
(2006) 08 KAR CK 0096

In the Karnataka High Court

Case No : Criminal Appeal Nos. 727 and 788/2003

Laxman Appayya Budag and Others

APPELLANT

Vs

State of Karnataka by State Public Prosecutor and and State
of Karnataka by Marihal Police Station
 Nagappa,
Yallappa and Huleppa Vs State of Karnataka

RESPONDENT

Date of Decision : 18-08-2006

Acts Referred:

Citation : (2006) 08 KAR CK 0096

Hon'ble Judges : S. Abdul Nazeer, J.;B. Padmaraj, J.

Bench : Division Bench

Judgement

1. These two criminal appeals are directed against the same Judgment and Order of the trial Court dated 25.3.2003 and hence they are conveniently dealt with/ heard together and are accordingly disposed of by this common judgment

2. By the impugned Judgment and Order, the trial Court has convicted the Accused Nos. 1, 3, 4, 6 and 7 for the offences punishable under Sections 143, 148, 504, 506, 302, 307 and 427 read with Section 149 of IPC. It has further convicted the Accused No. 1 for the offence punishable under Section 30 of the Indian Arms Act. The above said accused persons have been sentenced to undergo imprisonment for various terms including the life imprisonment for the offence under Section 302 read with 149 of IPC. The Accused No. 1 has been further sentenced to undergo R.I. for a period of six months for the offence under Section 30 of the Indian Arms Act All the sentences imposed against the accused are directed to run concurrently. They are also held to be entitled to the benefit of set off under Section 428 of Cr.PC.

3. In all there were 8 accused persons, of whom the Accused Nos. 2,5 and 8 have died before the commencement of the trial and ultimately it is only the Accused Nos. 1,3,4,6 and 7 who faced the trial before the trial Court, on the above said charges.

4. These two criminal appeals are by the convicted accused Nos. 1, 3, 4, 6 and 7 questioning the legality and correctness of the conviction and sentence passed against them by the Trial Court.

5. The prosecution charge or the gravamen of the charge against the accused persons was that on 25.4.1996 at about 7 a.m. in the morning at Hulyanur village within the limits of Marihal Police Station, they formed themselves into an unlawful assembly with the common object of committing the murder of one Sidarai Danappa Naik and in prosecution of the common object of such unlawful assembly, armed with deadly weapons they committed rioting, intentionally insulted the deceased and others, murdered the deceased Sidarai, attempted to commit murder of one Smt. Sattewwa PW. 5 and Basappa PW. 4, committed mischief by causing loss and damage to the house of the complainant Yallawwa PW. 1 to an extent of more than Rs. 50/- and criminally intimidated them and that thereby they have committed the offences punishable under Sections 143, 148, 504, 302, 307, 427 and 506 read with Section 149 of IPC The further charge against the accused No. 1 was that in the course of the same transaction, he had fired shots from the gun at the deceased Sidarai, resulting in his death, in contravention of the terms and conditions of the license and that thereby he has committed the offence punishable under Section 30 of the Indian Arms Act Since the Accused Nos. 2, 5 and 8 have died before the trial, only the surviving accused persons viz. Accused Nos. 1, 3, 4, 6 and 7 faced the trial before the trial Court on the above said charges.

