

(2000) 08 KAR CK 0001
In the Karnataka High Court
Case No : Criminal Appeal No. 123 of 1997

Kemparaju and Others

APPELLANT

Vs

State of Balakavadi Police

RESPONDENT

Date of Decision : 04-08-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162
Evidence Act, 1872 — Section 145
Penal Code, 1860 (IPC) — Section 143, 147, 300, 302, 307

Citation : (2000) CriLJ 4734 : (2000) ILR (Kar) 4192 : (2001) 1 KarLJ 294

Hon'ble Judges : S.R. Bannurmath, J; B. Padmaraj, J

Bench : Division Bench

Advocate : M/s. Shankarappa and Associates, for the Appellant; Sri B.C. Muddappa, Additional State Public Prosecutor, for the Respondent

Judgement

1. Heard the arguments of the learned Counsel for the appellants and the learned Additional State Public Prosecutor for the respondent-State at a considerable length and carefully perused the case records in detail with their assistance.
2. This is an appeal by the appellants against the order of conviction by the Trial Court under Sections 143, 148, 302, 323 and 325 read with Section 149 of the IPC.
3. The appellants herein were charged and tried along with 5 others with having been the members of an unlawful assembly with the common object of committing the murder of the deceased Kempegowda and his mother Ningamma and to cause injuries to others and with having committed, in furtherance of that common object, offences punishable under Sections 143, 147, 148, 302, 307, 324 and 326 read with Section 149 of the IPC. Accused 9 and 10 were additionally charged with the offence punishable u/s 114 of the IPC.
4. The prosecution case is:

On 29-1-1992 at about 6.00 or 6.30 p.m. in the evening, when the deceased Kempegowda was returning to his house from the land, he had a quarrel with one Narayana (since deceased) in respect of or regarding the alleged rape on his sister Shakunthala P.W. 5 by one Thimmegowda (brother of accused 7) of their village as the deceased Narayana was supporting the case of the rapist. At that juncture, it is stated that all these accused came there armed with deadly weapons like axe, etc. Before that, it is stated that the deceased Narayana had assaulted the deceased Kempegowda and on his being so assaulted, the deceased Kempegowda was said to be running away therefrom. But, he was chased by these accused by saying that, if one is to die from their group, two persons from the group of the deceased Kempegowda were to be killed. These utterances were said to have been made by the accused persons 9 and 10 at the spot. Then accused 1 assaulted the deceased Kempegowda with axe on his head and accused 2 and 5 committed assault on him with club and "vonake" (pounding staff) on the right shoulder. The deceased Kempegowda fell down after sustaining injury to his person. Then accused 6 assaulted him on his back with a chopper. As a result of the injuries sustained by him, the deceased Kempegowda died on the spot. On hearing the sound of commotion when P.W. 1-Rajamma came to the spot, accused 8 assaulted P.W. 1 on her head with a club. Further, on hearing such commotion when the deceased Ningamma came to the spot, all these accused persons pushed her into a drainage situated by the side of the house of one Lingayath Mahadevappa and accused 7 assaulted on her back with a club. Accused 4 dropped a size stone on the head of the deceased Ningamma. Even accused 3, a juvenile offender, is stated to have dropped a stone on the head of the deceased Ningamma. In the meantime, other two brothers of P.W. 1, viz., P.W. 2-Venkatappa and P.W. 4-Prakasha, also came to the spot and the accused assaulted them also. Besides these persons, even the sister-in-law of P.W. 1, viz., Kempajamma-P.W. 3, on hearing the commotion had come to the spot and she was also assaulted with club and wooden repiece. P.W. 5-Shakunthala, sister of Kempegowda, has also come to the spot and on being frightened by the situation that was then prevailing, she was stated to have run away from the scene of the incidence. The alleged incident was witnessed by some of the villagers like P.W. 8 and others. But, unfortunately for the prosecution P.W. 8 did not support the prosecution case and the other witnesses have been given up as being won over by the accused. So, the only witnesses who supported the case for the prosecution regarding the occurrence are P.Ws. 1 to 4. It would be of some relevance to note here itself that even P.W. 5 had turned hostile to the prosecution.

5. The first information report in respect of this incident was lodged by P.W. 1-Rajamma at about 8.30 p.m. in the night with the Police Sub-Inspector P.W. 14 at the jurisdictional police station situated at a distance of about 7 kms from the place of incident. On the basis of the first information report lodged by P.W. 1, a case was registered in Crime No. 7 of 1992 and investigation was taken up. The injured P.Ws. 1 to 4 were sent for treatment to the Malavalli hospital where they

were examined by the Doctor P.W. 10. It appears that on the same day at about 7.30 p.m. in the night, one Boranna, the brother of the deceased Narayana, had lodged a complaint against the deceased Kempegowda stating that he had killed the deceased Narayana by stabbing him with a knife, which was registered in Crime No. 6 of 1992. Copy of the FIR issued in that case was marked as per Exhibit D. 6 by the defence. Thereafter, investigation of this case was taken over by Circle Inspector of Police P.W. 13 and the PSI, P.W. 14, had been asked to continue the investigation in Crime No. 6 of 1992. After completion of the investigation, the Circle Inspector of Police, P.W. 13, submitted charge-sheet against the accused and since accused 3 was found to be a juvenile, his case was split up from these accused persons.

6. The Trial Court on consideration of the entire evidence on record has convicted accused 1, 2, 5, 6 and 8 only for the offences punishable under Sections 143, 148, 302, 323 and 325 read with Section 149 of the IPC and sentenced them accordingly. Accused 4, 7, 9 and 10 have been acquitted of all the charges framed against them by giving them the benefit of doubt.

7. Aggrieved by this judgment and order of conviction, it is only the convicted accused 1, 2, 5, 6 and 8 have preferred this appeal challenging their conviction as well as sentence. The State has not preferred any appeal against the order of acquittal made in favour of accused 4, 7, 9 and 10. Therefore, in this appeal we are concerned only with the conviction of accused 1, 2, 5, 6 and 8.

