

(2012) 05 BOM CK 0043

In the Bombay High Court

Case No : Criminal Appeal No. 31 of 2010

Clive Ellens, Presently in Custody at Central Jail, Aguada,
Bardez - Goa. Through his next friend Mrs. Eunice Ellens

APPELLANT

Vs

State of Goa and Public Prosecutor (High Court)

RESPONDENT

Date of Decision : 03-05-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 294, 428
Evidence Act, 1872 — Section 21, 27, 8
Penal Code, 1860 (IPC) — Section 300, 302, 304

Citation : (2012) 05 BOM CK 0043

Hon'ble Judges : U.V. Bakre, J;A.P. Lavande, J

Bench : Division Bench

Advocate : G. Teles, for the Appellant; Milena Gomeses Pinto, Public Prosecutor,
for the Respondent

Judgement

U.V. Bakre, J.—The accused, who has been convicted of the offence punishable u/s 302 of the Indian Penal Code (I.P.C., for short) and sentenced to undergo rigorous imprisonment for life and to pay fine of Rs. 5,000/-, in default, to suffer rigorous imprisonment for a period of two months, has filed the present appeal. Case of the prosecution, in short, is as follows :

On 18/10/2007, prior to 02.40 hours, near Dias Building, Mangor Hill, Vasco, the accused inflicted stab injuries with knife on the person of the deceased Valentin Stephen Dias and caused multiple serious injuries to him which resulted into his death while undergoing treatment.

2. The facts, as can be gathered from the charge sheet, are as follows:-

On 18/10/2007, at about 02.40 hours, P.W. 11 namely Siddhesh Bandodkar, P.W. 15, Merlyn Ellens and the accused brought Valentin Dias (since deceased) at the hospital of Dr. Ravindra @ Baban Parulekar (P.W. 1), by name "Parulekar Nursing Home" situated at Patrong, Vasco-da-Gama. The deceased had sustained 5 to 6 stab injuries and was in semiconscious condition. Some medical treatment was

given to him but he died at 03.20 hours. P.W. 1 informed about the death of Valentin Dias at Vasco Police Station. P.W. 5, Pushpalata Borkar, the then lady Assistant Sub Inspector attached to Vasco Police Station, received the said information and passed on the same to the Police Inspector Mr. Sammy Tavares (P.W. 22). P.W. 5 made the station diary entry, the extract of which is at Exhibit 36. Upon the instructions of P.W. 22, the Assistant Sub Inspector Shri Sidhappa Kamble(P.W. 6) went to the hospital of P.W. 1 and collected the First Information Report(Exhibit 22) given by P.W. 1 and handed it over to P.W. 22. P.W. 22 registered offence u/s 302 of I.P.C. He recorded supplementary statement of Dr. Ravindra @ Baban Parulekar. He thereafter conducted the inquest panchanama (Exhibit 25), between 05.15 hours to 06.30 hours over the dead body of Valentin Dias and seized his shorts of blue, white and red colour, underwear of grey colour and T-Shirt of yellow colour, all stained with blood. On the same day, P.W. 22 also seized the Esteem Car, of dark blue colour, bearing registration no. GA-01/C-3164, in the presence of panch witnesses namely Rafiq Ahmad and Jagat Kumar, under the panchanama (Exhibit 77) drawn between 07.00 hours to 07.45 hours. The Car was found on the road, infront of Parulekar Nursing Home. A photographer namely Shaikh Mohamad Saliya(P.W. 7), took out photographs of the dead body and the Esteem car. The said photographs with negatives are at Exhibits 40 to 57. Statement of P.W. 2, P.W. 11 and P.W. 15 were recorded and the accused was arrested in the presence of Taurappa Lamani and Sandip Shendekar (P.W. 4), on 18/10/2007 under the panchanama (Exhibit 30) drawn between 09.00 hours to 09.40 hours. Thereafter, the Panchanama of the scene of offence (Exhibit 168), was also conducted in the presence of Joseph Pereira(P.W. 20) and Maruti Naik, on 18/10/2007 between 10.00 hours to 11.00 hours. Blood sample collected on cotton; control sample of cotton; the broken pieces of glass from the road; empty Pepsi bottle and two empty glass bottles which were all found lying at spot were attached. A sketch(Exhibit 169) was drawn. Thereafter, on the same day i. e. 18/10/2007 between 11.40 hours to 13.00 hours, at the instance of the accused, blood stained track pant of grey colour and T-Shirt of blue colour and blood stained knife were attached u/s 27 of the Evidence Act. The disclosure-recovery panchanama drawn in the presence of Johny Carvalho(P.W. 16) and Menino Furtado is at Exhibits 109 to 111. Statement of witnesses were recorded by P.W. 22. Statement of some witnesses u/s 164 of Criminal Procedure Code were recorded by the learned Judicial Magistrate, First Class, Vasco-da-Gama. On 18/10/2007, the accused was also examined by Dr. Madhu Ghodkirekar (P.W. 10). The medical report is at Exhibit 67. On the same day, P.W. 18, Dr. Andre Fernandes conducted post-mortem examination over the dead body of the deceased. The Memorandum of Autopsy is at Exhibit 126. The sketch of Scene of offence(Exhibit 174) was drawn by the draughtsman Rajesh Kolvekar(P.W. 21). Further statements were recorded and Viscera of the deceased and property attached under the Panchanama were forwarded to Central Forensic Science Laboratory (C.F.S.L.), Hyderabad. After completion of investigation, P.W. 22 filed charge sheet against the accused.