6. The deceased is one Sidarai Danappa Naik. He was aged about 25 years at the time of his death and was a resident of Hulyanur village. Smt. Yallawwa PW. 1 aged about 50 years is the mother of the deceased. Laxman D. Naik PW. 3, Basappa. D. Naik PW. 4 and Nagawwa Basavaraj PW. 7 are the brothers of the deceased. The accused, the deceased and the material witnesses for the prosecution are residents of Hulyanur village. The house of the complainant PW. 1 was situated opposite to the house of the Accused No. 1. He was also running a grocery shop in a portion of the house occupied by him. The house of the complainant PW. 1 and that of the Accused No. 1 were separated only by a road in between. The Accused Nos. 1 and 2 were brothers and the Accused No. 2 was the father of the Accused No. 3. Accused No. 7 is a friend of the Accused No. 1 and the rest of the accused persons are all cousins of the Accused No. 1. PW. 1 Smt Yallawwa and the members of her family used to purchase certain articles from the grocery shop of the Accused No. 1 situated opposite to their house, both on cash and credit basis. While this was so, it is stated that on that relevant day i.e., on 25.4.1996 at about 7 a.m. in the morning when the deceased Sidarai was near his house, all these accused persons came there. Of them, the Accused Nos. 1 and 2 were armed with guns, the Accused No. 3 was armed with an iron bar, the Accused No. 4 was armed with an axe, the Accused Nos. 5 and 6 were armed with sticks, the Accused No. 7 was armed with a sickle and the Accused No. 8 was armed with an axe. Among the accused persons, who so came near the house of the complainant PW. 1, the Accused No. 1 demanded the deceased

Sidarai to repay his dues and for which, the deceased told the Accused No. 1 that he has no dues to pay to him. Thereupon, the Accused No. 1 all on a sudden, without any loss of time fired a shot from the gun that was held by him at the deceased. In the meantime, the Accused No. 2 also fired a shot from the gun held by him towards PWs. 4 and 5 who were standing nearby the deceased. The deceased sustained injuries from the shot fired by the accused No. 1 over the lower part of his abdomen and PWs. 4 and 5 sustained injuries from the shot fired by Accused No. 2 over the upper lip and on the left palm. PW. 4 had lost his two teeth in the incident. Thereafter, all the accused persons threw stones over the house of the complainant PW. 1, resulting in damage to the roof of the house and also to the tiles thereover. In the mean time, some of the persons from the neighbourhood like Basappa, Nagappa and others came there and prevented the accused persons from indulging in such acts. Upon such intervention by the neighbours, all the accused went away from the spot along with the weapons which were held by them. Thereafter the injured persons PWs. 4, 5 and the deceased Sidarai were taken in a tempo to the Civil Hospital at Belgaum for treatment. The doctor who examined the deceased at the hospital declared him to be brought dead. The other two injured persons, viz., Sattewwa-PW. 5 and Basappa-PW. 4 were admitted as inpatient for treatment into the hospital. Thereafter the complainant-PW. 1 proceeded to the Police Station to lodge a complaint regarding the occurrence with the Police concerned. PW. 20 Annasaheb was then the PSI of Marihal Police Station. On 25.4.1996 at about 10.45 a.m. in the morning when the PSI PW. 20 was at the Police Station, the complainant PW. 1 Yallawwa appeared before him and gave an oral complaint regarding the occurrence, which was recorded to writing as per Ex. P1 and on the basis of which, the PSI PW. 20 registered the case and took up investigation. According to him, the complainant PW. 1 Yallawwa had alone come to the Police Station to lodge a complaint. PW. 25 Basavantappa was then the CPI of Bagewadi Circle and Marihal Police Station was coming under his jurisdiction. He received the express report and phone message from the PSI PW. 20 regarding the registration of this case on 25.4.1996 at about 12.15 p.m. in the afternoon. He immediately went to the Civil Hospital at Belgaum, where he held the inquest proceedings over the dead body of the deceased as per the inquest report Ex. P2. He also recorded the further statement, of the complainant PW. 1 and the statements of PWs. 2,3,5 and others. Thereafter he visited the scene of incident at Hulyanur village and after examining the scene of incident in the presence of the panchas, he recorded a spot panchanama as per Ex. P6 and seized thereunder the blood stained earth, sample earth and one tooth that was lying at the place of incident and broken pieces of tiles as per nos. 12 to 15. He also recorded the statements of PWs. 6,7,10, 12 and others. On the same day, he seized the clothes that were found on the dead body of the deceased which were produced by a police constable after the PM examination was over under a panchanama Ex. P7 and they are as per nos. 16 to 19. On 28.4.1996 a glass bottle containing pellets that were preserved by the PM doctor were produced before him by a police constable and he seized the same under a panchanama

