

(2005) 08 AP CK 0010

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 382 of 2003

Gunnana Pentayya and Others

APPELLANT

Vs

State of A.P.

RESPONDENT

Date of Decision : 11-08-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 144, 374(2)
Penal Code, 1860 (IPC) — Section 141, 148, 149, 302, 323

Citation : (2006) 1 ALD(Cri) 387 : (2006) 1 ALT(Cri) 395 : (2005) CriLJ 4680

Hon'ble Judges : Bilal Nazki, Acting C.J.; K.C. Bhanu, J

Bench : Division Bench

Advocate : C. Padmanabha Reddy, for C. Praveen Kumar, for the Appellant;
Public Prosecutor, for the Respondent

Judgement

K.C. Bhanu, J.—This appeal, u/s 374(2) of the Code of Criminal Procedure, 1973, is directed against the judgment dated 24-3-2003 passed in S.C. No. 154 of 2001 on the file of the Court of the Sessions Judge, Sessions Division, Vizianagaram, whereunder A-1, A-8, A-12, A-21 and A-24 were found guilty for the charge u/s 302 of the Indian Penal Code, 1860, (for short "IPC") for causing the death of I. Appalaswamy (D-1) and sentenced to undergo imprisonment for life and to pay a fine of Rs. 500/- each and in default of payment of fine, to undergo six months simple imprisonment, and A-2 to A-7, A-10, A-14 to A-17, A-22, A-25, A-27, A-28, A-37, A-40 to A-45 and A-56 were found guilty for the charge u/s 302 read with 149 IPC in respect of the death of I. Appalaswamy (D-1) and sentenced to undergo imprisonment for life and also to pay a fine of Rs. 500/- each and in default of payment of fine, to undergo simple imprisonment for three months. So also, A-1 to A-7 were found guilty for the charge u/s 302 IPC for causing the death of P. Appalanaidu (D-2) and sentenced to undergo imprisonment for life and also to pay a fine of Rs. 500/- each and in default of payment of fine, to undergo simple imprisonment for three months each. Whereas A-8, A-10, A-12, A-14 to A-17, A-21, A-22, A-24, A-25, A-27, A-28, A-37, A-40 to A-45, A-47 and A-56 were convicted u/s 302 read with 149

IPC for causing the death of one P. Appalanaidu (D-2) and they were sentenced to undergo imprisonment for life and also to pay a fine of Rs. 500/- each and in default of payment of fine, to undergo simple imprisonment for three months. Some of the accused were also found guilty for the charges under Sections 148, 323, 325, 427 and 452 IPC and various sentences have been imposed on them. The other accused i.e., A-9, A-11, A-13, A-18, A-19 A-20, A-23, A-29, A-30 to A-36, A-38, A-39 A-46, A-48, A-49, A-50 to A-57 were found not guilty for the charges levelled against them and accordingly they were acquitted.

The appellants herein are A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-10, A-12, A-14,

A-15, A-16, A-17, A-21, A-22, A-24, A-25, A-27, A-28, A-37, A-40, A-41, A-42. A-43, A-44, A-45, A-47 and A-56.

2. The brief facts that are necessary for the disposal of the present criminal appeal as depicted by the prosecution may be stated as follows :

PW-1 is the wife and PW-2 is the son of P. Appalanaidu (D-2). PW-3 is the wife of I. Appalaswamy (D-1). All the accused, deceased and all the material witnesses are the residents of Ramannapeta village in Vizianagaram. All the accused are the supporters of Telugu Desam Party. Both the deceased and all the material witnesses are the supporters of Congress-I party. Deceased No. 2 was the Sarpanch of the said village. A-3, A-6 and A-7 are the manufacturers of the Illicit Distilled Liquor. The preparation of I.D. liquor was stopped as against the protest made by Mahila Sangam of their village, which was also supported by D-2. Therefore, the village was declared as Spandana village. For that reason, the accused bore grudge against the deceased and all the supporters of the Congress party, which led to group clashes, and cases and counter cases against each other were filed. It is the further case of the prosecution that one Mentada Rambabu, who is the son of Suryanarayana, belonged to the accused group, sent a love letter to Deepika (niece of PW-1 and D-2). In this connection, both the parties had clashes and some persons on either side were arrested. On 29-1-2000, there was a rumour that one person from accused party was killed and on that pretext in the early hours at about 6,00 a.m., the accused armed with sticks went to the house of the deceased No. 2 and A-1 to A-7 entered into the house by breaking the doors and beat D-2. They further caused damage to the furniture in the house of D-2. A-1, A 8, A-12, A-21 and A-24 went to the house of D-1 and he was also beaten. Thereafter, all the accused proceeded in the village and beat all the supporters of Congress party. PWs. 4 to 33 are the injured witnesses who sustained injuries. Thereafter, all the injured were taken to the Government Hospital, Gajapathinagaram and during the course of treatment, D-1 and D-2 were shifted to K.G. Hospital, Visakhapatnam. The Sub-Inspector of Police, on coming to know about the rioting, immediately rushed to the hospital and recorded the statement, Ex. P-1, from PW-1 and registered a case In Cr. No. 13 of 2000 and sent the F.I.R. to the concerned. The Inspector of Police took up further investigation and, on his instructions, the Mandal Revenue Officer issued