3. The prosecution examined 22 witnesses in order to prove the charge of murder framed against the accused. The case of the accused was of denial simplicitor. He did not examine any witness.

4. Upon consideration of the entire evidence on record, the learned Trial Judge concluded that the death of the deceased was homicidal and that the accused is the author of the injuries which resulted into the death of the deceased and that the act of the accused amounted to murder. The accused therefore came to be convicted of the offence u/s 302 of the I.P.C. and sentenced as above, against which he has filed the present appeal.

5. Shri G. Teles, learned advocate, on behalf of the accused, urged that he is not disputing the homicidal death of the deceased. He submitted that the evidence on record is not sufficient to prove that the accused was last seen with the deceased or that there was recovery of the weapon and the clothes of the accused at the instance of the accused. He also pointed out that this being a case based on circumstantial evidence, proof of motive was relevant, however in the present case no motive has been proved. According to learned counsel, therefore the evidence on record falls short to prove the guilt of the accused. In the alternative, learned counsel argued that the records reveals that the deceased had slapped the accused and only thereafter the accused had attacked. According to Shri Teles, there was no premeditation for killing the deceased. He also pointed that the evidence of P.W. 11 shows that there was fight between the accused and the deceased. He therefore contended that while quarreling, the accused in heat of passion by way of reaction suddenly gave blow of knife on the chest of the deceased without intending to kill him. Therefore, according to him, offence u/s 304(Part II) is proved and not u/s 302 I.P.C. He therefore urged that the period during which the accused has remained in custody that is from 18/10/2007, which is more than four and half years, is sufficient punishment. He relied upon following Citations;

(1) 2000 (10) SCC 225

(2) Unreported Judgment of this High Court in Criminal Appeal No. 3 of 2010 "Suresh Behra v/s. State"

(3) Unreported Judgment of this High Court in Criminal Appeal No. 5 of 2011 "Subhash Samal v/s. State"

6. Per contra, Mrs Pinto, learned Public Prosecutor argued that P.W. 11 is partly an eyewitness and that there is corroboration between P.W. 11 and P.W. 15 and their evidence sufficiently proves that the accused was last seen in the company of the deceased immediately prior to his death. She further contended that P.W. 10 Dr. Madhu Ghodkirekar had examined the accused who was found having injury and when questioned about the said injury, the accused had informed Dr. Ghodkirekar that he had quarrel at about 2.00 a.m. with his friend Valentin Dias (deceased), who gave him fist blow over the left side of his face and thereby caused the said injury. Learned Public Prosecutor further contended that the

motive for the accused is also proved by the evidence of P.W. 11, which is misbehaviour by the deceased with the sister of the accused about a month back. Learned Public Prosecutor further invited attention to the post mortem examination report and the evidence of P.W.18 and contended that injuries were caused to vital organs and that the stab injury was on the chest and had penetrated the heart. She contended that initially quarrel between the accused and the deceased had taken place on the terrace whereas the incident of killing the deceased occurred on the ground floor. She pointed out that the evidence reveals that the deceased and P.W. 11 had first gone down whereas the accused who resides on the third floor of the same building had no reason to come down and that too with the knife. According to learned Public Prosecutor, the accused had come down with knife as he had intention to kill the deceased. She therefore urged that it is Section 302 of the I.P.C. which is applicable to the present case. Learned Public Prosecutor has relied upon *Kanda Padayachi alias Kandaswamy Vs. State of Tamil Nadu*, wherein it has been held that statement made by the accused to Doctor, admitting incriminating fact, which taken along with other evidence, tends to prove the guilt of the accused, is only an admission and not confession and is relevant. She therefore submitted that there is no scope for interference with the impugned Judgment and sentence.

7. We have perused the entire record and proceedings and also the citations relied upon by learned counsel for the parties.

8. The fact of homicidal death of Valentin Dias is not disputed. P.W. 1, Dr. Ravindra Parulekar had examined the deceased at his nursing home situated at Patrong, Vasco da Gama, on 18 /10/2007 at about 2.40 a.m. His nurse Ana Maria Carvalho rang the bedroom bell of P.W. 1 from the hospital and he came to the hospital. P.W. 1 found that Valentin Dias was in semiconscious state and he tried to revive him by putting intravenous fluids and giving life saving drug like decadron. On examination, P.W. 1 found that Valentin Dias had sharp wounds on the chest, on the abdomen and the waist line. He sutured the wounds to stop bleeding but could not get response from the patient. Valentin Dias, according to P.W. 1, died at about 3.20 a.m.