Ex. P3. The said pellets were recovered from the dead body of the deceased Sidarai. The same is at MO. 9. On 30.4.1996, he recorded the statements of the injured at the Civil Hospital, Belgaum. Subsequent on 11.5.1996 while he was searching for the absconding accused, on certain credible information he went to Kalkhamb cross where he arrested all the accused persons at about 7 a.m. in the morning and returned to the Police Station alongwith arrested accused. After completing the arrest formalities at the Police Station, the CPI PW. 20 interrogated the accused persons. The Accused persons A1 and A2 volunteered with an information to produce the weapons that were used in the commission of the offence and the same were recorded to writing by the I.O. The voluntary information furnished by the accused No. 1 is as per Exhibit P. 24 and the voluntary information furnished by the accused No. 2 is as per Exhibit P.25. Thereafter, the Investigating Officer PW. 25 proceeded to Hulyanur village along with the accused nos. 1 and 2 and the two independent Panchas in a jeep. There, the accused No. 1 in pursuant to the information furnished by him led them to the Western side of the village, where he produced a single barrel gun (MO. 1) which was kept concealed in the heap of cotton stumps and also pointed out an empty cartridge - MO. 10 that was in the barrel. The same were seized under a Panchanama - Exhibit P. 4. Thereafter, the accused No. 2 in pursuant to the information furnished by him took them also to the Western side of the village and produced a single barrel gun MO.2 and a cartridge MO. 11 that was found in the barrel of the gun MO.2 from the place of its concealment. The gun produced by the accused No. 2 was also kept concealed in a heap of cotton stumps. Besides the gun MO.2 he also produced the two axes, a sickle, an iron bar and two sticks MOs.3 and 8 which were kept concealed in the said heap of cotton stumps. They were also seized under a Panchanama Exhibit P.4. On 18.6.1996 the Investigation Officer PW.25 sent the seized articles of this case for their chemical examination to the FSL at Bangalore. On 6.8.1996 he sent the injured Basavaraj- PW. 4 along with the Wound Certificate Exhibit P.9 and the teeth MO. 14 to the Dental Surgeon CW.29 in the Civil Hospital at Belgaum for his opinion and report. The report received in this regard from the Dental Surgeon is as per Exhibit P. 19. On 6.8.1996 he received the report of the Firearm Expert as per Exhibit P.23 and the report of the Chemical Examiner as per Exhibit P.26. On 8.8.1996 he obtained the necessary permission from the Deputy Commissioner, Belgaum, to prosecute and file a charge sheet against the accused nos. 1 and 2 as they had used fire arms in committing the offence which is as per Exhibit P.27. Exhibit P. 13 is the sketch map of the scene of incident received by him from the Assistant Engineer, PWD. Then upon completion of the investigation, the Investigating Officer PW.25 submitted the charge sheet to the court against all the accused for the offence punishable under Sections 143, 147, 148, 324, 302, 307, 504 and 427 read with Section 149 of IPC and Sections 25 and 30 of the Indian Arms Act.

7. After the case was committed to the Sessions Court and the accused persons having pleaded not guilty to the charges framed against them and claiming a

trial, they were put on trial before the Trial Court for the offences punishable under Sections 143, 148, 504, 302, 307, 427 and 506 read with Section 149 of IPC. The accused No. 1 was further charged under Section 30 of the Indian Arms Act As we have already stated the accused Nos. 2, 5 and 8 having died before the commencement of the trial, only accused Nos. 1, 3, 4, 6 and 7 were put on trial on the above said counts.