8. Learned Counsel for the appellants has vehemently contended before us that there is an inordinate delay in lodging the complaint as well as in despatching the FIR to the jurisdictional Magistrate. While elaborating this submission, he contended that the complainant P.W. 1 has stated in her evidence that she gave her complaint at about 8.30 p.m. in the night; but the evidence of the PSI, P.W. 14, would clearly indicate that her statement came to be recorded at about 10.30 p.m. in the night. He contended that the very admission of the PSI P.W. 14, that he made an endorsement on Exhibit P. 1 to the effect that it was recorded at 10.30 p.m. would indicate that P.W. 1 could not have lodged the complaint at about 8.30 p.m. as alleged by her. According to the learned Counsel for the appellants, the first information report Exhibit P. 1, has been prepared after due deliberation after the Investigation Officer visiting the spot after Boranna lodged the complaint. He further contended that on the facts and circumstances of this case the delay in delivering the FIR to the jurisdictional Magistrate by the police will assume importance. He contended that there cannot be any dispute that there was undue delay in delivering the FIR to the jurisdictional Magistrate and the explanation offered by P.W. 16 with regard to the said delay is not capable of being accepted. While elaborating this submission, he contended that, when P.C. No. 6 could take the injured persons to the hospital, the evidence of P.W. 16 that he could not get a conveyance during the night to deliver the FIR to the jurisdictional Magistrate is patently false and hence the explanation offered by him cannot be believed. He therefore

contended that the delay in lodging the FIR as well as in despatching the FIR to the jurisdictional Magistrate has been utilised by the Investigating Officer to give a shape to the case filed against these accused persons. He, therefore, contended that concoction had started even at the threshold itself. He contended that the complainant P.W. 1 is not a witness to be believed as she has suffered certain vital omissions in her testimony given in the Court. He also incidentally contended that the FIR Exhibit P. 1, said to have been lodged by P.W. 1 is hit by Section 162 of the Cr. P.C. in view of the fact that one Boranna had already lodged a complaint in respect of the incident which took place at that relevant night. He further contended that there is also considerable delay in recording the statements of P.Ws. 2 to 4, though they were available to the Investigating Officer. It is also contended on behalf of the appellants that the earlier statements of P.Ws. 2 to 4 recorded by the Investigating Officer have been suppressed in the case. He contended that the evidence of the PSI-P.W. 14, would clearly indicate that he recorded the statements of P.Ws. 2 to 4 in the same night at about 8.00 p.m. in the police station and that being so, the said statements which are said to have been recorded by the PSI P.W. 14, ought to have been produced by the prosecution. But, they have been suppressed for the reasons best known to the prosecution. He also contended that the genesis of the incident has been suppressed by the prosecution. He further contended that the medical evidence does not corroborate the eye-witness account given by P.Ws. 1 to 4. Coming to the testimony of P.W. 4, he contended that he has also suffered certain contradictions and omissions as per Exhibits D. 3(a) to (c) and hence he is not a witness to be implicitly relied upon. According to the learned Counsel, having regard to the improvements made by P.W. 4 it is doubtful whether P.W. 4 could be an eye-witness to the incident. He, therefore, contended that there could be no corroboration from P.W. 4 to P.S. 1, when P.W. 4 himself is not capable of being relied upon. He also contended that the circumstances regarding recovery at the instance of the accused has also not been proved in the manner as alleged by the prosecution. He contended that the case of the prosecution read as a whole is not free from doubt and hence the benefit of doubt must go to the appellants. He contended that the Trial Court did not give much importance to the omissions and the contradictions suffered by P.Ws. 1 and 4 which has resulted in miscarriage of justice. He also contended in the alternative that it is likely that the accused might have acted in retaliation after the death of the deceased Narayana and that being so Section 149 of the IPC is not at all attracted to the case on hand. He, therefore, contended that the Trial Court was not justified in convicting the accused with the aid of Section 149 of the IPC.

9. Learned Counsel for the appellants has relied upon the following decisions in support of his submission:

1. Lakshmi Singh and Others Vs. State of Bihar, , wherein it is held that, if the prosecution fails to explain the injury on the accused, two results follow i.e., the evidence of the prosecution witness is untrue and that the injuries probabilise the

plea taken by the appellants.

2. State of Haryana Vs. Chandvir and others, , wherein it is held that when the injuries suffered by some of the accused in the same transaction are not explained by the prosecution and the witness and the witnesses fabricate and improve their version from stage to stage, no implicit reliance can be placed on their evidence to convict the accused.

3. Dhanna v State of Madhya Pradesh, wherein it is held that, if the prosecution witness did not refer to any role played by the accused when he gave his statement to the police during investigation, the accused cannot be convicted for murder on the basis of the improvements made by the said witness at the trial.

4. State of U.P. Vs. Moti Ram and another etc., , (Head notes E and C) wherein it is held that where the witness falsely implicating the persons who are in prison at the time of offence and the possibility of witnessing the incident while he was fleeing for life is doubtful, the evidence of eye-witness was not reliable. It is also held therein that the General Diary indicating that the statements of the eye-witnesses were taken on the next day after the incident and the admission made by one of the witnesses, i.e, his vision was impaired, no blood being found at the place where the witness was allegedly lying at the time of the occurrence and the witness being indisputably a partisan witness, their evidence is held to be unreliable.

10. While relying upon the above decisions, the learned Counsel for the appellants has contended that the testimony of P.Ws. 1 and 4 given in Court is not capable of being relied upon and hence their evidence is liable to be discarded and except their evidence there is no other evidence to connect the accused with the crime. He, therefore, contended that the accused are entitled to acquittal.

