

(1996) 06 BOM CK 0062
In the Bombay High Court
Case No : Criminal Appeal No. 56 of 1982

Atmaram Gajanan Patil

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 25-06-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 165, 313
Evidence Act, 1872 — Section 27, 3, 32, 45, 59
Penal Code, 1860 (IPC) — Section 302

Citation : (1996) 5 BomCR 748

Hon'ble Judges : Vishnu Sahai, J;S.S. Parkar, J

Bench : Division Bench

Advocate : Shirish Gupte, for the Appellant; S.J. Pingulkar, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Vishnu Sahai, J.—The appellant aggrieved by the Judgement and order dated 28-7-1981, passed by the Additional Sessions Judge, Greater Bombay, in Sessions Case No. 350 of 1980, convicting and sentencing him to undergo imprisonment for life u/s 302 I.P.C., has come up appeal before us.

2. Briefly stated the prosecution case runs as under:---

On 12-3-1980, marriage of one Yesha an acquaintance of Mohammed Yameen Khan, P.W. 1 and deceased Mark Alexander on one side and the appellant on the other was scheduled to take place in Payalipada, Bombay. It appears that the appellant was a member of the marriage procession. At about 9 p.m., the procession reached the place of marriage. At that time, Mohammed Yameen Khan and Mark Alexander were standing in the verandah of the place, where the marriage was to be performed. Mohammed Yameen Khan was keeping his hand on the shoulders of Mark Alexander. At that time, the appellant came there and said as to why they were standing like girls. Saying this, he pulled the hand of Mohammed Yameen Khan and since the latter was putting his hand on the

shoulders of Mark Alexander, both of them fell down. Feeling infuriated Mohammed Yameen Khan slapped the appellant. A free fight between both the sides ensued. Friends of appellant started assaulting Mohammed Yameen Khan and Mark Alexander. They were all drunk. The appellant thereafter, ran in the direction of his house and returned within 5/10 minutes with a naked sword in his hand. Seeing him in such a condition, Mohammed Yamen Khan ran towards the house of his brother-in-law Mohammed Hussain Khan P.W. 2 and informed him about the appellant being armed with a sword. He told him that he should also have something to defend himself. Mohammed Hussain Khan dragged Mohammed Yameen inside his house. Mark Alexander was also with Mohammed Yameen Khan at that time. One Ali Bahadur Khadim Hussain P.W. 3 is said to have intervened between the appellant and Mark Alexander. Thereafter, Mohammed Yameen Khan and Mohammed Hussain Khan along with Mark Alexander went to the latter's residence. At that time, Mark's father Wallace Geogory Alexander P.W. 6, was present in the house. When Mark Alexander informed him about the incident he replied that he should leave the matter to him, and he would settle it. Thereafter, Mohammed Yameen Khan and Mohammed Hussain Khan along with Mark Alexander proceeded towards Mohammed Yameen Khan's house. Near the house of Mohammed Yameen Khan, Mohammed Hussain left. Thereafter, Mohammed Yameen Khan and Mark Alexander went inside the house of the former. Mohammed Yameen Khan's mother Shahjahan Begum was present in the house and told them that one boy by name of Fakira was inquiring about them. Mark Alexander replied that he will look into the matter, and asking Mohammed Yameen Khan to rest, left his place, Thereafter, Shahjahan Begum put a lock on the channel of the fencing door. The time was about 9.30-10 p.m.

3. The same night at about 11 or 11.15 p.m. when Mohammed Yameen Khan was going to sleep, he heard shouts of Mark Alexander "Yamin Yamin". On hearing them, Mohammed Yameen Khan rushed towards the front door, pulled that curtain aside and jumped towards the fencing gate. In panic, he had for gotten to bring the key of the lock which was fixed on the door. When he was at the door, he saw Mark Alexander and the appellant. The appellant had a sword in his hand and was trying to assault Mark Alexander with the same and the latter was trying to save himself. Mark Alexander succeeded in saving himself from one or two blows. Ultimately, when he tried to run away, the appellant inflicted a sword blow on the backside of his head. Thereafter, Mohammed Yameen Khan rushed inside the house brought the key and opened the lock of the channel door. He saw that Mark Alexander was running in the direction of his house with an injury on the back of his head and the said injury was profusely bleeding. At that time, Mohammed Yameen Khan saw the three brothers of appellant, Bhaga, Bhagwan and Prabhakar standing in the small lane near his house. On seeing them, he got frightened and came inside the house.