8. In order to substantiate the charges framed against the above said accused persons, the prosecution had examined at the trial PWs. 1 to 25 and placed on record Exhibits P.1 to P.27 and MOs. 1 to 19. The defence has got marked on their side Exhibits D1 to D11. Out of the 25 witnesses examined by the prosecution PW. 1 Smt. Yellawwa, PW. 2 Yallappa H. Naik, PW. 3 Laxman D. Naik, PW. 4 Basappa D. Naik, PW. 5 Smt. Sattewwa H. Naik, PW. 6 Nagappa B. Naik, PW. 7 Smt. Nagawwa Basavaraj and PW. 10 Bharmanna H. Naik are the eye witnesses to the occurrence. PW. 1 besides being an eye witness to the occurrence had also laid the first information of the occurrence to the PSI -PW. 20. PW. 12 Smt. Kenchawwa K, Pujari who was also projected as an eye witness had turned hostile to the prosecution. PW. 8 Ankush is a Panch for the Inquest proceedings held on the dead body of the deceased as per the Inquest Report Exhibit P. 2 and also to a seizure mahazar Exhibit P. 3. He has partially supported the case for the prosecution, PW. 9 is a Panch to the Panchanama Exhibit P. 4 and had turned hostile. PW. 11 who is a Co-Panch of PW. 9 had also turned hostile. PW. 13 Dastagirsab is a Panch to the two Pancharamas - Exhibits P6 and P7 and he had turned hostile. So also his Co-Panch PW. 14. PW. 15 Dr. Ashok is a Medical Officer who examined the two injured eye witnesses - PWs. 4 and 5 and has issued the Wound Certificates as per Exhibits P.8 and P.9. PW. 16 - Dr. Fakirgowda is the Medical Officer who held autopsy on the dead body of the deceased and issued the post mortem report as per Exhibit P. 11. PW, 17 - Srikanth is an Assistant Engineer in PWD who has drawn the sketch map of the scene of incident as per Exhibit P. 13 after a visit to the spot PW. 18 Maruthi is a Secretary of the Grama Panchayath who had issued a certificate as per Exhibit P. 14, which showed that the house in question was not standing in the name of the complainant PW. 1, but she had been in occupation of the same along with her sons during the relevant time. PW. 19 Basavaraj is the tempo driver who had taken the injured to the hospital in his tempo and he had turned hostile. PW. 20 Annasaheb is the PSI who registered the case, issued the FIR - Exhibit P. 15 and took up investigation. He has done a part of the investigation. PWs. 21, 22 and 23 are the formal witnesses who have carried out the instructions given by the Investigating Officer. PW. 24 - N.G. Prabhakar is a ballistic expert who had examined the guns and had issued the report as per Exhibit P.23. PW. 25- Basavanthappa is the Investigating Officer who upon completion of the investigation had laid the charge sheet against the accused. This in short is the summary of the evidence adduced by the prosecution at the trial.

9. The accused persons, when examined under Section 313 Cr.P.C, have denied all the incriminating circumstances appearing against them in the prosecution

evidence. They did not examine themselves nor did they examine any witness on their behalf. The defence of the accused appears to be one of a total denial of the case of the prosecution. It has however been suggested by the defence in the cross examination of some of the prosecution witnesses that since the accused did not like the activities of the complainant-party in the village and since they were opposing them, they have been falsely involved in the case. In substance, the accused would say that they have been falsely involved in the case on account of their hostility.

10. The trial court on consideration of the material placed on record by the prosecution and after hearing submissions on both sides has by its impugned judgment convicted and sentenced the above said accused persons as stated supra. Hence, these two appeals by the convicted accused persons.

11. As both the appeals arise out of the same judgment and order passed by the trial court, they were heard together.

12. We have heard the arguments of the learned Counsel appearing for the appellants in both these appeals and also the learned State Counsel and have carefully perused the entire material placed on record by the prosecution with their assistance. We have also carefully perused the impugned judgment passed by the trial court.