prohibitory orders u/s 144 Cr. P.C., as the situation in the village was tense. During the course of investigation, the Inspector of Police observed the scene of offence and prepared the observation report. He also prepared a rough sketch of the scene of occurrence and the photographs of the scene of occurrence were also taken. During the investigation, the Inspector of Police examined some witnesses. On 30-1-2000, on receiving the death intimation of D-1 and D-2, the section of law was altered to 302 IPC. In the presence of mediators, the Inspector of Police held inquest on the dead body of D-1 and also on the dead body of D-2. The Doctor, who conducted autopsy, opined that D-1 died due to respiratory and circulatory failure, whereas D-2 died due to septic and toxic condition due to injected injury to the brain and fracture of skull. Some of the accused surrendered before the Inspector of Police, whereas some others were arrested, and in pursuance of their confessional statements, the weapons of the offence were seized. After completion of investigation, the police filed a charge sheet. When the charges were read over to the accused, they pleaded not guilty and claimed to be tried.

3. To substantiate the case of the prosecution, it examined 55 witnesses and marked 89 documents besides the case properties of MOs. 1 to 27. Upon appreciation of evidence on record, the appellants before this Court were convicted and sentenced accordingly as aforesaid. Challenging the same, the present appeal is filed.

4. The learned senior counsel, Sri C. Padmanabha Reddy, appearing for the appellants contended that there was no unlawful assembly; that it is at best a case of rioting; that the accused have not shared the common object to kill the deceased; that there was no evidence that the appellants who are convicted u/s 302 read with 149, IPC were present as members of the unlawful assembly; that having acquitted some of the accused, the same benefit would have been given to the accused who are convicted under the aid of Section 149, IPC; that PW-1 was present inside the house and there is no possibility for her to identify the other accused; for the attack on the deceased No. 2, P.Ws. 1 and 2 are the witnesses and that PW-2 was planted as an eye-witness, because he was not examined immediately after the incident and his name was not figured as an eye-witness in the F.I.R., and therefore, he was planted as eye-witness after the death of D-2. He further contended that the incident had not taken place at one place so as to infer that all accused shared the common object and, even according to the case of the prosecution, the incident had taken place at different places. He also contended that there was abnormal delay in sending the F.I.R. to the Court, though the Court is located at a distance of 2 kms. from the Police Station and that in the absence of any explanation, it creates a suspicion that Ex. P-1 was brought into existence after due deliberations. He further contended that no specific overt acts were attributed to any of the accused in the F.I.R. and that only the names of 38 accused were given, which is highly doubtful, because PW-1 admitted that she does not know the names of all the accused persons. He further contended that there was no charge against A-12, A-21 and A24, but

convicting them u/s 302, IPC is highly irregular and hence, he prays to allow the appeal.

5. On the other hand, the learned Public Prosecutor contended that on coming to know about the rumour, all the accused formed into an unlawful assembly and caused the death of deceased Nos. 1 and 2 and that from the conduct and behaviour of the assembly, the common object can be gathered; that all the accused were armed with sticks and deadly weapons and they went on rioting and beating the persons belonging to the opposite political party i.e., Congress party; that because of the tension prevailing in the village, all the police persons were engaged in the duty, the delay in sending the report to the Magistrate by itself cannot be a ground to reject the case of the prosecution; that since all the accused were armed with deadly weapons, they shared the common object; that the presence of PW-2 who is the son of the deceased is quite natural and convincing in the early morning and even in the absence of his name in the F.I.R., it does not lead to a conclusion that he was not present at the time of incident; that P.Ws. 1 to 3 are the witnesses of the truth and if it is a case of false implication, they would have implicated some more accused as the assailants of both the deceased, and therefore, after an elaborate consideration of the matter, the learned Sessions Judge found the appellants guilty of the charges levelled against them, and therefore, he prays to dismiss the appeal.