It appears that while Mark Alexander was running to his house being chased, by the appellant at about 11.30 p.m. one Mohammed Ali Abdul Gani P.W. 5 who was

standing in a laundry in Payalipada (the area in which the incident took place) saw both of them. On seeing them, the appellant ran away. At that time, one Suleman was also along with Mohammed Ali Abdul Gani. Both of them asked Mark Alexander to stop and when the latter did, they found that he was injured by sword on the backside of his head and was profusely bleeding. They asked Mark Alexander as to what had happened and he replied that he was hit by the appellant with a sword. He also said that he was going to his house.

4. Mark Alexander thereafter, in a badly injured condition reached his house in Amar Nagar at about 11.30 p.m. He informed his father Wallace Geogory Alexander P.W. 6 that Atmaram (appellant) had assaulted him with a sword. He also informed him that he was assaulted by the appellant in front of the gate of Mohammed Yameen Khan's house. At that time, Mark Alexander's elder brother Geoffrey was also present. Immediately thereafter, Wallace Alexander, Geoffrey and Mark Alexander went to Chita Camp Police Station (Trombay police station). They reached there about 11.45 p.m. S.I. Vasant Pandurang Jadhav P.W. 14 who was present at the aforesaid police station, directed constable Ashok Gadave P.W. 12 to remove Mark Alexander to Sion Hospital. Accordingly, the aforesaid constable, Geoffrey and brother-in-law of Mark Alexander took Mark Alexander on a Taxi to Sion Hospital.

Mean while, Mohammed Yameen Khan and Mohammed Hussain Khan also reached the police station but, on learning that Mark Alexander had been taken to Sion Hospital, left for the hospital.

Mark Alexander was admitted in Sion Hospital at 00.15 hours on 13-3-1980. In the casualty department of the aforesaid hospital, Dr. Udayraj Kakade P.W. 15 examined Mark Alexander. Findings of Dr. Kakade, are noted in the Casualty Register at Serial No. 4493. Mark Alexander was found to have sustained one injury which was an incised wound near the vertex 3" x 1" x bone deep. There was also fracture of the skull. Since condition of Mark Alexander was precarious, Dr. Kakade had him admitted in the emergency ward.

It appears that at about 12.20 hours, on 13-3-1980, Mark Alexander was brought in the emergency ward. He was immediately examined by Dr. Umesh Oza P.W. 13. During the examination, Dr. Oza found that he was conscious, though drowsy. Dr. Oza also found that he had sustained a incised wound of the dimensions of 4" x 4" x 1/2" with crack fracture of skull near the vertex.

5. The F.I.R. of the incident was dictated by Mark Alexander to S.I. Vasant Jadhav at 2 a.m. on 13-3-1980 in the emergency ward of Sion Hospital. In the aforesaid F.I.R., Mark Alexander in brief has mentioned the recitals contained in paragraphs 2 and 3. There is a mention in it of both the incident which took place at about 9 p.m. on 12-3-1980 and also of the assault on him launched at the fencing gate of Mohammed Yameen Khan's house two hours later. The F.I.R. which the prosecution has tendered, in this case as a dying declaration is Exhibit 23.

It may be mentioned that S.I. Jadhav in paragraph 2 in his statement has mentioned that prior to his recording the F.I.R., the doctor examined Mark Alexander and had thereafter, accorded permission to record the F.I.R., stating that he was in a fit condition to make the same. S.I. Jadhav has also mentioned that after recording the F.I.R., he again obtained an endorsement of same doctor, namely Dr. Oza P.W. 13.