11. As against this, the learned State Public Prosecutor for the respondent-State has contended that even assuming that the Investigating Officers-P.Ws. 13 and 14, have committed certain irregularity that by itself will not be sufficient to discredit the evidence of the eye-witnesses, when their evidence is otherwise found to be trustworthy and reliable. In support of his submission, he relied upon a decision in State of Karnataka v K. Yarappa Reddy. According to the learned State Public Prosecutor, merely because the PSI P.W. 14, has stated that he has made an endorsement on Exhibit P. 1 for having recorded the same at 10.30 p.m. that by itself cannot take away the positive evidence of the complainant P.W. 1 that she has lodged the complaint with the police on 8.30 p.m. He further contended that, if the evidence of P.W. 1 and P.W. 14 are read together carefully, it would clearly indicate that the first information was lodged by the complainant P.W. 1 at about 8.30 p.m. on that night and not 10.30 p.m. In this context, he contended that merely because the PSI P.W. 14, had either deliberately or by mistake made a wrong endorsement that by itself will not take away the positive evidence of P.W. 1 that she has lodged the complaint at about 8.30 p.m. He

further contended that in view of such discrepancy only even the Trial Court in order to find out the truth, had posed certain questions to the PSI P.W. 14, and the said material brought on record would clearly indicate that the first information to the police in respect of this incident was lodged by P.W. 1 at about 8.30 p.m. in the night and not at 10.30 p.m. He contended that, when the incident in question took place at about 6.00 or 6.30 p.m. in the evening and the first information having been lodged at about 8.30 p.m. itself at the jurisdictional police station, it cannot be said that there was undue delay in lodging the FIR with the police. With regard to the delay in delivering the FIR to the jurisdictional Magistrate, he contended that the same has been properly and reasonably explained by P.W. 16 in his testimony in Court. He also contended that, when the FIR has been promptly lodged by the complainant P.W. 1 to the police, even assuming that there is some delay in despatching the FIR, that by itself will not be sufficient to discredit the case of the prosecution. He further contended that the FIR Exhibit D. 6, lodged by Boranna does not pertain to the incident in question and on the other hand it is in respect of an incident relating to the death of the deceased Narayana and, hence, the FIR Exhibit P. 1, is not hit by Section 162 of the Cr. P.C. While elaborating this submission, he contended that there were two incidents - one pertaining to the death of the deceased Narayana and the other pertaining to the death of the deceased Kempegowda and his mother Ningamma. He contended that it is no doubt true that one incident has followed the other, but at the same time both the incidents were distinct and separate. He, therefore, contended that merely because Boranna has lodged his complaint as per Exhibit D. 6 in respect of the earlier incident, the complaint Exhibit P. 1 lodged by P.W. 1 in respect of the subsequent incident cannot be hit by Section 162 of the Cr. P.C. According to the learned State Public Prosecutor, insofar as the present incident is concerned, it is only the complainant P.W. 1 who had lodged the first information and it is at Exhibit P. 1. He also contended that the mere delay in recording the statements of certain eye-witnesses in itself not sufficient to discard their evidence in the absence of there being anything on record to show that the delay has been utilised by the prosecution or by the Investigating Officer to fabricate a false case against the accused persons. He contended that in the instant case, when the first information report was already lodged by P.W. 1 at about 8.30 p.m. itself, the mere delay in recording the statements of P.Ws. 2 to 4 cannot be a circumstance which can be used against the prosecution. In support of this submission, he has relied upon a decision in Ramesh Gavli Vs. State of Madhya Pradesh and Others, . He further contended that even the defence did not dispute the presence of P.Ws. 1 to 4 at the time of the incident at the spot and that being so, the testimony of these two witnesses in Court cannot be discarded merely because they have suffered certain omissions which are highly inconsequential. He further contended that the evidence of P.Ws. 1 and 4 would clearly indicate the role played by accused 1, 2, 5 and 6 in causing the death of the deceased Kempegowda. Similarly, he contended that the evidence of P.W. 4 would clearly indicate the active participation of accused 8 in the commission of assault on the deceased

Kempegowda. He also contended that the evidence of P.Ws. 1 and 4 would clearly indicate the active participation of the above accused in committing the assault on the deceased Ningamma with club and further assaulting her with stone by pushing her into a drainage. He contended that there was a common object on the part of the appellants to cause death of the deceased Kempegowda and Ningamma and that being so, all the members of the said unlawful assembly are vicariously liable for the acts committed by each one of them. He contended that, when the common object is proved, mere participation is sufficient to convict the accused with the aid of Section 149 of the IPC. He also contended that the omissions pointed out on behalf of the appellants are all minor omissions and not so vital as to discredit the evidence of P.Ws. 1 and 4, He, therefore, contended that the judgment and order of conviction of the appellants made by the Trial Court warrants no interference at the hands of this Court in appeal.

12. Before we proceed to consider the case on merit, in the light of the submissions made on both sides, we shall place on record certain basic propositions with regard to appreciation of evidence in a criminal case as has been laid down and enunciated in various decisions of the Hon'ble Supreme Court.

1. In the case of *Sohrab and Another Vs. The State of Madhya Pradesh*, , the Hon'ble Supreme Court has held that merely because there has been discrepancies and contradictions in the evidence of some or all of the witnesses, it does not mean that the entire evidence of the prosecution has to be discarded. It is only after exercising caution and care and sifting the evidence to separate truth from untruth, exaggeration, embellishments and improvements, if the Court comes to the conclusion what can be accepted to implicate the accused and it will convict them.

2. In the case of *Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra*, , the Hon'ble Supreme Court has held that the too sophisticated approaches familiar in Courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variance on the fringes, discrepancies in details, contradictions in narrations and embellishments in essential part cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered.

The sluggish chronometric sense of the country-side community in India is notorious since time is hardly of the essence of their slow life and even urban folk make mistakes about time when no particular reason to observe and remember the hour of a minor event like taking a morning meal existed and too much play on such slippery facts goes against realism so essential in a testimonial appraisal.

3. In the case of *Bhajan Singh and Others Vs. State of Uttar Pradesh*, , the

Hon''ble Supreme Court has held that even if the accused were originally members of an unlawful assembly with the common object of only beating the deceased, having come forward with deadly weapons if the members of the assembly knew that by using those weapons on the deceased death would be caused they would be all guilty u/s 302 read with Section 149 of the Indian Penal Code.

Section 149 of the Indian Penal Code, constitutes per se a substantive offence although the punishment is under the section under which it is being committed by the principal offender in the unlawful assembly, known or unknown.

4. In the case of Mst. Dalbir Kaur and Others Vs. State of Punjab, , the Hon''ble Supreme Court has held that a close relative of the deceased in a murder case who is a very natural witness cannot be regarded as an interested witness. The term "interested" postulated that the person concerned must have some direct interest in seeing that the accused person is somehow or other convicted either because he had some animus against the accused or for some other reason.