6. PW-52 conducted inquest on the dead body of I. Appalaswamy (D-1) on 31-1-2000 in the presence of mediators. Ex. P-21 is the inquest report. The mediators opined that the deceased I. Appalaswamy died due to injuries. PW-52 also held inquest over the dead body of D-2 on 10-2-2000 at 12.00 p.m. in the presence of the mediators. The mediators also opined in Ex. P-2, inquest report, that the deceased died as a result of the injuries sustained by him. PW-54 is the Doctor who conducted autopsy on the dead body of I. Appalaswamy (D-1) on 31-1-2000 at 2.45 p.m. and found the following external injuries :

1. An oblique bone deep laceration of 6 cm long x 0.6 cms width x 0.5 cms depth (bone deep) is present over left middle top of the head (left parietal). Region is approximately with three block stitches. The injury situated 9 cms above the inner third of left eye brow and it is 10 cms above the left ear and it is 6 cms to the left of top middle of center of the head and 15 cms above the left margin of external occipital protuberance of the center of the back of the head. The edges are red in colour and are irregular with a effusion and infiltration with blood at the site of injury with surrounding bruise of 8x7 cms present. The hair bulbs tufts are injured and driven in wards and adherent to each other due to presence of dried blood.

2. A contusion 5x3 cms around the lids of right eye region.

3. A contusion of 6 x 5 cms at lid of left eye.

4. Contusion of 8 x 7 cms is present on left front chest 6 cms below the left nipple. Neck, chest, abdomen right upper limb and left upper limb, left lower limb

and genitalia no injuries.

5. Right lower limb reddish brown scab abrasion of 2 x 0.5 cms size is present on the inner side of lower 1 /3rd of right leg at a point 5 cms above the right ankle is obliquely placed.

6. A reddish brown scab abrasion of 0.25 x 0.25 cms is present obliquely on the inner side of right foot 3 cms below the right ankle."

He also found the following internal ante-mortem injuries :

1. Corresponding oblique bone deep laceration of 6 x 0.5 x 0.5 cms is present in all the underlying tissues over left parietal regions of scalp under external injury No. 1.

2. Bruising of 12 x 12 cms size present over left parieto temporal and upper left occipital underlying tissues of scalp under external injury No. 1.

3. A depressed comminuted fracture of 6 x 5 x 0.5 cms depressed area is present over left parietal region of the skull with a forward radiating fissured fracture of 10 cms long on two left front vault of the skull further dipping into the base and B) with a backward and downward radiating fissured fracture of 12 cms long on left back vault of the skull on the left occipital bone further dipping into the base.

4. Bruising of whole of left lobe of the brain with traumatic red coloured soft subdural and subtrachnoid haemorrhage of 0.5 cms thick and with a traumatic fresh red coloured intra-cerebral hemorrhage of 5 x 4 x 3 cms weighing 75 grams is present in the substance of left lobe of the brain.

Note : On cut section and dissection of left lobe of the brain there is and small old healed area of yellow organized residue of old healed spontaneous intra-cerebral lesion in the region of basal ganglia and pons indication of old paralytic stroke.

5. Fissure fracture of left front base of the skull (Left ACFC) as a continuous fissure fracture of internal injury No. 3(a)

6. Fissure fracture of 7 cms long left back base of the skull (LPCF) as a continuous fissure fracture from internal injury No. 3(b);

7. Fracture of ribs 2 to 7 at their angles on left side with bruising and laceration of left intercostal muscles and blood vessels with 400 ml of blood in the left chest cavity under the external injury No. 4. Age of the injury red coloured contusion, margins of scalp and laceration are reddish in colour, red coloured intracranial haemorrhage red coloured left chest injuries. About 24 to 36 hours prior to death. Type of force --blood force. Type of weapon blunt-weapon. There are no abnormal findings except the injuries noted."

7. The Doctor opined that the deceased died due to respiratory and circulatory failure due to injury to the brain, fracture of skull, head injury with injuries to the

left front chest and the weapons like sticks i.e., MOS. 16 to 23 and MO. 1 would have been caused those injuries. Ex. P-87 is the postmortem certificate.

8. On 10-2-2000 at about 2.55 p.m., PW-54 also conducted autopsy over the dead body of the P. Appalanaidu (D-2) and found the following external injuries :

"Head and neck :--1) An inflicted oblique bone deep laceration of 5 x 0.5 x 0.5 cms size present over outer aspect of right frontal region of the head approximated with 5 stitches. It is 7 cms above the middle of right eye brow region and 5 cms above the right ear. The edges are irregular and the wound is surrounded by and greenish yellow contusion of 8x4 cms present through the wound foul smell pus is coming out.

2) An infected half moon shaped surgically inside craniotomy wound of 12 x 0.5 x 0.5 cms size present over left temporal frontal and inner aspect of right frontal region of the head is approximated with 14 stitches. It is 5 cms above the inner aspect of right eye-brow and it is 5 cms above the left ear made for the drainage of brain haemorrhage as part of treatment, through which foul smell pus is coming out.