6. After recording the F.I.R., S.I. Jadhav recorded statement of Mohammed Yameen Khan u/s 161 Cr.P.C. That was at about 2.15 or 2.30 a.m. on 13-3-1980. Thereafter, he returned to the police station and on the basis of the F.I.R. registered a case u/s 326 I.P.C.

It appears that immediately thereafter, S.I. Jadhav left for the place of the incident At that time it was 3.30 p.m. to 4 p.m. (13-3-1980). He prepared spot panchanama Exhibit 13. He searched the house of the appellant and found nothing incriminating therein. He also drew up a panchanama of the place where the quarrel at 9 p.m. on 12-3-1980 had taken place between the appellant and the deceased.

7. At about 6 a.m. on 13-3-1980, Mark Alexander succumbed to his injuries in Sion Hospital.

The autopsy on the dead body was performed by Dr. (Mrs.) Sukeshi Mukesh Shah P.W. 16 between 10.20 a.m. to 11.40 a.m. on 13-3-1980. Dr. (Mrs.) Shah found a sutured wound 8.5 c.m. long over head of the deceased in rt.occipital region. She also found haematoma over occipital and right parietal region of 9 cm x 10 cm and skull fracture 9 cm long in occipital region extending over right parietal bone.

The Autopsy Surgeon did not find any damage or cut to trachea which could have impaired speech of Mark Alexander.

She stated that the deceased died on account of fracture of skull with intracranial haemorrhage as a result of the injury sustained by him, and the aforesaid injury was sufficient in the ordinary course of nature to cause death. She also stated that it was dangerous to live. In her cross-examination, she stated that the faculties of the deceased to speak could only have been impaired six to eight hours from the time of the assault. She categorically stated that the said faculty could not be impaired within two hours of the assault. She also stated that although there were blood clots but, the same could not immediately affect the speaking faculty because, they were present in the occipital and parietal region of the brain.

8. Mean while, on 28-4-1980, the appellant was arrested. Subsequent to his arrest, the same day, his blood-stained clothes namely pant, T-shirt, and underwear were seized under a panchanama, in the presence of public panch B.V. Ambre, P.W. 9. On 5-5-1980. under a panchanama in the presence of public panch A.M. Patil, P.W. 10, the weapon of assault namely a sword, is said to have

been recovered at the pointing out of the applicant. It is alleged that the sword was concealed inside the earth which was dug up by the appellant. Recovery was effected near the house of one Anant Patil. There were blood stains on the sword. The articles seized during the investigation were sent to the Chemical Analyst.

Finally, after completing the investigation, the appellant was charge-sheeted u/s 302 I.P.C.

9. The case was committed to the Court of Sessions in the usual manner. In the trial Court a charge u/s 302 I.P.C. was framed against the appellant to which he pleaded not guilty and claimed to be tried.

10. In the trial Court, apart from tendering some documentary evidence, the prosecution examined as many as 17 witnesses. It appears that the sheet anchor of the prosecution evidence was the ocular account furnished by P.W. 1 Mohammed Yameen Khan. The F.I.R. which was a dying declaration; and the oral dying declaration made by the deceased to his father Wallace Alexander P.W. 6 and Mohammed Ali Abdul Gani, P.W. 5. In defence, no witness was examined from the side of the appellant. The trial Judge accepted the evidence adduced by the prosecution and convicted and sentenced the appellant in the manner stated above.

Hence, this appeal.

11. We have heard Mr. Shirish Gupte learned Counsel for the appellant and Mrs. S.J. Pingulkar, learned Counsel for the respondent, at a considerable length. We have also perused the depositions of the prosecution witnesses, material Exhibits, including the F.I.R., tendered by the prosecution, the statement of the accused, recorded u/s 313 Cr.P.C. and the impugned judgment. After giving our anxious consideration to the matter, we are constrained to observe that we do not find any merit in this appeal and the same in our opinion, deserves to be dismissed.

12. At the very outset, we would like to express our indignation in the manner in which the impugned judgment has been written by the Additional Sessions Judge, Greater Bombay. It is a perfect example of what a Judgment should not be. Instead of being of any assistance to us, after perusing a part of it, we landed ourselves in the confusion zone and ultimately, gave up the endeavour. We find that not only his judgment is wholly unsystematic, but on most of the material aspects, the learned trial Judge has not cared to record any finding. That one rarely comes across a judgment of this type is no small consolation to us.