13. Learned Counsel for the appellants in both these appeals have contended as under:

There was absolutely no motive for the accused to commit the crime and the one suggested by the prosecution is totally fragile and frivolous so as to impel the accused to commit such ghastly incident. The yet another motive suggested by the prosecution for the commission of the offence has no relevance to the accused and hence it could not constitute a motive for the accused to commit the crime. The prosecution has not been able to establish that there was a common object on the part of these accused to commit the offence. In the contextual facts brought out by the prosecution it is difficult to imagine that the A1 and A2 could have opened the fire, more so, when there was no previous enmity between the accused and the complainant party. The suggestion of the defence is that the deceased had been killed by someone else and his dead body was lying on a road leading to Basavanakolla village and not in front of the house of the complainant PW. 1 as suggested by the prosecution. The eye witnesses who have supported the case of the prosecution are all closely related to the deceased and the only independent witness examined by the prosecution as an eye witness to the occurrence has turned hostile. The evidence of all these eye witnesses who have supported the prosecution case are wholly tainted and they have not come out with a true version of the occurrence. That apart, all these eye witnesses are having criminal antecedents and hence their evidence is not capable of being accepted on its face value. Moreover, most of the eye witnesses examined by the prosecution have stated that they did not give any statement before the

Investigating Officer and that they are deposing for the first time regarding the occurrence in court. When they have not been examined by the Investigating Officer, their evidence in court for the first time cannot be accepted. Besides this, PW. 4 is a child witness aged about 12 years and the evidence given by him in court is nothing but a tutored version of the occurrence. Even the investigation suffers from several flaws in as much as they have not seized the blood stained clothes of any of the injured eye witnesses which would create doubt about their presence at the spot when the incident in question had occurred. The quality of evidence led before the Court by the prosecution is poor and hence no implicit reliance can be placed upon such evidence. The circumstance regarding the recovery effected at the evidence of the A1 and A2 is not proved in view of the fact that the Panchas to the said recoveries have turned hostile. The medical evidence adduced in the case does not reconcile or tally with the eye witnesses account of the occurrence given by the prosecution witnesses. Even the evidence of the firearm expert would create doubt about the case of the prosecution as put forward or projected at the trial. He did not find any signs of discharge on the gun MO. 1 whereby creating a doubt, whether the gun MO. 1 which was alleged to have been recovered at the instance of the accused had really been used in the commission of the offence. In substance, the evidence on the side of the prosecution is not worthy of any acceptance, so as to base conviction against the accused persons. Moreover, the evidence adduced on the side of the prosecution would show that there was only one shot fired by the accused No. 1 from the gun MO. 1 whereas the injuries that were found on the dead body of the deceased were six in number, which completely belies the prosecution version of the incident. The distance from which the shots were fired by A1 and A2 is also rendered false from the evidence of the firearm expert and also from the medical evidence adduced in the case. The incident in question did not take place in the manner as alleged by the prosecution. In all probability the firing had taken place somewhere else as suggested by the defence and the blame is sought to be put upon these accused as they were opposing the activities of the complainant party in the village. Hence, the trial court was not at all justified in convicting the appellants for the above said offence and that too the aid of Section 149 of IPC. The necessary ingredients of the common object as alleged by the prosecution have not been established in the case and hence all these accused persons could not have been convicted with the aid of Section 149 of IPC. That apart, the questions in relation to the offence of murder and attempt to commit murder with the aid of Section 149 of IPC have not been put to the other accused persons other than the accused No. 1 when they were questioned under Section 313 Cr.P.C. and hence they could not have been convicted by the trial court with the aid of Section 149 of IPC for the offences under Section 302 and 307 of IPC. In totality the case of the prosecution is not free from doubt and hence the benefit of doubt should go to the accused. In support of their submissions the learned Counsel for the appellants have placed reliance upon the following decisions:

- i) 2005(1) SC 250 (Nagarjit Ahir Etc. v. State of Bihar) (relevant paras 13 and 14)
- ii) AIR 1976 SC. 2069 (Gajjan Singh v. State of Punjab)
- iii) Machander Vs. State of Hyderabad,
- iv) Lallu Manjhi and Another Vs. State of Jharkhand,
- v) AIR 2006 SCW 3419 (Bunnilal Chaudhary v. State of Bihar)

14. As against this the learned State Counsel in support of the impugned judgment of the trial court has contended as under.