3) Infected oblique greenish yellow lenior contusion of 7 x 2 cms size present over left soft cheek of the left side of the face. It is 2 cms to the left of left ear.

Trunk :00 4) Infected oblique greenish yellow lenior contusion of 8 x 2 cms size present over upper aspect of right front chest. It is 2 cms below the outer 1/3rd of right collar bone and 4 cms above the right: nipple;

5) Infected oblique greenish yellow lenior contusion of 7 x 2 cms size present over back of the left shoulder region;

6) Infected abrasion with falling of scab of 4 x 2 cms size present over back of middle of left chest region 6 cms to the left of back line of the chest (scapular region).

Right Upper Limb :--

7) Infected oblique greenish yellow lenior contusion of 21 x 2 cms size present over inner aspect of right upper arm region;

8) Infected oblique greenish yellow lenior contusion of 7 x 2 cms size present over front of right fore-arm 4 cms below the right front elbow region;

9) Infected oblique greenish yellow lenior contusion of 9 x 2 cms size present over back of right fore-arm region;

Left Upper Limb :--

10) Infected abrasion with fall of scab of 0.5 x 0.25 cms present over back of left elbow.

Right Lower Limb :--

11) Infected oblique greenish yellow contusion of 22 x 2 cms size present over outer aspect of right mid and lower thigh region.

He also found the following ante-mortem infected internal injuries :--

1) Corresponding infected oblique laceration of 5 x 0.5 x 0.4 cms present in all the underlying tissues over right frontal regions of scalp below the external injury No. 1.

2) Infected greenish yellow contusion of 12 x 10 cms size present over right fronto temporal underlying tissues of scalp below the external injury No. 1.

3) An infected depressed comminuted fracture of 4 x 2 x 0.5 cms obliquely present over right frontal vault of the skull with forward radiating fissured fracture of 6 cms size present over right frontal and temporal vault of the skull further dipping into the base below the internal injury Nos. 1 and 2.

4) Infected pale brownish yellow extra-dural haemorrhage of 5 x 1 x 0.25 cms size weighing 25 grams present below the internal injury No. 3.

5) Infected surgically removal of 6 x 6 cms of skull bone present over left frontal vault of the skull (left frontal parasitical craniotomy) and the removed bone kept in the same place by the surgeon as a part of treatment to the brain haemorrhage. The underlying membranes are removed by the Surgeon, the whole part is infected and foul smell pus is present. This is below the external injury No. 2;

6) Infected contusion of whole left hemisphere of the brain with 0.5 cms pale brownish subdural haemorrhage with foul smell pus is below the internal injury No. 4.

7) Infected fissured fracture of 6 cms size present over right front base of the skull as a continuous fracture from the internal injury No. 3 is present. Base of the skull containing 50 ml of foul smelling pus. The age of the injuries abrasion falling of scab, contusion greenish yellow. Brain haemorrhage pale brownish yellow about 12 days prior to death. Type of weapon--blunt weapon. Type of force --blunt force."

9. He opined that the deceased died due to infected injury to the brain and fracture of skull. The cause of the death as spoken by the Doctor, who conducted autopsy on the dead body of both the deceased, is not specifically denied or disputed. So, from the medical evidence, it is established that the death of both the deceased is homicidal.

10. P.Ws. 4 to 33 are the injured witnesses. The learned Counsel for the appellants did not seriously dispute about the evidence of P.Ws. 4 to 33 in view of the fact that they speak about some of the accused causing injuries to them. They did not speak with regard to the accused causing injuries either to the deceased or any of the prosecution witnesses. Some of the accused were convicted u/s 325, IPC and some of them were convicted u/s 323, IPC and some

of the accused were convicted under Sections 452 and 144, IPC. So far as the charges levelled against such of those accused, who are convicted under Sections 148, 325, 323 and 452, IPC are concerned, the learned senior counsel did not point out any infirmities in the evidence of P.Ws. 4 to 33. So also, the learned Counsel for the appellants did not dispute about the receipt of the injuries by P.Ws. 4 to 33. Even though,, the counsel did not dispute about the sustaining of injuries by P.Ws. 4 to 33, but we have perused the evidence of those witnesses and they have categorically stated that some of the accused beat them. Their evidence is completely in corroboration with the medical evidence. Except suggesting that some of the accused did not beat the injured witnesses, nothing has been elicited to discard their testimony. It is not even disputed by the accused that P.Ws. 4 to 33 did not receive any injuries. The presence of P.Ws. 4 to 33 and receipt of injuries by them has been established beyond all reasonable doubt. Perhaps that is the reason why the learned senior counsel is not seriously disputing about the evidence of P.Ws. 4 to 33. On perusing the evidence, we find no infirmity in convicting the appellants under Sections 148, 323, 325 and 452, IPC.