13. The evidence adduced by the prosecution in the instant case, can be classified under four heads:---

(a) Ocular account furnished by P.W. 1 Mohammed Yameen Khan;

(b) Oral dying declaration deposed to by P.W. 6 Wallace Geogory Alexander and P.W. 5 Mohammed Ali Abdul Gani;

(c) F.I.R in the form of dying declaration lodged by the deceased Mark Alexander; and

(d) recovery of blood-stained clothes from the person of the appellant and Weapon of assault namely axe at his pointing out.

14. We now, propose discussing the aforesaid evidence.

We would like to begin with the ocular account furnished by Mohammed Yameen Khan P.W. 1. We may mention that it is primarily on the basis of the recitals contained in the examination in-chief, of his statement in the trial Court that we have set out the prosecution story in the preceding paragraphs and consequently we do not propose reiterating it. Broadly speaking, Mohammed Yameen Khan deposed that on 12-3-1980 there was marriage of one Yesha which was to be performed in Payalipada. In the aforesaid marriage, he, deceased, Mark Alexander and the appellant Atmaram Patil were invited. Atmaram Patil was in the marriage procession. He and Mark Alexander were standing in the Verandah of the house where the marriage was to take place. At about 9 p.m. when the marriage procession reached the place of the marriage, the appellant accosted him and Mark Alexander (they were holding one another) not to stand like girls and instead to take part in the dance. Saying this, he pulled him resulting in both he and Mark Alexander falling down on the ground. An altercation and a free-fight thereafter ensued. The appellant ran in the direction of his house and returned within 5/10 minutes with a sword in his hand. However, the matter was pacified as a consequence of his (Mohammed Yameen's) brother-in-law Mohammed Hussain Khan P.W. 2 intervening. Statement of Mohammed Yameen Khan is further to the effect that at about 11/11.15 p.m. while he was preparing to go to sleep, he heard shouts of Mark Alexander to the effect "Yamin Yamin". When on hearing the shouts, he reached the channel gate of his house, he found that both the appellant and Mark Alexander were there. The appellant had a sword in his hand and with the same, was trying to assault Mark Alexander. Mark Alexander succeeded in avoiding two blows. Ultimately, when he tried to run away, the appellant inflicted a sword blow on the backside of his head. This struck.

The crucial question is as to whether the statement of Mohammed Yameen Khan inspires confidence or not? Our very considered answer, to the same is in the affirmative. Why we have arrived at that answer, we now, set out to explain.

Firstly, we find that the manner of assault as deposed to by him, is corroborated by the nature of injuries suffered by the deceased. In the earlier part of our judgment, we have mentioned that the Autopsy Surgeon found an incised wound on the head of the deceased, which was accompanied by extensive fracture of skull. It is true that the prosecution did not ask the Autopsy Surgeon whether the injuries on the deceased could have been caused by the sword which was

recovered on the pointing of the appellant. However, that lapse in our view, is inconsequential. It is common knowledge, which is also supported by a large number of books on Medical Jurisprudence that sword causes incised wounds. It is a trite that for lapses of the prosecution, justice should not be allowed to be defeated.

Assurance is also rendered to the statement of this witness by the circumstance that immediately after recording of the F.I.R. at Sion Hospital, which was 2 a.m. on 13-3-1980 the statement of this witness u/s 161 Cr.P.C. was recorded by P.W. 14 P.S.I. Vasant Jadhav P.S.I. Jadhav has mentioned the time as 2.15 to 2.30 a.m. Importance of prompt interrogation u/s 161 Cr.P.C. has been repeatedly extolled by the Apex Court. The same largely eliminates chances of an adulterated account creeping in the testimony of a witness and to a reasonable degree also ensures against the false introduction of a witness in a case.