This is a case where the FIR was laid promptly and the entire case of the prosecution had been disclosed therein at the earliest. There is absolutely no inconsistency between the medical evidence and the ocular evidence given by the eye witnesses to the occurrence and so also there is absolutely no inconsistency between the evidence given by the firearm expert PW. 24 and the other evidence in the case. Though the accused No. 1 was stated to have fired only one shot which was made up of pellets and when fired from a certain distance, the pellets will have dispersed resulting in more than one injury, and out of the pellets that were so dispersed, three of them have entered into the body of the deceased giving rise to 3 punctured wounds with blackish discoloration around the wounds. The eye witness account given by the prosecution eye witnesses were to be examined in the light of the medical evidence and the evidence given by firearm expert and if that is done, it is in consonance with each other. The possibility of the gunpowder being washed off due to the lapse of time, cannot be ruled out on the gun-MO. 1 and merely because the firearm expert PW. 24 did not find the signs of any discharge on the gun MO. 1, that by itself is not sufficient to discard the ocular evidence of the eye witnesses which has been believed by the trial court. With regard to the motive for the commission of the offence, even the defence itself has suggested that the complainant party were unwanted elements in the village and that being so, there was a hostility between the accused and the complainant party. Even otherwise in the face of the direct evidence, the motive relegates to the background. All these appellants were armed with the deadly weapons and they had proceeded in a group towards the house of the deceased which in itself would show that they had constituted an unlawful assembly with the common object of committing the crime and they had in fact committed the crime, viz., the death of the deceased, injuries to some of the prosecution witnesses and also damaged the house of the complainant PW. 1. Under the circumstances, therefore, the mere presence of an accused is sufficient to hold him guilty of the offence with the aid of Section 149 of IPC. Therefore, the trial court was justified in convicting all these appellants with the aid of Section 149 IPC.

In support of his submissions the learned State Counsel has placed reliance upon the following decisions:

- i) AIR 1965 S.C. 902 (G) Masalti v. State Of Uttar Pradesh

ii) 1999 SCC (Cri) 384 (Rachamreddi Chenna Reddy and Ors. v. State of A.P.)

15. Having heard the submissions on both sides and having carefully perused the material evidence placed on record by the prosecution in the light of the decisions relied upon by the learned Counsel on either side, the question for consideration is whether the impugned judgment and order of conviction and sentence passed by the trial court warrants any interference in the appeal?

16. Out of the 8 accused persons who were named in the FIR and were charge sheeted by the police, 3 of them viz., Accused Nos. 2, 5 and 8 have died before the commencement of the trial. Among the surviving accused persons, the A-1 was having his shop and residence in front of or opposite to the house of the complainant PW. 1. Their two houses were separated only by a road in between. The accused No. 1 was running a grocery shop in his house. Accused No. 2 is the father of the accused No. 3. The accused nos. 1 and 2 are the brothers. The rest of the accused persons except accused No. 7 are the nephews of the accused No. 1. The accused No. 7 is a friend of the accused No. 1. The accused persons, the deceased and the material witnesses for the prosecution are residents of the same village and they knew each other. The population of their village Hulyanur at the material time was about 400 to 500. According to the defence the population of the village was only 100 to 120 and there were only 80 houses in the village. On all the 4 sides of the village there was a forest In other words, the village Hulyanur is situated in the midst of a forest The complainant Smt. Yallowwa - PW. 1 is the mother of the deceased and PWs. 3, 4 and 7 are the brothers and sister of the deceased. PWs. 2 and 5 are the relatives of the complainant PW. 1. The defence would suggest that the deceased and his brothers were unwanted elements in the village having a criminal background or criminal antecedents. The complainant PW. 1 and the members of her family used to purchase certain items of articles from the grocery shop of the Accused No. 1 situated opposite to their house, both on cash and credit basis.