11. For causing the death of the D-I, P.W. 3 is the sole eye-witness. She is no other than the wife of I. Appalaswamy (D-1). For causing the death of deceased No. 2, P.Ws. 1 and 2, who are the wife and son respectively, are the eye-witnesses. Even the injured witnesses, P.Ws. 4 to 33, did not speak about the presence of any one of the accused or causing any injuries to both the deceased. It is true that all the three witnesses are related to both the deceased and as such they are interested witnesses. But mere interestedness was not a valid ground to reject their evidence. All that was necessary was to scrutinize their evidence with more than ordinary care and circumspection with reference to the part or role assigned to each of the accused. An effort should have been made to sift the grain from the chaff to accept what appeared to be true and to reject the rest.

12. The Apex Court in the decision reported in Gauri Shanker Sharma etc. Vs. State of U.P. etc., , it was held :

"Unless there are sound grounds to reject the evidence of the so-called interested witnesses, it would not be proper to brush aside their evidence on the specious plea that they are interested witnesses."

13. The motive as spoken by PW-1 is that A-3, A-6 and A-7 used to prepare I.D. Arrack. The deceased No. 2 and other Mahila Sangam members tried to eradicate the manufacturing of I.D. Arrack. Therefore, the business of the accused has gone down and for that purpose, the accused bore grudge against the deceased. It is not in dispute that there are political fractions in the village: All the prosecution witnesses belonged to the Congress party, whereas all the accused belonged to the Telugu Desam Party. The incident in question has taken place on 29-1-2000 at 6.00 or 6.30 a.m. at the house of the deceased No. 2, Therefore, the presence of PW-1, who is the wife of the deceased No. 2, is quite natural and

convincing, inasmuch as the attack was made at her house. The immediate reason for reaction of the accused is that on 27-1 -2000 the paternal uncle's daughter of PW-2 received a love letter from one Mentada Rambabu, who is the supporter of Telugu Desam Party, and on that ground both the groups had quarrelled. The police arrested the persons of both the groups and the cases have been filed before the Court.

14. Insofar as the evidence of PW-3 is concerned, she stated that A-1, A-8, A-12, A-21 and A-24 came to her house; A-1 beat her husband with a stout stick on his head; A-24 beat on his legs with a stick; A-8, A-12 and A-21 beat with sticks indiscriminately on the body, as a result of which her husband (D-1) sustained grievous injuries. At the time when the deceased No. 1 came out from his house to take tea, the incident took place. So, there is every scope or possibility for PW-3 to identify the assailants of the deceased. Except suggesting that A-1, A-8, A-12, A-24 and A-21 did not beat her husband, nothing has been elicited to discard her testimony. Her presence is not disputed since the incident took place at 6.30 a.m. i.e., in the early morning. She is the quite natural witness and there is a scope to identify the assailants of the deceased. The two witnesses, P.Ws. 1 and 3, in our considered opinion, are truthful and reliable witnesses because if P.Ws. 1 and 3 wanted to perjure themselves, they could as well have stated in their evidence of having seen the entire incident and the remaining accused were also the assailants of the deceased, instead of deposing that they identified very few accused beating the deceased at the time of incident. Therefore, in our considered opinion, P.Ws. 1 and 3 are the truthful witnesses and they have deposed only with regard to the facts, which they have actually seen. Since all the accused belonged to the rival group, P.Ws. 1 and 3 would have implicated some more accused, if they wanted to implicate them as the assailants of the deceased. Their presence at the time of incident cannot be doubted and they have spoken to only what they have witnessed. Nothing has been elicited in their cross-examination to discard their testimony.

15. The only contention raised by the learned senior counsel for the appellants is that it is not possible for PW-1 to identify all the accused who surrounded the house and there is no scope for all the accused to enter into the house. The learned Counsel is right in saying that it may not be possible for all the accused to enter into the house in view of the fact that the room, where the deceased No. 2 was attacked is a small one. Though PW-1 named 38 persons in the F.I.R. as the assailants of the deceased and no specific overt acts are mentioned in Ex. P-1, the overt acts attributed to such of the accused as spoken by her in the Court are required to be taken into consideration. Even according to PW-1, only 7 accused persons beat her husband i.e. A-1 to A-7. Even according to her, specific overt acts have been attributed to A-1 to A-3 whereas A-4 to A-7 beat her husband with sticks indiscriminately. According to PW-1, other accused have surrounded the house, when the incident has taken place inside the house. There is no scope or possibility to know the persons who are present outside the house. Therefore, it is clearly an improvement and it is an exaggeration, and undue

importance cannot be given to such exaggerations.