The motive for the incident namely, quarrel between this witness and Mark Alexander on the one side and the appellant on the other hand, which took place at about 9 p.m. on 12-3-1980, at the place of the marriage; a marriage in which all the three of them had been invited, also explains the happening of the incident and lends assurance to the claim of this witness of having seen the same. In this context, it would be worth mentioning that the 9 p.m. incident, is also admitted to the appellant, though in a different way. In his statement, u/s 313 Cr.P.C. the appellant stated that the quarrel was at the instance of this witness and Mark Alexander and not at his instance. Be that as it may, the fact of the matter is that a quarrel had taken place between the deceased and this witness on one side and the appellant on the other, and this in our opinion, furnished a plausible motive for the incident.

During the cross-examination, (paragraph 16) when the claim of this witness of having seen the assault on the deceased was challenged and he was asked as to whether blood, hair and chappal of Mark were found, he replied that "some blood, hair of Mark and chappals of Mark and also some stones were lying near my gate after the incident." It would be significant to point out that blood, hair and chappal of Mark were seized from the place of incident during the course of investigation. The last two were also identified. P.W. 7 Shaikh Abdul Kayum, public panch of recovery in paragraph 4 of his statement, when he was shown a bunch of hairs and slippers recovered from the place of incident, identifying them said that they were the same which he had seen on the place of the incident.

In our view, having gone through the evidence of Mohammed Yameen Khan, we feel constrained to observe that we find no infirmity in the same. To us, he is a wholly reliable witness. It is true that he is a friend of the deceased but, that would only make us evaluate his evidence with caution and not mechanically reject the same. Having exercised that caution, we find his evidence to be implicitly reliable. In our view, his solitary statement was by itself sufficient for sustaining the conviction of the appellant.

15. We next take up the oral dying declaration made by the deceased Mark Alexander to his father Wallace Alexander P.W. 6 and Mohamad Ali Abdul Gani P.W. 5. We have seen earlier that Mark Alexander was in a position to speak. So far as Mohamad Ali Abdul Gani is concerned, we find no infirmity in his evidence. We find him to be a wholly independent witness who had no axe to grind against the appellant. He has explained his presence, in his statement, at the place of the incident. He deposed that on 12-10-1980 at about 11.30 p.m. while he and Suleman were standing in a laundry in Payalipada, he found Mark Alexander running, being chased by the appellant who was having a sword in his hand. He also deposed that there was an injury on the backside of Mark Alexander's head which was profusely bleeding, and when he asked Mark Alexander as to what had happened, he told him that Atmaram had assaulted him. In our view, this evidence of oral dying declaration deposed to by this witness has a ring of truth in it. In the absence of any enmity with the appellant, we are not inclined to believe that this witness would have falsely deposed about this piece of evidence. It appears that during cross-examination, he was also asked as to what he had asked Mark. To that he replied (see paragraph 5) that Mark Alexander told him that Atmaram had assaulted him with a sword.

So far as oral dying declaration as deposed to by Wallace Alexander P.W. 6 is concerned, we do not think that it would be very safe to act upon it, because, not only being father of the deceased, this witness is a highly interested witness but, he was interrogated u/s 161 Cr.P.C. on 27-3-1980 i.e. more than two weeks after the incident.

In our view, the oral dying declaration deposed to by P.W. 5 Mohamad Ali Abdul Gani can by itself be the sole basis for sustaining the conviction of the appellant.

16. We now take up the dying declaration which is in the form of F.I.R. dictated by Mark Alexander, prior to his death at 2 a.m. on 13-3-1980 to P.W. 14 S.I. Vasant Jadhav, in Sion Hospital. In the aforesaid F.I.R., the victim has categorically referred both to the 9 p.m. incident as well as assault on him by a sword by the appellant Atmaram, at about 11.15 p.m. on the fencing gate of P.W. 1 Mohammed Yameen Khan the same day. In as much as an incised wound on the skull of the deceased was found by the doctor, medical evidence is corroborating this dying declaration. As mentioned in paragraph seven the Autopsy Surgeon Dr. Sukeshi Shah has stated in her cross-examination that the speech faculty of the deceased, would not have been impaired for about six to eight hours of his having been assaulted. We have also seen in the aforesaid paragraph that Dr. (Mrs.) Shah found no injury or damage on the trachea of the deceased. We have also seen earlier that both prior to recording of dying declaration and after the same had been recorded by S.I. Vasant Jadhav, the victim had been medically examined. The medical evidence in the instant case is clear that both prior to recording of dying declaration and after its recording the deceased was in a condition to speak. In our view, the F.I.R. which is a dying declaration, inspires confidence and would be admissible u/s 32 of the Indian

Evidence Act and also can constitute the sole basis for sustaining the conviction of the appellant.