The specific suggestion of the defence to the prosecution witnesses in the cross-examination is that since the accused persons were opposing the activities of the sons of the complainant PW. 1 in the village, they have been falsely involved in the case. Although the said suggestion made by the defence has been denied by the prosecution witnesses, it would show that the accused persons were opposed to the activities of the deceased and his brothers in the village. Thus, all was not well between the accused and the complainant party. They were all rustic villagers. Even the scene of murder is a remote village situated in the midst of forest, having a very small population. It is to be seen, therefore, the prosecution witnesses and so also the accused are rustic villagers living in a remote village situated in the midst of a forest having a very thin population. Therefore, their behavioral pattern and perspective habits have to be judged as such. In other words, the scene of murder is rural, the witnesses to the case as well as the accused are rustics and so their behavioural pattern and perspective habits have to be judged as such. 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. Further, when scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts 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 the testimony delivered. The trial court has at some length dissected the evidence, spun out contradictions and tested with precision the time and sequence of the events connected with the crime, all on the touchstone of the medical evidence and the firearm expert. Certainly, the trial court which has seen the witnesses depose, has a great advantage over the appellate court which reads the recorded evidence in cold print, and regard must be had to this advantage enjoyed by the trial court of observing the demeanour and delivery, of reading the straightforwardness and doubtful candour, rustic naivete, etc, of persons who swear to the facts before it. Nevertheless, where the trial court draws its conclusions not so much on the directness or dubiety of the witness while on oath, but upon general probabilities and on expert evidence, the Court of appeal is in as good a position to assess or arrive at legitimate conclusions as the Court of first instance. It also needs to be noted that, the witnesses for the prosecution were examined in Court in the year 2002 whereas the incident in question had occurred in the year 1996. That means, the witnesses were examined in Court almost after a lapse of six years of the incident. In the meantime, even 3 of the accused persons have also died. The alleged incident according to the prosecution had occurred just in front of or at the door step of the house of the complainant PW. 1 during day time at about 7 A.M. in the morning. The defence would however suggest that before sun rise, someone had fired shot from a gun at the deceased and that the dead body of the deceased was lying on the way to Basavanakolla village and after the news of his death was spread in the village, the dead body of the deceased that was lying on the road from Hulyanur to Basavanakolla village was taken in a tempo to the Civil Hospital at Belgaum by the complainant PW. 1. All these suggestions have no doubt been denied by the prosecution witnesses, but the fact still remains on record is that the deceased had been killed or died due to the shots fired from the gun. In this context it is pertinent to note that PWs. 4 and 5 as per the prosecution case are the injured eye witnesses and they were injured in the same occurrence when the accused Nos. 1 and 2 had opened fire from the guns held by them. With this backdrop let us now sift the evidence from the proper perspective outlined above avoiding both the exploitation of every plausible suspicion as militating against the certitude of guilt and the unjust loading of the dice against the accused merely because of a conviction rendered by the trial court. With vigilant scepticism, let us scan the important evidence without going over the whole ground again. In this context we shall first consider the medical evidence on record of the two doctors, PW. 15 who examined the two injured witnesses PW. 4 and PW. 5, and PW. 16 who held autopsy on the dead body of the deceased. According to the prosecution case, the shot that was fired by the

deceased A-2 had first hit the left hand of the injured PW. 5 and then hit the upper lip of the injured PW. 4.