16. Insofar as the evidence of PW-3 is concerned, she stated that A-1, A-8, A-12, A-21 and A-24 bet her husband with sticks. She did not speak about the presence of the remaining accused at the house or in or around the house. Serious attack has been made on the evidence of P.W. 2, whose name has not been referred to in the F.I.R., and he was not immediately examined by the police. Therefore, the contention is that he is a planted witness for the purpose of this case. Admittedly, the name of PW-2 has not been stated in the F.I.R.

17. It is pertinent to refer to a decision reported in State of Madhya Pradesh Vs. Mansingh and Others, , wherein it was observed that mere non-mention of the name of an eyewitnesses does not render the prosecution version fragile. There can be no hard-and-fast rule that the names of all witnesses, more particularly eye-witnesses, should be indicated in the F.I.R. Furthermore, even though the name of PW-2 is not specifically mentioned in the F.I.R., but at the same time, he is no other than the son of the deceased. Since the incident took place at the house, his presence is quite natural in view of the fact that the incident took place at about 6.30 a.m. Therefore, there is every possibility for PW-2 to be present at the time of incident.

18. With regard to the delay in examination, it is pertinent to refer to a decision reported in State of U.P. Vs. Satish, , wherein it was held (Para 19) :

"As regards delayed examination of certain witnesses, this Court in several decisions has held that unless the Investigating Officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom."

19. In this case, no question has been put to PW-53 as to why there was delay in examination of PW-2. Even otherwise the presence of PW-2 at the relevant point of time of the incident is not specifically denied or disputed, no suggestion has been put to PW-2 that he was not present at the time of the incident at the house of his father (D-2) or that he was residing separately from his father. Therefore, PW-2 is present at the time of incident and he has spoken to with regard to specific overt acts against A-1 to A-3 and he also stated that A-4 to A-7 beat hip father indiscriminately. So, from the evidence, it is clear that A-1 to A-7 caused injuries to the deceased No. 2, whereas A-1, A-8, A-12, A-21 and A-24 caused injuries to the deceased No. 1. The complicity of the aforesaid accused in causing the death of the two persons has been established beyond all reasonable doubt.

20. Now, it has to be seen whether the accused who are found guilty of the charge u/s 302 read with 149, IPC have shared the common object with a view to kill the deceased.

21. The two essential ingredients of Section 149 are the commission of offence committed by any member of an unlawful assembly and that such assembly

must have committed in prosecution of common object of that assembly or must be such as the members of that assembly knew to be likely to be committed, not every person is necessarily guilty, but only those who share in the common object. The common object of the assembly must be one of the five objects mentioned in Section 141, IPC. It is difficult to prove the common object by the prosecution by adducing direct evidence. The common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of the case.

22. The law on this aspect is very well established in the decision reported in Rambilas Singh and Others Vs. State of Bihar, , wherein it was held (Para 7) :

"...It is true that in order to convict persons vicariously u/s 34 or 149, IPC it is not necessary to prove that each and every one of them had indulged in overt acts. Even so there must be material to show that the overt act or acts or one or more of the accused was or were in furtherance of the common intention on behalf of the accused or in prosecution of the common object of the members of the unlawful assembly."

23. The scope of common object and inference regarding the same has been pointed out in a decision reported in Chandra Bihari Gautam and Others Vs. State of Bihar, , wherein it was held :

"Section 149 has two parts. First part deals with the commission of an offence by a member of an unlawful assembly in prosecution of the common object of that assembly and the second part deals with the liability of the members of the unlawful assembly who knew that an offence was likely to be committed in prosecution of the object for which they had assembled."

24. It was further held that the knowledge of the consequential action in furtherance of the initial common object is sufficient to attract the applicability of Section 149 for holding the members of the unlawful assembly guilty for the commission of the offence by any member of such assembly.

25. It is also pertinent to refer to a decision reported in State of Maharashtra Vs. Kashirao and Others, , wherein it was held :

"The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available."

26. It is also pertinent to refer to a decision reported in Chanakya Dhibar (Dead) Vs. State of West Bengal and Others, , wherein it was held :

"Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141."

27. In a decision reported in *Dani Singh and Others Vs. State of Bihar*, , Para 15), it was held :

"Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case."

28. In a recent decision reported in *Sunil Kumar and Another Vs. State of Rajasthan*, , Para 7), it was held :

"Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly."

