know the names of the Accused, he knew them by their faces. He also deposed that Accused No. 1 was carrying a knife.

27. In order to corroborate the version of these witnesses and the attack and the assault being mounted on Zenito, it is necessary to refer to the evidence of PW-6, Dr. Laura D' Souza, who is examined as a witness in Sessions Case No. 41/2009.

The said witness, apart from examining Francis D'Souza had also examined Zenito Cardozo on 10.05.2009 when she was in the Casualty and on examining him at 16:52 hours, she deposed that he has sustained the following injuries:-

"1. Head Inj. plus linear fracture of left squamous temporal bone duly commuted fracture of both nasal bones as seen on CT scan of Head A. CLW admeasuring 1x0.5x0.5 cmts on left parietal region.

2. Fracture of frontal process of maxilla. A CLW admeasuring 1x.05.x.05 cmts. At root of the nose.

3. CLW admeasuring 1x.05x.05 cmts on left infra orbital region. X-ray of nasal bone 13817 show commuted fracture of nasal bone and displacement of lower fragment under upper fragment. Patient was advised CT scan of Head X-ray of nasal bone chest X-Ray and X-ray of left thigh.

4. Multiple stab inj. bearing from 1x1x1 cmts to 5x3x6 cmts on left lateral on posterial aspect on thigh and buttock and on the right buttock. All inj. was caused by sharp obj. less than 6.00 hrs duration. Inj. 1 to 3 were grievous in nature and inj. No. 4 was simple in nature."

The hurt certificate of Zenito (Exhibit-55) is relied by the learned Judge in Sessions Case No. 15/2010, which referred to the injuries sustained by Zenito as grievous injuries, which included the head injuries along with linear fracture of the left temporal bone plus commuted fracture of both nasal bones, fracture of frontal process of maxilla and multiple stab injuries caused by sharp object.

28. Seven persons were arraigned as Accused when the Agassaim Police Station registered an FIR on the basis of the statement of the Complainant, Judas Fernandes (PW-6) and charges were levelled against the Accused persons under Sections 143, 144, 147, 148, 307 and 323 of IPC read with Section 149 of IPC. Two of the Accused persons, Johnny and Santosh being dead, five persons faced the trial and on appreciation of the evidence, the Sessions Judge acquitted Mr. Francis D'Souza, Accused No. 1, Mr. Prasad Kubal, Accused No. 3 and Mr. Sachin Padgaonkar, Accused No. 4 under Section 307 of IPC as well as Section 149 of IPC as it is held that the ingredients of Section 307 of IPC are not attracted as the evidence on record do not suggest that it was the intention on the part of the Accused persons to kill Zenito because they were not aware that he would be coming to the shack and also for the reason that the injuries were aimed on his thigh and buttock and the pelting of broken bottles caused the head injury and facial injuries.

However, as far as Section 149 of IPC is concerned, it is held that it is not attracted since the said provision is attracted only when an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly and in the instant case, since the Accused persons had not formed

an unlawful assembly in prosecution of any common object to kill Zenito, even Section 34 was not attracted.

Since no evidence was found against Accused No. 5, he was acquitted of all the charges.

The Trial Judge, therefore, convicted the three Accused persons for committing an offence punishable under Section 326 of IPC as grievous hurt was caused to Zenito with a knife and broken glass bottles, and accordingly, the Accused were sentenced to undergo rigorous imprisonment for four years with a fine of Rs.10,000/- each on being convicted under Section 326 of IPC.

29. In Criminal Appeal No. 50 of 2016 filed by Zenito Cardozo, the learned Senior Counsel Mr. Lotlikar has urged that the prosecution has failed to prove its case beyond reasonable doubt and he would submit that the Complainant, who is an eyewitness did not support the case of the prosecution and PW-7, Hazel, an interested witness did not render any assistance to the prosecution and in any case, she is not a witness to the fight.

Apart from this, he would submit that PW-11 has also turned hostile and in the wake of this, only three witnesses remained, namely, PW-10, PW-13 and PW14 and according to him, PW-13 and PW-14 are interested witnesses as they form a part of group that assaulted Zenito. Apart from this, it is his categorical

submission that their version suffers from inconsistency, embellishments and contradictions, which go to the root of the matter and is fatal for the prosecution.