In the same decision it has been further held that there is no rule of law that if the Court acquits an accused on the evidence of a witness find it to be open to some doubt, any other accused against whom there is absolute certainty about this complicity in the crime based on the remaining credible part of the evidence of that witness, should also be acquitted.

5. In the case of K. Yarappa Reddy, supra, the Hon''ble Supreme Court held that the suspicious role of the Investigating Officer, like manipulation in a station house diary is not fatal to the prosecution. The Court, if convinced of truthfulness of the testimony of a witness to the occurrence, can act on such testimony irrespective of the suspicious role of the Investigating Officer.

6. In the case of Ambika Prasad and Another Vs. State of (Delhi Administration, Delhi), , it has been held by the Hon''ble Supreme Court that in a case of defective investigation it would not be proper to acquit the accused if the case is otherwise established conclusively. A criminal trial is meant for doing justice to the accused, the victim and the society so that law and order is maintained. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.

7. In the case of Hari Singh and another Vs. State of Rajasthan, , it is held that the name mentioned in FIR but statement recorded about 16 days later, the Investigating Officer clarifying that the witness was not available when he tried to be contacted, in such circumstances, merely because the said witness had deposed that during all those days he was in the village and had not gone out, it could not be inferred that the Investigating Officer was not telling the truth and that the witness concerned was a got-up witness.

8. In the case of Paras Yadav and others Vs. The State of Bihar, , it has been held by the Hon''ble Supreme Court that it is true that there is negligence on the part of the Investigating Officer. On occasions, such negligence or omission may give rise to reasonable doubt which would obviously go in favour of the accused. But in the present case, the evidence of the prosecution witnesses clearly establishes beyond reasonable doubt that the deceased was conscious and he was removed to hospital by bus. It is held that in such a case the lapse on the part of the Investigating Officer should not be taken in favour of the accused. It may be that such lapse is committed designedly or because of negligence and hence the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not.

9. In the case of Tahsildar Singh and Another Vs. The State of Uttar Pradesh, , it has been held that the procedure prescribed for contradicting a witness by his previous statement made during investigation, is that, if it is intended to contradict him by the writing, his intention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The proviso to Section 162 only enables the accused to make use of such statement to contradict a witness in the manner provided by Section 145 of the Evidence Act. It would be doing violence to the language of the proviso if the said statement be allowed to be used for the purpose of cross-examining a witness within the meaning of first part of Section 145 of the Evidence Act.

10. In the case of Masalti Vs. State of U.P., , it is held that Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.

Keeping these principles in mind we shall now proceed to consider the case on merits in the light of the submissions made on both sides.

13. There is no serious dispute about the cause of death of the deceased Kempegowda and Ningamma. It is also not in serious dispute that they had met with homicidal death. It is however the case of the accused that it is one Narayan (since deceased), was responsible for the death of the deceased Kempegowda and his mother Ningamma, while it is the case of the prosecution that the deceased Kempegowda and his mother Ningamma died at the hands of this accused. Now it has to be seen whether the Trial Court was justified in convicting the appellants herein for the above said offences.

14. It is not in dispute that in respect of the death of one Narayana, on the basis

of a complaint lodged by one Boranna as per the copy Ex. D. 6, Crime No. 6 of 1992 was registered against the deceased Kempegowda only. The contents of the copy of the said FIR Ex. D. 6 would read as under:--

15. This document Ex. D. 6 which has been marked on behalf of the accused and placed reliance by the defence would show that after the deceased Kempegowda had stabbed and killed the deceased Narayana, the accused persons namely Kempraj and others had started the galata. This is very clear from the above contents of the FIR Ex. D. 6, which says that as soon as the deceased Kempegowda had stabbed the deceased Narayana, the deceased fell down and died and within a short while thereafter the accused 1-Kempraj and others, who came armed with clubs etc., had started the galata. Therefore, the contents of this Ex. D. 6 relied upon by the accused themselves would show that the deceased Narayana could not have assaulted the deceased Kempegowda, his mother Ningamma and the other injured persons namely P.Ws. 1 to 4. Therefore, the possibility of the deceased Kempegowda and Ningamma being killed by the deceased Narayana referred to in Ex. D. 6 is ruled out by the contents of this document. Ex. D. 6 that apart the contents of this document Ex. D. 6 would further indicate that in all probability there were two incidents, one relating to the killing of the deceased Narayana and the other subsequent incident relating to the killing of the deceased Kempegowda and his mother Ningamma and causing injuries to P.Ws. 1 to 4. It is to be seen therefore that the subsequent incident appears to be in answer or in retaliation to the earlier incident. In this backdrop we shall now proceed to consider the materials placed on record in respect of the incident in question.

16. In order to prove its case, the prosecution has mainly relied on the evidence of the injured eye-witnesses P.Ws. 1 to 4.

17. It is no doubt true that P.Ws. 1 to 4 are close relatives of the deceased Kempegowda and Ningamma. But there is no general rule that the evidence of the relations of the deceased must be corroborated for securing the conviction of the appellants. Each case depends on its own facts and circumstances. In the instant case, the evidence of P.Ws. 1 and 4 was found to be truthful and convincing by the Trial Court. It has to be pointed out that the venue of the incident besides being not disputed by the accused, is amply proved from the materials on record. The contents of the copy of the FIR Ex. D. 6 relied upon by the accused themselves, as we have already pointed out, would show that within a short while of the killing of one Narayana by the deceased Kempegowda, the accused 1-Kempraj and others of this case, who were armed with clubs etc., had started the galata giving rise to the present incident. It would therefore indicate that within a short while of the incident of assault and killing of the deceased Narayan, the incident in question had started by the accused 1-Kempraj and others being armed with clubs etc. Therefore, in this background if the evidence of P.Ws. 1 and 4 is found to be trustworthy as has been recorded by the Trial Court, the non-examination of any independent witnesses will be of no

consequence and it will not be fatal to the prosecution case. Therefore, we shall now proceed to consider the evidence of P.Ws. 1 and 4 in order to find out whether their evidence with regard to the incident in question is worthy of acceptance as has been found by the Trial Court.