29. The learned Counsel for the appellants relied upon a decision reported in *Anil Rai v. State of Bihar*, : 2001CriLJ3969 , wherein it was held :

"The scope of Section 149, IPC has been . explained by this Court in various judgments holding that application of Section 149, IPC would be highly unsafe unless it is positively proved that each one of the accused shared the common object and accordingly participated in the occurrence."

30. Bearing the above principle in mind, it has to be seen whether the accused who are convicted with the aid of Section 149, IPC are the members of the unlawful assembly and whether they have shared the common object to kill both the deceased.

31. Except an omnibus allegation made by PW-1 that A-1 to A-57 armed with sticks and deadly weapons formed into an unlawful assembly and came to her house and they removed the iron grill and the door was broke open by them and thereafter A-1 to A-7 beat her husband (D-2) indiscriminately, she does not know the names of other accused. She did not specifically state as to the names of the persons, who are present outside the house, because even according to her it is A-1 to A-7 who entered into the house when she was present in the house.

32. As rightly contended by the learned Counsel for the appellants, it is not

possible for her to know the accused who were waiting outside the house or who had surrounded her house. So also, PW-2 stated the same thing that he was present inside the house. Therefore, there is no scope or possibility to see the other accused who were present outside the house. This witness also makes an omnibus allegation that all the accused raised cries before the incident.

33. Insofar as PW-3 is concerned, she did not speak about the presence of the A-1, A-8, A-12, A-21 and A-24. There is no other evidence to show that all the accused shared the common object in order to kill both the deceased.

34. There is no direct evidence or the circumstantial evidence so as to infer that the other accused who are convicted under . Section 149, IPC had intentionally joined or continued in that unlawful assembly or that they knew of the common object of the unlawful assembly or that an offence was committed in prosecution of the common object of the assembly or that they knew that such offence was likely to be committed in prosecution of their common object. Therefore, convicting the accused with the aid of Section 302 read with 149, IPC cannot be sustainable in view of the fact that there is absolutely no evidence or inferences can be drawn so as to arrive at a conclusion that the accused shared the common object in order to do away with the lives of the both the deceased.

35. The learned Sessions Judge on the sole ground that all the accused belong to one group of political party, and the prosecution witnesses and the deceased belong to another political party, found the accused guilty of charge u/s 302 read with Section 149, IPC. The finding of the learned Sessions Judge is that because more than five accused formed into an unlawful assembly and have participated in the offence of rioting, the charges have been proved. Mere participation does not make a member in the < assembly liable for the said charge unless it is established that those accused shared the common object or he knew that an offence is likely to be committed.

36. Hence, the conviction and sentence recorded against A-2 to A-7, A-10, A-14 to A-17, A-22, A-25, A-27, A-28, A-37, A-40 to A-45, A-47 and A-56 is not sustainable and they are entitled for the acquittal. Accordingly, the aforesaid appellants, A-2 to A-7, A-10, A-14 to A-17, A-22, A-25, A-27, A-28, A-37, A-40 to A-45, A-47 and A-56, are acquitted for the charge u/s 302 read with Section 149, IPC insofar as causing the death of I. Appalaswamy (D-1) is concerned. So also, the conviction of the appellants u/s 302 read with Section 149, IPC in causing the death of P. Appalanaidu (D-2) relating to A-8, A-10, A-12, A-14 to A-17, A-21, A-22, A-24, A-25, A-27, A-28, A-37, A-40, A-41, A-42 to A-45, A-47 and A-56 is also not sustainable and therefore, their conviction and sentence u/s 302 read with 149, IPC is set aside.

37. It is also contended that there was abnormal delay in sending the F.I.R. to the Court and the time was taken for the purpose of implicating the accused falsely because they belonged to the opposite political party, and therefore, there is any amount of suspicion with regard to the lodging of Ex. P-1.

38. It is not in dispute that the incident alleged to have been taken place at about 6.00 or 6.30 p.m., whereas the statement of PW-1 was recorded at 9.30 a.m. Admittedly," as per the evidence of PW-53, the F.I.R. (Ex. P-84) was received by the Court at 5.30 p.m. on 29-1 -2000. Admittedly, the Judicial First Class Magistrate Court is situated at a distance of 2 Kms. from the Police Station. Therefore, basing on the above fact, it is contended that the F.I.R. was brought into existence after due deliberations.

39. It is pertinent to refer to a decision reported in Ashok Kumar Pandey Vs. State of Delhi, , wherein it was held that :

"In our view, even in cases where there is some delay in dispatch of the first information report to the Court and its receipt by it, that alone can in no case be taken to be a ground for throwing out the prosecution case if otherwise the same is proved by unimpeachable evidence. However, in cases where the Court otherwise doubts the veracity of the prosecution case, they may be taken to be one of the grounds to discard the same."