9. P.W. 2, Ana Maria Carvalho is the said nurse working in "Parulekar Nursing Home" and she has fully corroborated the testimony of P.W. 1.

10. P.W. 3, Allywin Mascarenhas acted as one of the pancha witnesses in the Inquest Panchanama conducted by P.W. 22 over the dead body of the deceased on 18/10/2007 at about 5.15 a.m. P.W. 3 has also confirmed that there were stitched wounds on the chest, abdomen and waistline of the deceased. He has duly proved the Inquest Panchanama.

11. P.W. 18, Dr. Andre Fernandes conducted the post mortem examination over the dead body of Valentin Dias on 18/10/2007 between 12.40 p.m. to 2.00 p.m. P.W. 18, found following external injuries on the dead body of the deceased:

1. Incised stitched wound, vertically oblique, reddish and fresh, 2cms x 5

stitches, on left side upper outer aspect of front of chest. On cutting and removing the stitches, the incised penetrating wound gapes into dimension of 2 cms x 5 mms where the lower inner end is less acutely cut and is placed 14 cms from midline and 141 cms about left heel. The upper outer end is acutely cut. It makes a cut of 2 cms x 5 mms x 2.4 cms in the skin, subcutaneous tissues and muscles of the chest bones and then makes a cut of 2 cms x 5 mms x 2 cms in the 3rd intercostal space muscles and the parietal layer of pleura in mid-clavicle line and then enters the left side chest cavity and makes vertically oblique cut of 1.5 cm x 3 mms on the anterior surface of the upper lobe of left lung, 1.5 cm from anterior border and a corresponding cut of 1.5 cm x 3 mms on the medial mediastinal hilar aspect of left lung. The total thickness of lung tissue between the two surface cuts is 2.1 cms. It then makes a cut of 1.5 cm x 3 mms x 2 mms to the pericardial sac and then makes a cut of 1.5 cm x 3 mms x 2.8 cms to the left ventricle of the heart, on the lower anterolateral aspect and enters the left ventricular channel. The lower end is placed 4.5 cms above the apex of the heart and the left ventricular wall thickness is 2.8 cms. The cut to the endocardial surface of left ventricle is 5 mms x 2 mms. The total depth of the incised penetrating wound from skin to the endocardium of the heart is 9 cms. It is directed inward, medialwards, downwards and forward. There is extravasation of blood present in whole track of the wound.

2. Incised punctured wound, horizontally oblique, reddish and fresh, 1.5 cms x 2 mms x 8 mms, on left side front of chest, the lower less acutely cut end is placed 6.5 cms from midline and the upper outer acutely cut end is placed 11.2 cms below the lower border of middle third of left clavicle. It is directed before backwards, downwards and forwards. There is extravasation of blood present in the whole track of the wound.

3. Superficial incised wound, horizontally oblique, reddish and fresh, 8 mms x 2 mms x 1mm, with tailing of 4 mms x linear, directed downwards on right side front of chest, upper outer end is placed 5 cms from midline of the chest.

4. Incised punctured wound, horizontally oblique, reddish and fresh, 1 cm x 2 mms x 1cm, on right side front of chest, upper medial end is acutely cut and is placed 2.5 cms from midline. There is extravasation of blood present in the whole track of wound.

5. Incised punctured wound, horizontally oblique, reddish and fresh, 9mms x 2 mms x 1 cm, on right side outer lower aspect of chest, medial upper end is acutely cut and is placed 19 cms from midline. It is directed inwards and downwards and there is extravasation of blood in the track of the wound.

6. Incised stitched wound, horizontally oblique, reddish and fresh, 1.5 cm x 3 stitches on left hypocondrial region of abdomen. On cutting and removing the stitches the incised punctured wound gapes into a dimension of 1.5 cms x 3 mm x 4 cms where the lower outer end is less acutely cut and is placed 126 cms above left heel and the upper medial end is acutely cut and is placed 7 cms from

midline. It has made a cut in the skin and then cut the muscles in the abdominal wall. This injury has not entered the abdominal cavity and is directed inwards, downwards and slightly backwards. There is extravasation of blood present in whole track of the wound.

7. Incised stitched wound, vertically oblique, reddish and fresh, 1.5 cm x 2 stitches on right iliac fossa region of abdomen. On cutting and removing the stitches, the incised punctured wound gapes into a dimension of 1.5 cm x 3 mm x 3 cms., where the lower inner end is less acutely cut and is placed 10 cms from the midline and 100 cms above the right heel. It has made a cut in the skin, tissues and muscles of the abdominal wall. It is directed inwards, downwards and slightly forward. There is extravasation of blood present in the whole track of the wound.