18. P.W. 1, P.W. 4 and the appellants herein belong to the same village and they were well-known to each other. The incident in question took place in front of a house in the midst of the village at about 6.00 or 6.30 p.m. in the evening. The incident in question had occurred in the last week of January. Having regard to these materials on record, there can be no difficulty regarding the identification of the assailants. Further P.W. 1 has stated in her evidence that there was sufficient light at the time of the incident at the spot.

19. P.W. 1-Rajamma besides being an injured eye-witness to the incident in question, had also lodged a complaint as per Ex. P. 1 in respect of this incident at the police station on the same night at about 8.30 p.m. The distance between the place of incident and the police station was about 7 kms. In this case, we cannot shut our eyes to the reality that for the complainant P.W. 1 it is her mother and brother who were butchered right in front of her eyes. Therefore, if she had taken a couple of hours to regain her composure to go to the police station for lodging the complaint Ex. P. 1 it only sounds as normal conduct of a member of the bereaved family in the aforesaid circumstances. We find no good ground or justification to use that short delay for denouncing the core of the prosecution case. It was however contended by the Learned Counsel for the appellants that in this case the endorsements made by the PSI P.W. 14 would show that the complaint Ex. P. 1 came to be recorded by him at about 10.30 p.m. in the night and not at 8.30 p.m. as alleged by the complainant P.W. 1. It is no doubt true that the said endorsement would reveal that the same has been recorded by the PSI P.W. 14 at 10.30 p.m. But we have the positive evidence of the complainant P.W. 1 who has clearly stated that she went to the police station and lodged her complaint at about 8.30 p.m. in the night. In fact even the PSI P.W. 14 has stated in his cross-examination that the statement of the complainant P.W. 1-Rajamma was recorded to writing by him at about 8.00 or 8.15 p.m. and it is in his own handwriting. He has also stated that the said complaint of P.W. 1 was recorded at the police station. Then on being confronted with the endorsement made by him on the complaint Ex. P. 1 he has stated that it shows that it was recorded at 2230 hrs. In fact in view of such ambiguity, the Trial Court had also put certain questions in order to find out as to when exactly the complaint Ex. P. 1 came to be lodged by P.W. 1 and the said attempt made by the Trial Court would reveal that on that night P.W. 1-Rajamma had visited the police station at about 8.00 or 8.10 p.m. and her complaint came to be recorded as per Ex. P. 1. To be more specific, this is what P.W. 14 has stated to the Court questions that "'at about 8.00 or 8.10 p.m. P.W. 1-Rajamma appeared at the police station. When Rajamma came to the police station, Boranna was also present at the police station itself but after seeing the face of Rajamma-P.W. 1, Boranna left the police station". It is thus clear from the evidence of PSI P.W. 14

that the complainant P.W. 1 had come to the police station at about 8.00 or 8.10 p.m. to lodge a complaint in respect of this incident. In this context the evidence of the complainant P.W. 1 would clearly indicate that she had lodged the complaint at about 8.30 p.m. at the police station. Therefore, in our view it leaves no doubt that the first information in respect of this incident came to be lodged by the complainant P.W. 1 at the police station at about 8.30 p.m. Even assuming that the alleged endorsement made by the PSI, P.W. 14 on the complainant lodged by P.W. 1 would create some doubt regarding the time at which the FIR in respect of this incident had been lodged by her. That by itself will not be sufficient to discredit the substantive evidence of P.W. 1 given in Court, which gets ample support from the other circumstances appearing in the case. The said endorsement made by the PSI, P.W. 14, at the most will only create a suspicion on the role of the P.W. 14, which is not necessarily fatal to the prosecution. It has to be stated that the Court if convinced of truthfulness of the testimony of P.W. 1 given in Court with regard to the occurrence in question, it can act on such testimony notwithstanding the suspicious role of the PSI, P.W. 14. Insofar as the complainant, P.W. 1 is concerned, she is positive in her say that she has lodged the complaint in respect of this incident at 8.30 p.m. and not at 10.30 p.m., which is further confirmed from the evidence of the PSI P.W. 14. That apart the mere delay in lodging the FIR, if any, cannot by itself be a ground to disbelieve the prosecution evidence. Unless there are indications of fabrication, the Court cannot reject the prosecution version as given in the FIR and later substantiated by evidence, merely on the ground of delay in lodging the FIR. In case of suspicion, the Courts should scrutinize the evidence of the interested witnesses with greater care and caution. In the instant case there is nothing on record to indicate that there was a delay in lodging the FIR with intent to deliberate over the matter to involve some innocent person. That being not the case here, even if there is any delay, no significance can be attached to it. It would be of some relevance to note here itself that all the details of the facts are not required to be mentioned in the FIR. It is not expected that each and every details should be mentioned in the FIR. Therefore, non-mentioning of some facts in the FIR Ex. P. 1 by the complainant P.W. 1 is not at all fatal to the prosecution case. As we have already stated, in the instant case, there is nothing on record to show that the FIR Ex. P. 1 lodged by P.W. 1 is a result of fabrication or it was lodged after due deliberation. On the other hand it has been promptly lodged without inordinate delay, giving out all the essential particulars of the occurrence relating to the death of the deceased Kempegowda and his mother Ningamma. In fact if the complaint Ex. P.] of P.W. 1 is read alongside the FIR Ex. D. 6 lodged by Boranna in the other case relating to the death of the deceased Narayana, it will give a clear indication as to what has been stated in the FIR Ex. P. 1 by the complainant P.W. 1-Rajamma is a true and correct version of the incident. It has to be stated that giving of more details while deposing before the Court is not improvements in the strict sense of the term. Likewise, the non-acceptance of the evidence against some of the co-accused for independent corroboration etc., it does not introduce any infirmity in the evidence of either