40. PW-52, who is the Investigating Officer, immediately after coming to know about the case, went to the scene of occurrence at about 10.30 a.m. and the Sub-Inspector of Police (PW-53) also brought the printed F.I.R. PW-52 arranged police picketing because of the prevailing tense in the village. Even though there is a delay in dispatching the F.I.R. to the Court, but at the same time, the evidence of P.Ws. 1 to 3 is convincing. Some irregularity committed by the Investigating Officer in not forwarding the F.I.R. to the Court after its registration, does not by itself a ground to disbelieve the prosecution's case. Even otherwise it is not suggested to PW-53 that after due deliberations Ex. P-I was brought into existence. PW-53 has categorically stated that while he was present at Firing Range, Gantyada at about 8.30 a.m., he received a wireless message about taking place of rioting at Ramannapet. Thereafter, he rushed to the Community Health Centre, Gajapathi-nagaram and recorded the statement of PW-1 and reached the police station at 9.30 a.m. The fact that he went to the hospital after 8.30 a.m. and before 9.30 a.m. and the fact that he recorded the statement, Ex. P-1, have not been specifically denied or disputed in the cross-examination. Except giving an omnibus suggestion that he cooked up the F.I.R. (Ex. P-84) and Ex. P-I with consulting the Congress leaders, nothing has been elicited to discard his testimony. Therefore, in these circumstances, undue importance cannot be given to in not sending the F.I.R. to the Court immediately.

41. It is vehemently contended by the learned Counsel appearing for the appellants that no charge has been framed u/s 302, IPC against A-12, A-21 and A-24 and convicting them u/s 302, IPC simpliciter is bad and therefore, the conviction and sentence imposed against A-12, A-21 and A-24 is liable to be set aside.

42. As rightly pointed out by the learned Counsel for the appellants that the charge in respect of causing the death of the deceased No. 1 is only against A-1,

A-8, A-10 and A-40 and no specific charge has been framed u/s 302, IPC simpliciter against A-12, A-21 and A-24. But during the course of evidence of PW-3, the presence of A-12, A-21 and A-24 has come into existence. PW-3 specifically stated about the overt acts of A-12, A-21 and A-24. Except giving an omnibus suggestion that they did not beat the deceased, nothing has been elicited to discard her testimony. The evidence of PW-3 is completely in corroboration with the medical evidence,

43. The mere imperfection in the charge is not enough by itself for the purpose of setting aside the conviction. The conviction can be set aside only when apart from establishing that charge was defective, the accused is further able to satisfy the appellate Court that as a result of that defect he was misled in his defence and prejudice was occasioned to him as to cause a failure of justice. In a case in which the accused are fully aware of the case against them and had full opportunity of rebutting the evidence given against them, it must be held that no prejudice has been caused to them by the defect or imperfection in the charge. Even though no specific charge is framed u/s 302, IPC against A-12, A-21, A-24, but at the same time, a specific charge against them u/s 302 read with Section 149, IPC is framed.

44. Therefore, the accused had a fair trial and they knew that they had been tried for the murder of the deceased No. 1 and they were having a full and fair chance to defend themselves. u/s 464, Cr. P.C., it is possible for the appellate Court to convict an accused for an offence for which no charge was framed, unless the Court is of the opinion that a failure of justice would in fact occasioned. The only mistake committed by the trial Court is that Section 302 simpliciter has not been framed against A-12, A-21 and A-24. But a specific charge u/s 302 read with Section 149, IPC has been framed against them. So, convicting the appellants, A-12, A-21 and A-24, u/s 302, IPC simpliciter would not cause any prejudice to the case of the accused.

45. For the aforesaid reasons, the conviction and sentence passed against the accused under Sections 148, 323, 325 and 452, IPC is set aside. The conviction and sentence of the appellants, A-2 to A-7, A-10, A-14 to A-17, A-22, A-25, A-27, A-28, A-37, A-40 to A-45, A-47 and A-56, u/s 302 read with Section 149, IPC in respect of the death of the I. Appalaswamy (D-1) and also the conviction and sentence of the appellants, A-8, A-10, A-12, A-14 to A-17, A-21, A-22, A-24, A-25, A-27, A-28, A-37, A-40, A-41, A-42 to A-45, A-47 and A-56 u/s 302 read with Section 149, IPC in respect of the death of P. Appalanaidu (D-2) are set aside, confirming the conviction and sentence recorded against A-1, A-8, A-12, A-21 and A-24 u/s 302, IPC for causing the death of I. Appalaswamy (D-1) and A-1 to A-7 u/s 302, IPC for causing the death of P. Appalanaidu (D-2).

46. The Criminal Appeal is partly allowed to the extent indicated above.