8. Incised stitched wound, horizontally oblique, reddish and fresh, 3 cms x stitches on dorsal outer aspect of right elbow. On cutting and removing the stitches, the incised wound gapes in to a dimension of 3 cms x 2 mm x 4 mm with tailing of 2 mm x linear at outer lateral end.

12. upon internal examination, P.W. 18, Dr. Andre Fernandes found that the left side chest cavity contained 410 grams of blood clot and 640 ml of fluid blood. The left lung was in collapsed state and partially shrunken. There was a cut of the size of 1.5 cm x 3 mm x 2 mm in the pericardium sac which contained 65 grams of clotted blood. There was a cut of the size 1.5 cms x 3 mm x 2.8 cms to the left ventricle of the heart on the lower anterior lateral aspect. On the endocardium of left ventricle, there was a cut of the size 5mm x 2mm due to injury no.1, described by P.W.18.

13. As per the Memorandum of Autopsy which is at Exhibit 126 and as deposed by P.W. 18, the death was due to cardiac tamponade as a result of penetrating injury for the lung and heart caused by sharp pointed cutting edged weapon which was ante-mortem, fresh and necessarily fatal. P.W. 18 has further opined that the incised penetrating and punctured wounds caused to the chest wall of the deceased are possible by knife.

14. The above medical evidence is sufficient to prove that the deceased died homicidal death.

15. The next point for determination is as to whether it is proved that the accused is the author of the injuries caused to the deceased, which resulted into his death.

16. There is no direct evidence to prove the guilt of the accused. The case rests upon circumstantial evidence. The learned trial judge has not enumerated the circumstances which establish the guilt of the accused. However, the following circumstances can be culled out from the evidence on record:

i) Deceased and accused were not in talking terms with each other since about a month prior to the incident.

- ii) Deceased was last seen in the company of the accused.
- iii) There was a hot discussion between the accused and the deceased.
- iv) There was a fight between the accused and the deceased.
- v) Accused had sustained simple injury whereas the deceased sustained fatal injury on his chest, which resulted into his death.
- vi) General conduct of the accused.

17. The evidence of P.W. 11, Siddhesh Bandodkar who is a friend of the accused as well as of the deceased reveals that on the day of incident, P.W. 11 had called the deceased from his mobile at about 8.30 p.m. and had asked his whereabouts and he learnt that the deceased was on the terrace of Valeria Apartment, in which the house of the accused is situated. Deceased called P.W.11 to come on the terrace of that building and to bring with him Romanov Vodka. P.W.11 has stated that he asked the deceased as to how he is there when he is not talking with the accused since last one month. According to P.W.11, deceased told him that Marilyn Ellens (P.W. 15) who is sister of the accused had come from Bangalore and therefore the deceased had gone to her house that is the house of the accused to meet her. This house is a flat on the third floor of Valeria Apartment situated near Ambabai temple opposite Dias Building at Mangor hill. The evidence of P.W. 11 reveals that when he reached the terrace of that building, he saw the deceased, the accused and P.W. 15 -Marilyn Ellens present there and were talking to each other. According to P.W. 11 he joined their company and started drinking.

18. The evidence of P.W.17, Vishwanath Ghosh, a common friend of the deceased, accused, Marilyn, etc., also reveals that on 17/10/2007, at about 8.30 p.m., he had been to the building in which the accused used to reside on the third floor, since the sister of the accused that is Marilyn had returned from Bangalore and after reaching the building, the accused told him to go to the terrace. When P.W.17 went to the terrace, he saw Siddhesh Bandodkar and Valentin Dias sitting while Zicco Rodrigues standing there. After some time, Marilyn came there. According to P.W.17, Zicco Rodrigues left the terrace at about 9.10 p.m. whereas he left the terrace at about 9.20 p.m. Thus, neither P.W.17 nor Zicco Rodrigues had witnessed the incident.

19. However, what is relevant is that even, P.W. 17 has stated that the accused and Valentin Dias were not on talking terms with each other before the incident in question, because of some incident which had taken place in a club at Baga. Therefore, there is corroboration between P.W.11 and P.W.17 regarding the fact that the accused and the deceased were not in talking terms before the incident. This fact has not been denied at all.

20. The evidence of P.W.11 reveals that in the course of the party, as per the instructions of Marilyn Ellens and the deceased, P.W. 11 had gone down twice in order to bring Romanov Vodka and Pepsi and had returned back to the terrace.