It is his specific contention that the incident resulted because of the provocation by PW-10 Francis D'Souza, in which, the Appellant was grievously assaulted by broken glass by the Accused persons and also with a knife and whatever he did was in exercise of his right to defend himself or else he would have succumbed to the injuries.

30. On perusal of the judgment rendered by the Trial Judge in Sessions Case No. 41/2009, where two of the Accused stood acquitted and Accused No. 1, Zenito, the Appellant (in Criminal Appeal No. 50 of 2016) stand convicted, it is relevant to note that he is charged under Section 304 of IPC, which at the outset according to me, is an erroneous approach, in the wake of the chargesheet being filed, as two persons have been done to death in this incident, the charge ought to have been framed under Section 302 of IPC, but despite the chargesheet being filed under Section 302 of IPC, the charge was framed against the Accused persons under Section 304 of IPC and only Zenito was convicted under Section 304 Part II of IPC. The entire approach of the Trial Court is highly erroneous as when the chargesheet accuse the Accused

persons of being responsible for murder and there is an accusation of committing an offence under Section 302 of IPC, the Judge, before the evidence could be lead, has come to a conclusion that it is a culpable homicide not amounting to murder, ignoring the fact that Section 304 does not create an offence, but merely provides for punishment for culpable homicide not amounting to murder. However, at this stage nothing can be done as the prosecution has not raised a challenge to the framing of charge under Section 304 and rather proceeded with the trial establishing the charge under Section 304 instead of Section 302 and the judgment being pronounced, sentencing Accused No. 1 for the offence punishable under Section 304 Part II of IPC, on a conclusion being drawn that the Accused had no intention to cause bodily injury as was likely to cause death, but had the knowledge that the injury is likely to cause death. The whole approach of the Trial Judge is highly inappropriate. But, since at this stage, the gross error that has been committed is not possible to be rectified, in my considered opinion, the conviction under Section 304 Part II of IPC and the sentence of three years of imprisonment do not warrant any interference as in any case, the Appellant has been in fact shown much leniency as his act has been treated as falling within Part II of Section 304 of IPC and hence, I am not persuaded to interfere with the impugned judgment.

31. Mr. Rohan Desai, representing the Appellants in Criminal Appeal Nos. 52 and 53 of 2016 has vehemently urged that the conviction of the Appellants under Section 326 of IPC is unsustainable as the learned Sessions Judge has failed to appreciate the evidence in its proper perspective and there is no role clearly attributed to the said Accused persons. He has urged before me that the witnesses, PW-1 and PW-2, being interested witnesses, have attributed assault by all Accused persons and have suppressed the injury inflicted by the persons from other factions and moreover, they have not identified the knife. According to him, the version of these witnesses was only one-sided version and the injured Zenito Cardozo (PW-3) had given an exaggerated version which cannot be believed as he has several improvements in his version, which is not to be found in the version of other witnesses.

Mr. Desai has placed reliance on the decision of the Apex Court in the case of **Darshan Singh Vs. State of Punjab & Another**[1], in support of his submission that the Appellants, Sachin Padgaonkar and Prasad Kubal, exercised their right of private defence and he would rely upon the principles culled out in the said decision regarding right of private defence.

Needless to state that I am bound by the principles flowing from the decision of the Apex Court where self-preservation is

1 (2010) 2 SCC 333

recognized as a basic human instinct and it being also recognized by the criminal jurisprudence, however, I must note that this right is available only to one who is suddenly confronted with the necessity of averting an impending danger and not a self-creation. Apart from this, it is worth to note that the right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension, though it is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

The well accepted principle of private defence being that the force used by the Accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

When I appreciated the evidence of the injured, Zenito Cardozo, whose version is, when he along with his friends Mahavir and Domnic reached the beach, he heard someone calling from inside, to meet Francis alias Miranda, who confronted him with his behavior and who started the abuse.

32. As far as this version, the Accused persons, including the two deceased persons were present in the shack and amongst them Johnny (deceased) slapped Mahavir (PW-1) and Miranda caught hold of Zenito's collar and pushed him down and

thereafter, he was assaulted by all Accused by means of kicks, blows, a knife, bottles being broken on his head.

During the identification parade, he identified the two Appellants in the identification parade as he deposed that he knew Miranda, Johnny and Poko (Prakash Naik-Accused No. 5).