17. We now, come to the last leg of the evidence adduced by the prosecution in the instant case namely recovery of blood-stained clothes from the appellant and blood-stained sword at his pointing out. Having gone through the evidence in respect of those recoveries, we feel that but, for fact that the injuries attributable to a sword were found on the person of the deceased, these recoveries really do not help the prosecution.

17A. In our view, there was sufficient trustworthy evidence warranting the conviction of the appellant and the impugned judgment has been correctly recorded.

18. In spite of the fact that the odds were pitted against him, Mr. Shirish Gupte, learned Counsel for the appellant left no stone unturned to persuade us to hold that the conviction and the sentence of the appellant does not warrant to be affirmed. Mr. Gupte made a large number of submissions before us, which we now, propose considering.

Firstly, Mr. Gupte urged that the conduct of P.W. 1 Mohammed Yameen Khan in not following Mark Alexander who was being chased by the appellant with a sword in his hand, after being assaulted, in spite of the fact that he was his friend makes his claim of having seen the incident, extremely doubtful. We regret that we cannot accede to this contention of his. In paragraph 5 of his statement, he has stated that at the time of the assault, on the lane near his house, he saw three brothers of the appellant namely Bhagha, Bhagwan and Prabhakar standing and hence, he got frightened and came inside the house. To us, the aforesaid explanation of this witness appears to be extremely natural. It is a trite that the instinct of self-preservation is a paramount instinct in human beings. This witness barely seconds before had seen the fate of Mark Alexander and we find it nothing improbable that on account of seeing the brothers of the appellant there, he became frightened and did not chase the appellant. Hence, this submission of Mr. Gupte fails. True to his customary fairness, Mr. Gupte accepted that he could not point out any other infirmity in the evidence of this witness which could erode his credibility.

Courts have been repeatedly observing that evidence has to be weighed and not counted. On this legal principle, are founded the provisions contained in section 134 of the Indian Evidence Act, which read thus:--

Section 134:---

"Number of witnesses.

No particular number of witnesses shall in any case be required for the proof of any fact."

Since the evidence of this witness is implicitly reliable, it by itself is sufficient to

confirm the conviction and sentence of the appellant as mentioned earlier.

19. Secondly, Mr. Gupte urged that the evidence of oral dying declaration does not inspire confidence. In this connection, he pointed out that Mohammed Ali Abdul Gani P.W. 5, who deposed about it is a purely chance witness and it is extremely difficult to believe his claim that on 12-3-1980 at about 11.30 p.m. he and Suleman were standing near a laundry in Payalipada from where, at the aforesaid time, they saw Mark Alexander running, being chased by the appellant who had a sword in his and immediately thereafter, Mark Alexander made a oral dying declaration before, them that Atmaram (appellant) had assaulted him with a sword. We do not find any merit in this submission. During the cross-examination, this witness was asked as to what time, the laundry remained open and he replied till midnight. Again, this witness is a wholly independent witness. During the cross-examination, no suggestion of any animosity on its part against the appellant was made. In such a situation, we feel that this witness would not have falsely deposed about the oral dying declaration had not the same been really made. Hence we reject the aforesaid submission of Mr. Gupte.