P.W. 11 has stated that by about 12.00 or 12.30 O'clock at mid night, Marilyn Ellens left the terrace and went to sleep, P.W. 11 has then stated that the deceased had told him earlier that when he had been to disco he had kissed Jovian(Joanne) who is younger sister of the accused and therefore there was a fight between him and the deceased due to which the accused and the deceased were not talking to each other. According to P.W.11, the deceased and the accused agreed to talk on the subject due to which they were not talking to each other and began to talk to each other on that subject and therefore, he went to some distance away from both of them. P.W. 11 has stated that the accused and the deceased started talking in harsh manner and hence he went near them. Then the accused abused the deceased and went to his house. The evidence of P.W. 11 reveals that he along with the deceased came down from the terrace by taking remaining drinks with them and then both of them reached at "Dias Building" where the deceased had parked his Esteem car. The deceased said to (P.W.11) that "I will show Clive in the morning". P.W. 11 tried to pacify the deceased and at that time he saw the accused coming down from the flat which is located on the third floor of Valeria Apartment. P.W. 11 has stated that the accused had a glass in his hand and was waiting on opposite side of the road. According to P.W. 11, the deceased went to the accused and slapped him. P.W. 11 has then stated that he turned his face and the accused and the deceased fought with each other and within a second the deceased came near shop and laid himself by facing downwards near the general store and P.W. 11 tried to wake up the deceased. P.W. 11 has stated that the accused also rushed there and tried to move the deceased who was in a pool of blood. P.W.11 has confirmed that he, the accused and the deceased were the only persons present there. On seeing Valentin in a pool of blood, P.W.11 realized that there was something wrong and therefore he called out Marilyn Ellens, who in turn came down. P.W. 11 has then stated that he, Marilyn Ellens and the accused put the deceased in the Esteem car belonging to the deceased and shifted him to the hospital of Dr. Parulekar. According to P.W. 11, the nurse who was present there called the doctor. P.W. 11 has stated that the Doctor came and asked as to what had happened to which they told him that they found Valentin near Dias building. Dr. Parulekar extended medical treatment and at that time Marilyn told P.W.11 that the mobile of the accused is forgotten at the spot where the car was parked. P.W. 11 along with the accused came back to Dias building and P.W. 11 found the mobile. According to P.W. 11, the accused was frightened and nervous and was searching something. P.W.11 has stated that the accused, after the mobile was found at the spot, went to his house and he(P.W. 11) came back to the nursing home. Marilyn was with Valentin Dias and Valentin died when he was under treatment.

21. P.W. 11 has stated that the deceased was wearing T-shirt and pant of black and white colour whereas the accused was wearing T-shirt and a track pant when they brought the injured to the hospital. Dr. Parulekar then called the police. According to P.W. 11, he and Marilyn went back to Dias building and Marilyn went to her house and brought the accused down and thereafter all of them went back

to the hospital. P.W. 11 has stated that when they took the accused for the second time to the hospital, he (the accused) had changed his earlier clothes. According to P.W. 11, when the police officials asked them as to what had happened, they told them the same thing which they had told to the doctor. According to P.W. 11, the police officials took him to the spot of incident and asked him to tell the truth saying that otherwise he would be in trouble. Thereafter the statement of P.W. 11 was recorded.

22. It is pertinent to note that in the cross-examination of P.W. 11 the fact that there was a party on the terrace of the building and that the accused, the deceased, Marilyn Ellens and P.W. 11 were present for that party and subsequently only the deceased, the accused and P.W.11 were present on the terrace has not been denied. It is further pertinent to note that the fact that thereafter the deceased and P.W. 11 came down the terrace on the road and subsequently the accused also came there and there was fight between the accused and the deceased has also not been denied. In his cross-examination, P.W. 11 has stated that the accused did not go anywhere during the period of his fight with the injured till they shifted the injured to hospital. He has stated that the accused has two sisters of 26 and 17 years of age approximately and the accused, his sisters and the deceased used to go collectively for night parties and to night clubs. P.W. 11 has further stated that he does not know as to whether the deceased did not apologize because of the incident when he had kissed younger sister of the accused. He has further stated that the sisters of the accused were in talking terms with the deceased even though the accused was not. All the above facts including the fact that on account of the incident of the deceased kissing the younger sister of the accused, the accused and the deceased were not in talking terms with each other since about a month prior to the incident and on the day of incident, there was discussion between the accused and the deceased on this subject, are not denied. Even otherwise, P.W. 11 is a friend of the accused as well as the deceased and he has no reason to tell lies.

23. P.W. 15, Marilyn Ellens, who is sister of the accused, has deposed that on 17/10/2007 she was along with the accused, the deceased-Valentine Dias and P.W. 11-Siddhesh Bhandodkar at the terrace at about 10 to 11 p.m. and about an hour thereafter returned to her flat situated on the third floor of the same building that is Valeria Apartments. The deposition of P.W. 15 further reveals that at mid night she heard sound which came from below the said building and therefore she came down and saw the deceased lying unconscious on the road. She then with the help of the accused and P.W. 11 shifted the deceased to the hospital. P.W. 15 being a sister of the accused has absolutely no reason to tell lies. Besides that, her testimony has not at all been shaken in her cross-examination.