P.W. 1 or P.W. 4 regarding the reliability of their evidence. If the evidence of P.Ws. 1 and 4 is found to be trust-worthy, the above delay even if any in lodging the FIR Ex. P. 1 will not be of any consequence in view of what we have stated above. A reading of the testimony of P.W. 1-Rajamma makes it very impressive that on hearing the sound of commotion, she rushed out of the house to see what was going on. Her mother Ningamma had also been present at that time in the house. When P.W. 1 was approaching the house of one Lingayatha Mahadevappa of their village, she saw her brother Kempegowda quarrelling with the deceased Narayana and while they are so quarrelling, it is stated that all these accused persons came there armed with weapons like axe etc., she has further stated that before that her brother Kempegowda had been assaulted by the deceased Narayana and hence her brother Kempegowda was running away therefrom. It is no doubt true that in the FIR Ex. P. 1, the complainant P.W. 1 had stated that her brother Kempegowda having assaulted the deceased Narayana was returning to the house and within a short while thereafter, the present incident took place. Therefore, to that extent the evidence of P.W. 1 in Court being not in conformity with the FIR Ex. P. 1, it cannot be believed. But with regard to the rest of the incident is concerned it is quite in conformity with the contents of the FIR Ex. P. 1. It would only show that the complainant P.W. 1 had tried to plead her ignorance with regard to the earlier incident. But that by itself is not sufficient to discredit her evidence with regard to the incident in question. It would therefore appear to us that in all probability and more so in view of the contents of the FIR Ex. D. 6 of one Boramma relied upon by the accused themselves and also looking to the contents of the complaint Ex. P. 1 lodged by P.W. 1, the incident in this case took place while the deceased Kempegowda was returning to his house after assaulting the deceased Narayana. With regard to the actual incident of assault, P.W. 1 has stated that the accused 1 had assaulted her brother Kempegowda with an axe on his head and the accused 2 and 5 had assaulted him with a club and vonike on his right shoulder. As a result of such assault, her brother fell down. Then she says that the accused 6 committed assault on the back of her brother Kempegowda with a chopper. Her brother Kempegowda had died on the spot. She has further stated that when she had raised hue and cry on seeing the assault committed on her brother, the accused 8 assaulted her, on her head with a club. On hearing her hue and cry, when her mother Ningamma came to the spot from the house, she was pushed into a drainage and then the accused 7 assaulted her mother on her back with a club and the accused 4 took a size stone which was lying on the spot and dropped it on the head of her mother Ningamma. She has stated that the face of her mother was crushed. In the meanwhile her brothers P.Ws. 2 and 4 also came there and they were also assaulted by the accused. According to her even her sister-in-law P.W. 3 who came to the spot was assaulted by the accused.

20. P.W. 4-the brother of the deceased Kempegowda as well as P.W. 1 has stated that on that relevant day at about 6.00 or 6.30 p.m. while he was coming from the land towards their house, he saw his brother Kempegowda being assaulted

by accused 1. Accused 1 assaulted his brother Kempegowda on his head with the axe. The accused 6 has assaulted his brother Kempegowda on his right shoulder with a chopper and the accused 8 had assaulted him with an wooden repiece on his back. He has also stated that in the meantime his mother Ningamma came there and the accused 8 assaulted his mother with a club. His mother fell into a drainage. Then the accused 1 and 2 dropped stones on the head of his mother. Thereafter, the accused 3 and 8 came near him and assaulted him with kaggali badige and reaper on his right hand, arm and back. Fearing that they may kill him, he says that he ran into the village.

21. Now we shall advert to the evidence of the doctor P.W, 12, who conducted the post-mortem examination on the dead body of the deceased Kempegowda. He noticed the following external injuries on the dead body of the deceased Kempegowda.--

(1) An incised injury over the left frontal region and near the hair line measuring 7.5 cm. in length and depth bone deep.

(2) A lacerated injury over the right temporal region, extending to the interior aspect of occipital region, length 16 cm. and 8 cm., width. Depth upto the brain mater. Skull opened out. There was a fracture of lateral part of temporal, partial and frontal bones on the right side. Dura mater is visible through the injury and dura mater is injured just beneath the temporal bone.

(3) A lacerated injury over the posterior aspect of right ear length 8 cm., width 1 cm., depth 1 cm.

(4) A lacerated injury over the scalp just above the right ear 8 cm. x 2 cm. x 1 cm.

(5) An incised wound over the middle right external ear measuring 4 cm., and the cartilage of the pinny was also injured and the same was seen through the injury.

(6) Shape of the face on the left half was disfigured and on palpation there appears to be clinical fracture of the skull bone on the left side of face. On opening of the skin, there was a fracture of following bones of the skull's -- frontal, zygomatic, temporal, maxilla and mandible on the left side.

22. He has opined as to the cause of death of the deceased Kempegowda was due to injuries to vital organ like brain, hemorrhage and shock. According to him the injuries 1 and 5 can be caused by sharp edged weapons like MOs. 1 and 2 and injury Nos. 2 to 4 can be caused by MOs. 7, 8 and 10. He has further stated that injury No. 6 can be caused by MOs. 3 and 4 or both. The above evidence of the doctor P.W. 12 is in conformity with the ocular evidence of P.W. 1 with regard to the assault committed on the deceased Kempegowda. It is true that in the cross-examination of the possibilities of sustaining such injury. But the medical evidence cannot be considered in isolation. After all, medical opinion is based on inferences drawn from various facts present. Merely because the doctor P.W. 1

had stated certain hypothetical answers with regard to the possibility of the deceased Kempegowda sustaining certain injuries, that by itself cannot detract the evidence of P.W. 1. However in this case, we find that the medical evidence of the doctor P.W. 11 is quite positive that the injuries sustained by the deceased Kempegowda could be caused with the weapons shown to him in Court and there is no reason to doubt the same. Insofar as the post-mortem report issued in respect of the deceased Ningamma is concerned, the doctor who conducted post-mortem examination on the dead body of deceased Ningamma could not be examined in Court for non-availability of the said doctor and the same has been proved through the evidence of her colleague P.W. 12-Dr. Syed Ghouse Mohiddin, P.W. 12 is quite acquainted with the handwriting and signature of the Dr. Nageena Banu who conducted the post-mortem examination on the dead body of the deceased Ningamma and he has stated that the post-mortem report Ex. P. 24 has been issued by the Dr. Nageena Banu who conducted the post-mortem examination on the dead body of the deceased Ningamma. When the Dr. Nageena Banu who conducted the post-mortem examination on the dead body of the deceased Ningamma was not available to give evidence in Court, the Trial Court was justified in admitting the post-mortem report in respect of the deceased Ningamma as evidence without insisting upon the evidence of the said doctor and the same being proved through the evidence of the doctor P.W. 12 who was acquainted with the handwriting and the signature of the said Dr. Nageena Banu. In fact there is also a separate order passed in that regard by the Trial Court on 24-9-1996. Therefore, we find no merit in the contention urged on behalf of the appellant that the post-mortem report in respect of the deceased Ningamma could not have been marked in the absence of the evidence of the doctor who conducted the post-mortem examination. The description of the injuries as mentioned in the post-mortem reports as well as in the inquest reports Ex. P. 4 which has been proved through the evidence of P.W. 6 and P.W. 13, would also substantially corroborate with the evidence of the eye-witness P.W. 1. P.W. 1-Smt. Rajamma besides being an eye-witness to the incident, had also sustained injuries on her person. The evidence of the doctor P.W. 10 would show that the complainant P.W. 1 had sustained the following injuries on her person.--