20. Thirdly, Mr. Gupte attacked the F.I.R. which was taken down on the dictation of Mark Alexander by S.I. Vasant Jadhav on the ground that there is no documentary evidence to show that Dr. Oza (P.W. 13) had medically examined Mark Alexander prior to the recording of his statement (F.I.R.). He urged that the documentary evidence would have been the best evidence and in the absence of the same, it would not be proper and judicious on our part to accept the bald statement of the doctor that he examined the victim prior to the recording of the F.I.R. and also that of S.I. Vasant Jadhav to the said effect. In this connection, Mr. Gupte pointed out that a perusal of the F.I.R. shows that after it had been recorded, Dr. Oza made an endorsement to the effect that the informant was talking and had given a statement. He urged that had Dr. Oza medically examined the informant, prior to the recording of the F.I.R., such an endorsement by him should have been made in the F.I.R. itself. There can be no getting away from the fact that the best evidence would have been the documentary evidence and that too an endorsement by Dr. Oza in the F.I.R. itself prior to the commencement of its recording. However, we feel that mere absence of this cannot lead us to infer that the deceased was not in a fit mental condition to make the F.I.R. Medical case papers of the deceased Exhibit 24 contain a number of entries which show that right from the time of his admission, in Sion Hospital, at about midnight, till his dictating the F.I.R., two hours later, the deceased was conscious. We further feel that in the absence of any animosity either on the part of Dr. Oza or S.I. Vasant Jadhav, P.W. 14, against the appellant, they would not have falsely stated that the deceased was in a fit mental condition when he made the F.I.R.

21. Fourthly, Mr. Gupte contended that since the Chemical Analyst did not find any blood on the sword recovered at the pointing out of the appellant, it cannot be said that this was the very sword which the appellant used in assaulting the

deceased and no reliance can be placed on this piece of evidence admissible u/s 27 of the Indian Evidence Act. In this connection, it would be worth remembering that the incident took place at about midnight on 12-3-1980. The appellant could only be arrested as late as on 28-4-1980. The sword was recovered on his pointing out on 5-5-1980. It was sent to the Chemical Analyst on 13-6-1980 and examined by him on 9-9-1980. In our view, it is hardly surprising that six months after incident, the Chemical Analyst found no blood on it.

22. Finally, Mr. Gupte contended that even if the prosecution case is to be accepted, as it is, the conviction of the appellant u/s 302 I.P.C. would be unsustainable in law. To buttress his submission, Mr. Gupte primarily emphasised that this is not a case in which there was a background of protracted ill-will or malice between the appellant on one side and the deceased on the other and as a result of the appellant being provoked on account of the incident, which took place hardly two hours before he inflicted a solitary sword blow on the head of the deceased which unfortunately proved fatal. Hence, in his contention, only an offence u/s 304 Part 2 I.P.C. would be made out against the appellant. He urged that when the appellant inflicted a single sword blow may be even on the head of the deceased, he could only be fastened with the knowledge of death as contemplated by 2nd part of section 304 I.P.C. We regret that we cannot accede to this contention of Mr. Gupte. Had the killing of the deceased been a part of the 9 p.m. transaction in which there was a quarrel between the appellant and the deceased, there may have been some merit in Mr. Gupte's contention. However, in the instant case, evidence is that there was a time lag of approximately two hours between the two. The evidence as we have seen above is that the quarrel between the appellant on one hand and deceased & P.W. 1 on the other, took place at about 9 p.m. but, the fatal assault on Mark Alexander was made more than two hours later, at about 11.30 p.m. in front of the fencing gate of Mohammed Yameen Khan's house. This time lag in our view, is fatal for accepting the submission of Mr. Gupte.

From the evidence, it appears that with the intention of killing the deceased, at about 11.15 p.m. the appellant chased him with a sword in his hand and thereafter assaulted him. It may be that only one injury was actually suffered by the deceased as a consequence of the assault. However, evidence of Mohammed Yameen Khan which we have accepted is that near his fencing gate, first the appellant attempted to give one or two blows on the deceased, but, the deceased somehow or the other managed to save himself. Ultimately, when he tried to run away, the appellant gave blow on the head of the deceased and this struck the deceased. Severity of the blow was such that the Autopsy Surgeon P.W. 16 Mrs. (Dr.) Shah found fracture of skull 9 c.m. long in occipital region extending over right parietal bone. Injury caused by the appellant in the opinion of Dr. (Mrs.) Shah was sufficient in the ordinary course of nature to cause the death of the deceased.