24. The evidence of P.W.11 and P.W.17 proves that the accused and the deceased were not in talking terms with each other before the incident. The evidence of

P.W.11 further proves that the reason for the said rift was that the deceased had kissed the younger sister of the accused on one day in a disco due to which there was a fight between the accused and the deceased. The evidence of P.W.11 also proves that on the night of incident, there was discussion between the accused and the deceased regarding the said incident and both were talking in a harsh manner and at the end the accused went to his house by extending abuses to the deceased. Therefore, it is wrong to say that motive for the accused is not proved.

25. The evidence of P.W. 11 and P.W. 15 read with the evidence of P.W. 1 and P.W. 2 is sufficient to prove that the accused was the last person seen with the deceased immediately prior to the death of the deceased. In fact, the evidence of P.W. 11 sufficiently proves that there was fight between the deceased and the accused and within a second thereafter, the deceased laid himself facing downwards near the general store, at the spot of fight, and was in a pool of blood and from there was shifted to the hospital. P.W.18, Dr. Ghodkirekar has stated that the injuries sustained by the deceased were clean cut with no bruising around and therefore the injuries were caused by sharp edged pointed metallic weapon. To the Court question, P.W. 18 has stated that these injuries are possible by means of knife. Since there was nobody else at the spot, and there was fight between the accused and the deceased and since the deceased had sustained stab injuries, it can be concluded that the accused had assaulted the deceased with sharp edged pointed object on left side of his chest and on other parts of the body of the deceased. The evidence of P.W. 11 proves something more than "last seen together". The time gap between the deceased being seen alive in the company of the accused and the deceased found lying in a pool of blood after the deceased went near the accused and slapped him is so small that there is no possibility of any other person, other than the accused being the author of the crime.

26. Since P.W.11 was the person who was with the accused and the deceased when they were fighting, it may be true that he is hiding something by merely saying that he had turned his face. It must, however, be kept in mind that P.W.11 is a friend of the accused as well as the deceased. P.W.15 is the sister of the accused. Whatever that is stated by them is not false though they might not have told all that is known to them.

27. P.W. 4, Sandeep Gangaram Shendekar acted as one of the pancha witnesses for the panchanama of the arrest of the accused. He has deposed that on 18/10/2007, the police arrested the accused in their presence and they took personal search of the accused. He has stated that at that time the accused was wearing red colour T-Shirt and long Jeans pant and on physical verification it was noticed that there was a bruise on left side of his face and scar on his right forearm. He has stated that the police prepared the arrest panchanama from 9 a.m. to 9.45 a.m. Exhibit - 30 is the said arrest panchanama. The injuries sustained by the accused are duly mentioned in the said panchanama. In the

cross-examination of P.W. 4, it is not denied that the accused had sustained the said injuries, as stated by P.W. 4.

28. On the same day that is on 18/10/2007, the accused was examined by P.W. 10, Dr. Madhu Ghodkirekar. P.W. 10 has deposed that the accused had sustained a bruise, redish blue of 3cms x 2 cms, over left malar region of face and that injury was simple in nature and age of the injury was about 12 hours and on inquiry, the accused stated that he had quarrel at about 2 a.m. with his friend Valentin Dias who gave him fist blow on left side of his face thereby causing the said injury. Exhibit - 67 is the report of examination of the accused prepared and identified by P.W. 10. P.W. 10 has corroborated the said report with regard to the injury sustained by the accused and the history given by him. During the course of examination of the accused, the medical officer had asked him as to how he sustained that injury. The said history given by the accused to P.W. 10 is not a confession but as to the cause of injury sustained by him and hence is admissible in evidence. In the case of "Kanda Padayachi" (Supra), accused had an abrasion on his toe and multiple linear abrasions on his right arm and chest and after his arrest he was taken by the police to the Doctor, to whom he stated that it was the deceased who had caused the injury on his toe by biting him. The Hon'ble Supreme Court has observed that the said statement could be relied upon as an admission u/s 21 of the Evidence Act, 1872 and nothing was and could be found against the Doctor to prevent his evidence about the statement made before him by the appellant (accused) from being accepted. It has been held that a confession has to be a direct acknowledgment of the guilt of the offence in question and such as would be sufficient by itself for conviction. If it falls short of such a plenary acknowledgment of guilt, it would not be a confession even though the statement is of some incriminating fact which, taken along with other evidence, tends to prove the guilt of the accused. Such a statement is only an admission and not a confession. In the present case also the statement of the accused made to P.W. 10 is not a direct acknowledgment of guilt of the offence in question. However, it tends to show that the deceased had assaulted the accused. This read with the evidence of P.W. 11 sufficiently proves the guilt of the accused.