(1) Cut wound with bleeding present on right side of forehead measuring 3" x 1/4 x upto scalp bone deep.

(2) A contusion wound present on right middle forearm measuring 3" x 2 x 1/2".

23. The doctor P.W. 10 has further stated that he had treated the injured P.W. 1 and referred her for further treatment to an orthopedic surgeon at Mandya. P.W. 11 is the doctor who had treated the complainant P.W. 1-Rajamma at Mandya. He has stated that on examination of injured P.W. 1, he found on her person the following injuries:

(1) Heeled sutured wound over the vertex, 5 cm. x 1 cm. in length.

(2) Swelling of right forearm middle 1/3rd present, tenderness present. X-ray of

ulna right forearm taken on 12-2-1992 revealed fracture of shaft of right ulna.

24. According to the doctor P.W. 11 the injury No. 1 was simple in nature while the injury No. 2 was grievous in nature. He has issued the wound certificate as per Ex. P. 15. According to him, the injury No. 2 sustained by the complainant P.W. 1 could be caused with any blunt weapon. The injuries sustained by P.W. 1 could not be self-inflicted. From the above said facts, it can be seen that the complainant P.W. 1 had received injuries on her person including a grievous injury and her presence at the scene of occurrence cannot be doubted. Therefore, the evidence of the complainant P.W. 1 carries great weight and the same is further corroborated by the other evidence on record including the evidence of P.W. 4. The Court below has given cogent reasons for accepting the evidence of the complainant P.W. 1. P.W. 4 is another eye-witness whose testimony was found to be reliable by the Trial Court. P.W. 4 is none other than the brother of the deceased Kempegowda. According to him when he was returning from the land towards the house on that fateful day he saw the dead body of the deceased Narayana lying near the flour mill of one Mahadevappa and he also sees the accused 1 assaulting his brother Kempegowda on his head with an axe. The accused 6 assaulted Kempegowda on his right shoulder with a chopper while the accused 8 had assaulted him on the back with wooden repiece. He also saw accused 3 assaulting his brother Kempegowda on his leg and other parts of the body with kaggali badige. On being so assaulted, his brother Kempegowda fell down. He has further stated with regard to the occurrence as under.--

"2. After my brother Kempegowda fell down, A-2 Narayana came and dropped a stone on his head. A-9 and A-10 were instigating the accused to assault. In the meantime, my mother Ningamma came there. A-8 assaulted my mother with a club. Hence, she fell down in the drainage. A-1 and A-2 stating "Ivaloo bandiddale Ivalannu mugisi". Each one of them took a stone and dropped on the head of my mother. A-2 and A-8 came there and assaulted me with kaggali badige and reaper respectively on my right hand arm and back respectively. Fearing that, they would murder me, I ran inside the village to hide".

25. P.W. 4 was also examined by the doctor P.W. 11 and he found on his person the following injury.--

(1) Contusion wound on the right elbow joint with diffused swelling, tenderness present. The wound was measuring by 3" x 2" x 1/2".

26. He has issued the wound certificate as per Ex. P. 13 though the injury sustained by P.W. 4 has been described as simple in nature, it could not be a self-inflicted injury even according to the doctor. The evidence of P.W. 1 receives substantial support from the evidence of P.W. 4 with regard to the assault committed on the deceased Kempegowda and his mother Ningamma. Merely because the complainant P.W. 1 gave some wrong description of weapon used or that some other weapon was seized, her evidence cannot be discredited on that

score. It is no doubt true that P.Ws. 1 and 4 are the close relatives of the deceased. But then as we have already stated there is no general rule that the evidence of the relatives of the deceased cannot be accepted unless corroborated for securing conviction of the accused. Each case depends on its own facts and circumstances. The Trial Court has taken great pains in fully scrutinizing and properly evaluating the evidence of P.Ws. 1 and 4 and after applying the correct principles governing the appreciation of the evidence of relations, accepted the evidence of these 2 witnesses P.Ws. 1 and 4 as true and convincing. We have also scrutinized the evidence of P.Ws. 1 and 4 and we find no good ground to discard their evidence. Once P.Ws. 1 and 4 are held to be trustworthy, then there could be no reason for not acting upon their testimony. The fact that the other persons v/ho were present at the spot and had witnessed the occurrence have without any good reason or with oblique motive chosen not to state the truth in Court and thereby to obstruct the course of justice, could prove a sound reason for sustaining the conviction of the appellants. To decline to act upon the evidence of P.Ws. 1 and 4 because of the absence of the other witness to corroborate them in Court is to defeat the cause of justice in the present case. Further merely because there have been discrepancies and contradictions in the evidence of P.Ws. 1 and 4, it does not mean that the entire evidence of the prosecution is to be discarded. It is only after exercising caution and care and sifting the evidence to separate the truth from falsity, the Trial Court came to the conclusion that what can be accepted clearly implicates the accused, it will convict them. The maxim, *falsus in uno, falsus in omnibus* is not a sound rule for the reason that hardly one comes across a witness whose evidence does not suffer from any exaggeration. In most of the cases, the witnesses when asked about details, venture to give some answer not necessarily true or relevant, for fear that their evidence may not be accepted in respect of the main incident which they have witnessed. It is no doubt true that P.W. 14 had stated that he had recorded the statement of P.Ws. 2 to 4 on the same night and P.W. 13 has stated that he had recorded their statement on the next day morning while P.W. 2 would say that his statement was obtained at the hospital. But that by itself will not be sufficient to discredit the testimony of P.W. 4 in Court when it has not been shown that there were any serious variations in the said statements made by P.W. 4. That apart it has to be remembered that the witnesses were giving evidence in Court after a lapse of 2 or 3 years from the date of the incident and it is quite likely that they may not be accurate as to when their statement was recorded. Therefore, merely because there is some discrepancy with regard to the date on which the statement of P.W. 4 came to be recorded by the Investigating Officer, the testimony given by P.W. 4 in Court cannot be discarded especially when he has not suffered by such vital omissions amounting to material contradictions. In the instant case, P.W. 4 was called upon to give evidence with respect to an occurrence in which the deceased Kempegowda and Ningamma had been killed and injuries sustained by others including P.W. 4 himself. Thus, P.W. 4 gave evidence to that extent in this case. The defence by marking Ex. D. 3 (A to C) wanted to show that he is also an eye-witness to the