In our view, act of the appellant would fall squarely within the ambit of clauses

firstly and thirdly of section 300 I.P.C. Whereas, clause firstly of section 300 I.P.C., provides that culpable homicide is murder if the act is committed with an intention of causing death, clause thirdly provides that culpable homicide is murder, if there is an intention to inflict an injury which is sufficient in the ordinary course of nature to cause death.

In order to ascertain whether there is intention to cause death, courts look for a variety of circumstances like motive, manner of assault, the nature of the injury and the part of body on which it has been inflicted. When on a cumulative examination of the aforesaid circumstances, it finds that it can be inferred that there was an intention to cause death, the act would fall within the mischief of Clause firstly of section 300 I.P.C. Whether there is an intention to cause death or not is always a question of fact. In the instant case, we find that there is clinching evidence to show that the appellant intended to commit the murder of the deceased. There was a motive for him to kill the deceased. As seen above, two hours prior to the fatal assault, at about 9 p.m. there was a quarrel and an exchange of blows between the deceased on one side and the appellant and Mohammed Yameen Khan P.W. 1 on the other. The intensity of the motive can be determined by the fact that immediately after the quarrel, the appellant went to his house and fetched a sword and with it, attempted to assault the deceased but, he could not succeed in his endeavour for P.W. 2 Mohammed Hussain Khan intervened. The manner of assault also shows that the appellant intended to kill the deceased. The evidence is that with a sword in his hand, the appellant chased the deceased resulting in his reaching the fencing gate of Mohamad Yameen Khan P.W. 1. There, he tried to inflict 1/2 blows with the sword but, the deceased some how or the other, managed to save himself from the aforesaid blows. Ultimately, when he tried to run, the appellant inflicted a blow on his head and this struck on his head. The injury inflicted by the appellant on the head of the deceased was so serious that it resulted in fracture of skull. It was the severity of the blow, received by the deceased which resulted in the death of the deceased, within 2 1/2 hours of receiving the same. In our view, when the aforesaid facts are taken into consideration, it can be safely concluded that the appellant intended killing the deceased and therefore, in our view, he would be guilty of an offence punishable u/s 302 I.P.C. alone.

The act of the appellant would also fall within the ambit of Clause thirdly of section 300 I.P.C. The said clause reads:---

Section 300:---

Murder-Except in the cases hereinafter excepted, culpable homicide is murder.....

Thirdly:---

If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or.....

An analysis of the said clause would show that for its application, two requirements have to be satisfied namely:---

(a) There should be an intention to inflict a bodily injury (it should not be accidental and,

(b) the injury inflicted should be sufficient in the ordinary course of nature to cause death.

In the instant case, both the requirements are met. It is crystal clear:--

(i) that the appellant intended to inflict a bodily injury on the head of the deceased; and

(ii) the bodily injury inflicted by the appellant was sufficient in the ordinary course of nature to cause death.

That there was intention to inflict a bodily injury by a sword, on the head of the deceased, is clear from the evidence of Mohammed Yameen Khan P.W. 1 who stated that when the deceased tried to run away, the appellant assaulted him with a sword on his head. On the face of this evidence, it cannot be said that the injury was accidental. That the injury inflicted by the appellant on the head of the deceased was sufficient in the ordinary course of nature to cause his death has been so stated by P.W. 16 Dr. (Mrs.) Shah the Autopsy Surgeon.

Our view in respect of clause thirdly of section 300 I.P.C. is based on the decision of the Apex Court reported in Virsa Singh Vs. The State of Punjab, . There is no dispute that the decision reported in Virsa Singh Vs. The State of Punjab, , still governs the interpretation of Clause thirdly of section 300 I.P.C., and that we are respectfully following.

For the aforesaid reasons, we reject this submission of Mr. Gupte.

23. In the result, this appeal is dismissed. The conviction and sentence of the appellant recorded vide the impugned judgment is confirmed. The appellant is on bail. He shall be taken into custody forthwith, to serve out the sentence.