29. P.W. 20, Joseph Pereira acted as one of the pancha witnesses for the panchanama of the scene of offence (Exhibit 168) and the sketch (Exhibit 169), drawn on 18/10/2007 at 10.00 hours, by the side of the road near Dias building. This is the main road between Dias building and Valeria Apartment. The evidence of P.W. 20 reveals that P.W. 11 had showed the spot and there was blood; a Pepsi bottle stained with blood; two glass bottles of XXX Rum and pieces of glass or glasses at that spot. A maruti Esteem car of golden yellow colour was found parked at a distance of about one and half metre from the spot where blood was lying. Blood sample on cotton, control sample of cotton and other articles were seized and sealed. As per the C.F.S.L. report at Exhibit 153, human blood was detected on the blood sample on cotton and the Pepsi bottle. This strengthens the case of the prosecution that the incident of assault on the deceased had

taken place at this spot.

30. With regard to the above deposition of P.W. 20, in respect of the Esteem car, the learned trial judge, in paragraph 34 of the impugned judgment, has observed that it is evident that the witnesses Siddhesh Bandodkar, Marilyn Ellens and the accused had taken the deceased in the same Esteem car to hospital of Dr. Parulekar and under this circumstance, it is not understood how this Esteem car was at the spot of incident at the time of drawing panchanama (Exbt. 168). The trial judge has held that therefore, the evidence showing that the Esteem car was at the spot of incident at the time of this panchanama does not import reliability. The above finding of the trial judge, as rightly pointed out by the learned Additional Public Prosecutor, is apparently erroneous. The Esteem car seen by P.W. 20, at the scene of offence, at the time of panchanama of the scene of offence is not the one by which the deceased was taken to the Nursing Home of Dr. Parulekar. The Esteem car seen by P.W. 20, parked at the place of offence was of golden yellow colour which has no relevance with the present case. There is no mention of this car in the panchanama which is at Exhibit 168. The Esteem car belonging to the deceased and by which he was taken to the hospital, was of dark blue colour. P.W.7, Shaikh Mohamad Saliya has deposed that on 18/10/2007, Police Inspector Tavares had called him at around 5.00 a.m. at the hospital of Dr. Baban Parulekar and he snapped seven photographs of the dead body of a male in the hospital, and five photographs of the Esteem car which was parked at the hospital. The said photographs along with negatives are at Exhibits 47 to 51. The panchanama of the attachment of the said Esteem car bearing No. GA-01/C-3164 is at Exhibit 77. This panchanama appears to have been admitted u/s 294 of the Criminal Procedure Code. The said car was attached from in front of the Nursing Home of Dr. Parulekar. P.W. 22; the investigating Officer has deposed that the Esteem car bearing registration no. GA-01-C 3164 was in front of the hospital of Dr. Parulekar and he seized the same in the presence of two pancha witnesses namely Rafik Ahmad and Jagat kumar, under the panchanama which is at exhibit 77. Therefore, there is no discrepancy about the Esteem car and hence there is nothing unreliable insofar as the panchanama of the scene of offence, is concerned.

31. P.W. 22, Sammy Tavares, the investigating officer, has deposed that the accused while he was in the police custody gave information that the incriminating weapon knife is thrown by him at rear side of his building and that blood stained clothes are kept by him in his house and became ready and willing to produce the objects. P.W. 22 has deposed that he recorded the information given by the accused in the presence of two pancha witnesses by name Johny Carvalho and Menino Furtado. He has then stated as to how the accused led them to his flat, then to the bathroom from where the accused removed one grey colour track pant and T-Shirt of blue colour which were stained with blood. According to P.W. 22, the accused then took them to the terrace where cigarettes buds and broken glasses were lying. P.W. 22 has further stated that the accused then took them to the rear side of the building and produced a knife which was

kept near the bushes. P.W. 22 has described the said knife which was packed and sealed. According to P.W. 22, the accused then took them near Dias building and showed the spot of incident.

32. The evidence of P.W. 16, Johny Carvalho reveals that the accused had taken him and others to the house where he stays and had produced before them the track pant of grey colour and T-Shirt of blue colour which were stained with blood and which were kept in the bucket in the bathroom of house of the accused and the said clothes were seized under the panchanama. P.W. 16 has deposed that the accused took them all to the terrace where the party was held. According to P.W. 16, broken pieces of glass were found lying there. The Evidence of P.W.16 further reveals that thereafter the accused took him and other pancha witness and police team to the ground floor at the back side and pointed out the knife which was in bushes behind the said building and the police had seized the said knife and had sealed the same. The panchanama under which the knife and the clothes were attached is at Exhibits 109, 110 and 111 and it is stated to be u/s 27 of the Evidence Act.

33. However, since P.W. 16 has not stated that the accused had made disclosure statement, the trial judge has held that it cannot be said that the said recovery panchanama has been proved u/s 27 of the Evidence Act. No doubt, the Investigating Officer that is P.W. 22 has deposed that the accused had made the disclosure statement. However since there is not corroboration from P.W. 16, the learned Trial Judge has refused to believe that the recovery is at the instance of the accused, u/s 27 of the Evidence Act. However, the fact that the accused had showed the said clothes and the knife is still relevant u/s 8 of the Evidence Act, as subsequent conduct of the accused. It is pertinent to note that as per the C.F.S.L. report which is at Exhibit 153, human blood was detected on the said track pant, T-Shirt and the knife.