33. When the evidence of the injured PW-3 is compared with the evidence of his two friends who accompanied him i.e. Mahavir and Domnic, I find that they corroborate each other. Apart from the fact that what is important is the evidence of the pancha witness (PW-5) who carried out the panchanama of the scene of offence and he refer to the seizure of a knife and broken bottle pieces from the spot, which establishes the case of the prosecution. Though I find that some doubt is raised about the manner in which the test identification parade is carried out as it is urged before me that PW-12, who depose about the procedure adopted by her, did not strictly follow the procedure set out in the Criminal Manual and moreover, there is a delay of one month to conduct the identification parade, it is relevant to note that though he had admitted in the cross examination that he had seen Accused Nos. 3 and 4 in the judicial custody, since he identified the said Accused in the dock, merely because there is some discrepancy in the

conduct of the test identification parade, it would not absolve the two Appellants, Prasad Kubal and Sachin Padgaonkar, before me.

34. PW-1, Mahavir, Accused No. 2 in Sessions Case No. 41/2009, in his examination in chief categorically deposed that he knew all the Accused and he had given the names of Accused Nos. 1 to 5, who were present in the shack where Zenito was called and thereafter, were assaulted by all the Accused persons.

Similarly, PW-2, Domnic Nazareth, Accused No. 3 in Sessions Case No. 41/2009 also deposed that he knew the friends of Prakash, Accused No. 5, by face and he identified Prasad and Sachin, present in the Court as friends of Mr. Francis alias Miranda.

Since the testimony of the witnesses is in sync with one another, in my opinion, there is no doubt about the identity of the Appellants and the role attributed to them as the injured (PW-3) along with the eyewitnesses, who deposed that all the Accused persons mounted an assault on Zenito. Taking into account the nature of evidence of Dr. Laura D'Souza (PW-6), who had deposed about the injuries sustained by him, in my opinion, the Trial Judge has been lenient in convicting the Accused only under Section 326 of IPC and acquitting them of the charge under Section 307 of IPC and since I am of the view that the defence of the Accused that the

injuries were caused by way of private defence, is not borne from the record as I find that Zenito was mercilessly assaulted and with the hurt certificate on record, in my opinion, the injuries caused are not by way of right of private defence as these particular two Appellants have not sustained a single injury.

35. The reliance placed by Mr. Desai on **Nathi Lal & Others Vs. State of U.P. and Another**[2], laying down the procedure to be followed by the Trial Court, I do not find any infraction as what is expected is that each case is to be decided on the basis of evidence on record without being influenced by the evidence or arguments in the cross case and the judgment to be pronounced by the same Judge one after another and I find that this is exactly the procedure that is followed by the Sessions Judge, who pronounced the judgment in Sessions Case No. 41/2009 on 29.07.2016 and in Sessions Case No. 15/2010 on 30.07.2016. The common evidence relied upon is only the evidence of the Dr. Laura D'Souza who was examined in Sessions Case No. 41/2009 (Criminal Appeal No. 50 of 2016) as she happened to be the Doctor, who deposed about the injuries sustained by Zenito and she also examined Johnny as well as Francis, therefore I am not subscribed to the submission of Mr. Desai that the parameters laid down in **Nathi Lal** (supra) have not been adhered to.

---

2 1990 (Supp) SCC 145

36. Finding no merit and substance in all the three Appeals as I find that there is no scope for any interference in the findings rendered by the learned Trial Judge while convicting Zenito Cardozo (Accused No. 1) in Sessions Case No. 41/2009 (Criminal Appeal No. 50 of 2016) and Mr. Prasad Kubal (Accused No. 3) and Mr. Sachin Padgaonkar (Accused No. 4) in Sessions Case No. 15/2010 (Criminal Appeal Nos. 52 and 53 of 2016) and by upholding the findings recorded along with the sentences imposed, the Appeals are dismissed.

Since the Appellants before me are already on bail, the respective Counsel undertake that the Accused shall surrender before the learned Additional Sessions Judge, Mapusa on or before 10.11.2025 and shall be taken in custody for undergoing the balance sentence imposed on them by impugned orders.

BHARATI DANGRE, J.

Signed by: ESHA SAINATH VAIGANKAR
Designation: Personal Assistant
Date: 14/10/2025 19:39:19