incident wherein the deceased Narayana had been killed and he is deliberately suppressing that incident in this case. It has to be pointed out that even as could be seen from the contents of the FIR Ex. D. 6 marked on behalf of the defence that there were 2 incidents, one relating to the killing of the deceased Narayana and the other relating to the incident subsequent to the killing of the Narayana which had resulted in the death of the deceased Kempegowda and Ningamma and also injuries to P.W. 1 and 4 by the appellants. It is only after the deceased Narayana had been killed by the deceased Kempegowda, it appears, that the present incident in question had occurred. As we have already stated it would therefore appear that the present incident is in answer or in retaliation to the first incident. Though one incident has followed the other, they do not overlap each other. On the other hand they were both distinct and separate incidents. In this case, P.W. 4 had stated about the occurrence in which the deceased Kempegowda and Ningamma had been killed and himself and P.W. 1 had been injured and he did not claim to be an eye-witness to the earlier incident in which the deceased Narayana had been killed by the deceased Kempegowda. That by itself is not sufficient to discard the evidence of P.W. 4 regarding the incident in question. Further the defence cannot use the statement recorded u/s 161 of the Cr. P.C. for the purpose of showing that P.W. 4 is also an eye-witness to the earlier incident and he has suppressed the same. That apart the statement made before the Investigating Officer can be used for contradiction, but only after strict compliance with Section 145 of the Evidence Act. As to the procedure for bringing contradiction, on record, it was held by a majority Bench of the Supreme Court that the proviso to Section 162 of the Cr. P.C. only enables the accused to use the statement of a witness recorded by the police to contradict him in the manner provided in the II part of Section 145. The statements made before the Investigating Officer cannot be used for the purpose of cross-examining a witness within the meaning of the first part of Section 145 to establish a contradiction between one statement and another. This is exactly what was sought to be done by the defence in marking Ex. D. 3 (A to C), which in our opinion is not permissible. That apart it is quite likely that P.W. 4 could not have witnessed the earlier incident relating to the killing of the deceased Narayana and he might have come to the spot only after hearing the commotion and had witnessed the subsequent incident which had resulted in the killing of the deceased Kempegowda and Ningamma. P.W. 4 being an injured eye-witness, his presence at the spot cannot be doubted. Even assuming that he is an eye-witness to the earlier incident and that he is not prepared to say anything regarding that incident, that by itself will not discredit his evidence with regard to the subsequent incident wherein the deceased Kempegowda and Ningamma had been killed and himself and P.W. 1 had been injured. If the evidence of the witnesses P.Ws. 1 and 4 is accepted and we see no good ground or reason not to accept the same, would clearly involve the appellants herein in the crime alleged against them.

27. The materials placed on record would clearly indicate that when the deceased

Kempegowda was passing in front of the house of the Narayana, he was being taunted by the said Narayana over the issue of Shakuntala P.W. 5 and following which, a quarrel ensued between him and the deceased Narayana. That means the provocation for that incident came from the said deceased Narayana and not from the deceased Kempegowda. It is only after the culmination of the said incident between the deceased Narayana and the deceased Kempegowda, the present appellants came in a group armed with deadly weapons in order to take revenge for the murder of the deceased Narayana and committed assault on the deceased Kempegowda in a brutal manner which resulted in his death. Besides committing assault on the deceased Kempegowda, they also committed assault on whomsoever who came to the rescue of the deceased and in the process they also killed deceased Ningamma and caused injuries to P.Ws. 1 and 4. In the circumstances therefore, it cannot be said that the deceased Kempegowda was in any way responsible for giving rise to this incident which was subsequent to the incident relating to the deceased Narayana. On the other hand, it appears that while the deceased Kempegowda was on his way to the house from his land and when he happened to pass in front of the house of the deceased Narayana, he was being taunted by the said Narayana which was the cause for the initiation of the incident between him and the deceased Narayana and that it is only after the culmination of the said earlier incident, the appellants herein formed themselves into a group armed with certain weapons and attacked the deceased Kempegowda in a revengeful manner. It has to be pointed out that the deceased Kempegowda was in the process of returning to his house after the earlier incident and the attack on the deceased Kempegowda was in the nature of taking a revenge. The intention of the appellants was only to give a brutal answer to what the deceased had done and to act in retaliation. Obviously for this reason alone, they tried to develop a theory that it was deceased Narayana who had killed the deceased Kempegowda and his mother Ningamma and not the appellants. But, unfortunately, the deceased Narayana was not at all alive to cause any injuries either to the deceased Kempegowda or to the deceased Ningamma. Therefore, the defence strategy that it is the deceased Narayana who had killed deceased Kempegowda and his mother Ningamma is absolutely without any basis and it has no legs to stand.

27-A. Therefore, having given our anxious consideration to the submissions made on both sides and on reappreciation of the entire evidence on record, we see no good ground to interfere with the findings recorded by the Court below. Hence, the judgment and order of conviction as well as the sentence passed by the Trial Court against the appellants is liable to be affirmed, and it is accordingly affirmed. We find no merit in any of the contentions urged by the learned Counsel for the appellants.

28. In the result therefore, this criminal appeal filed by the appellants fails and it is accordingly dismissed.