34. According to P.W. 1, Dr. Parulekar, the patient Valentin was brought to his hospital by Siddesh Bandodkar and Merilyn whereas one person was sitting on the back seat of the Esteem car which was outside his hospital. P.W. 2, the nurse says that the girl, Siddesh Bandodkar and the accused had brought the deceased in the hospital, but when the treatment was going on, the accused was sitting in the car. The accused was worried about his mobile which was forgotten by him at the spot. P.W. 11 and the accused had gone to the spot and P.W. 11 found the mobile. But according to P.W. 11, the accused was searching something and was frightened and nervous. Instead of coming back to the hospital, the accused went to his house and changed his clothes. The above conduct of the accused is also not normal and read with other circumstances established by the prosecution, sufficiently proves the guilt of the accused.

35. The evidence of remaining witnesses examined by the prosecution is not of much relevance and hence is not discussed.

36. The evidence discussed above, sufficiently proves that the accused is the

author of the injuries sustained by the deceased, which resulted into his death.

37. The last question which arises for consideration is whether the act of the accused, of causing the death of the deceased, amounts to murder or to culpable homicide not amounting to murder and if so whether it falls under Part I of section 304 of I.P.C. or under Part II of section 304 of I.P.C.

38. What emerges from the evidence on record is as follows:-

- i) Deceased and the accused were both drunk and in excited mood.
- ii) After the party, P.W. 11 and the deceased came down the building by taking remaining drinks with them and were proceeding to the place where the deceased had parked his Esteem car, whereas the accused had gone to his flat, on the third floor.
- iii) Deceased said to P.W. 11 " I will show Clive in the morning".
- iv) Accused then came down the building with glass in his hand and he had a knife with him. But he was waiting on opposite side of the road.
- v) Deceased, without any reason, went to that side and slapped the accused.
- vi) Thereafter there was fight between the accused and the deceased.
- vii) Blows of knife were inflicted on the left and right side of the chest and on the abdomen of the deceased.
- viii) Penetrating injury to the left side of lung and heart caused cardiac tamponade, which resulted into the death of the deceased.
- ix) Accused sustained only a simple injury.

39. There is no evidence to prove that the accused had specially brought the knife with him while coming down. He was holding the glass in his hand. Therefore there is doubt whether there was premeditation. It is not known whether anything would have happened if the deceased had not gone to the opposite side of the road and had not slapped the accused. But the deceased did this and that ensued in a fight. In that sudden fight in the heat of passion upon the sudden quarrel, the accused stabbed the deceased. There is nothing to indicate that the accused had taken undue advantage or had acted in an unusual manner. One of the stab injuries was caused to the left side of lung which reached upto the heart. In the circumstance above, while deciding whether the act of the accused amounts to murder or culpable homicide not amounting to murder, the benefit has to be given to the accused. However, since the injury is caused by means of a knife and to the heart, it can certainly be said that the accused had the intention of causing such bodily injury as was likely to cause death. The act of the accused, in our considered opinion, falls under Part I of section 304 of I.P.C. and not u/s 302 of I.P.C. Therefore the conviction of the accused u/s 302 of I.P.C. cannot be sustained and is required to be altered to u/s 304 Part I of I.P.C.

40. It cannot be said that if none of the exceptions to Section 300 of I.P.C. is applicable to a particular case, the case should be invariably considered to be of murder. In the case of Ruli Ram and Another Vs. State of Haryana, , the Apex Court has held that a plea that Section 304, Part II applies only when any of the exceptions to Section 300 covers the case, is misconceived.

41. We have gone through the citations relied upon by the learned counsel for the accused, wherein section 304 Part II of I.P.C. has been held to be applicable. The facts and circumstances of those cases are different and we do not deem it necessary to discuss them in the present case.

42. Coming to the question of sentence, section 304, Part I of I.P.C. provides for punishment with imprisonment for life or imprisonment of either description for a term which may extend to ten years and also to fine. In our opinion, rigorous imprisonment for a term of ten years and fine would be appropriate punishment to the accused. In the result, the appeal is partly allowed.

(a) The conviction and sentence of the accused for offence u/s 302 of I.P.C. is set aside.

(b) The accused is convicted of the offence u/s 304 Part I of I.P.C. and is sentenced to undergo rigorous imprisonment for a period of 10 years and also to pay fine of Rs. 5,000/-in default to suffer rigorous imprisonment for a further period of two months.

(c) Period of detention already undergone by the accused shall be set off in terms of section 428 of Criminal Procedure Code.

(d) The order of trial judge insofar as the Esteem car is concerned is maintained whereas the other muddemal articles shall be destroyed after a period of 90 days from today.

(e) Appeal stands disposed of accordingly.