17. PW. 15 at the material time was working as Senior Specialist in the District Hospital at Belgaum. He has stated that on 25.4.1996 at about 9.40 A.M. in the morning he had examined the injured Sattewwa- P.W. 5, who was brought to him with the history of gun shot injury at about 7.30 or 8 A.M. in the morning on 25.4.1996. He found the following injuries on the person of the injured PW-5:

i) Irregular lacerated wound measuring 1"x 1/2" on the medial side of left wrist with bleeding. Her X-Ray showed fracture base of the 5th metacarpal bone with in a particular minute grains like foreign body in the left hand wrist of the injured PW. 5. The injured PW. 5 was admitted for treatment on the same day and was discharged on 4.5.1996. He has stated that the injury found on the person of the injured PW. 5 could be caused by a shot fired from a gun and the injury was grievous in nature. He has issued the Wound Certificate as per Exhibit P. 8 in respect of the injured PW. 5. On the same day the doctor- PW. 15 had examined the injured Basavaraj PW. 4 who was also brought with the history of firearm injury on the same day at about 7.30 AM. He found on his person an irregular lacerated wound on the upper lip measuring 1"x 1/2" with bleeding present and the underlying incisor teeth being loosened. The injury found on the person of the injured PW. 4, according to the doctor was grievous in nature and the same could be caused by a fire-arm or by any blunt object He has issued a certificate as per Exhibit P. 9 in respect of the injured Basavaraj PW. 4.

18. Under the cross-examination done by the defence, apart from eliciting that such injuries could also be caused due to a fall, nothing worthwhile is elicited so as to discredit the evidence of the doctor PW. 15 with regard to the injuries sustained by the two injured persons PWs. 4 and 5.

19. Thus, the evidence of the doctor PW. 15 would clearly indicate that both PWs. 4 and 5 had sustained certain injuries on their persons which could be caused by a firearm. The history that was furnished to the doctor was that they had been injured in an incident, which took place in the morning at about 7.30 or 8 A.M. on 25.4.1996. The evidence of the doctor PW. 15 stands corroborated from the wound certificates exhibits P.8 and P.9 issued in respect of these two injured persons. The injuries that were sustained by them were grievous in nature and they could not be self-inflicted.

20. PW.16 was also working as a Senior Specialist in the District Hospital at Belgaum at the material point of time. He conducted the postmortem examination on the dead body of the deceased Sidarai on 25.4.1996 from 4.45 p.m. to 6.30 p.m. He found the following external and ante-mortem injuries on the dead body of the deceased:

i) A Blackish discolouration over the umbilical region 3 Cm below the umbilicus. Size 1 1/2 Cms x 2 1/2 Cms oval in shape.

ii) Punctured wound over the left lumbar region. 2 Cm x below the injury No. 1 towards left side. Size 2 1/2 Cms x 1 Cm. and the abdominal cavity, oval in shape.

iii) Blackish discolouration over the left lumbar region and 6 Cms. below the umbilicus and towards right side and 7 Cms away from the injury No. 2. size 1 1/2 Cms x 1 3/4 Cms.

iv) Punctured wound over the right lumbar region 1 1/2 Cms below to injury No. 3. size 3 Cms x 2 cms, Oval in shape and into the abdominal cavity surrounding is blackened.

v) Lacerated wound over the left hip, region laterally 2 1/2 Cms below the left iliac crest, Size 1 1/2 Cms x 1 1/4 Cms blood clot present, surrounding region swollen present, and one bullet traced here.

vi) Lacerated wound over the left gluteal region, laterally size 1 1/2 Cms below the injury No. 5, surrounding is swollen, size 1 1/2 Cms x 1/2 Cms x blood clot present.

21. On dissection of the dead body of the deceased he found the following internal injuries:

i) Below the injuries Nos. (2) and (4), the perforate the abdominal cavity, through peritoneum and cause damage to the mesentery and its vessels and intestines- small and large. Abdominal cavity- is in pool and blood, clots and vital organs like liver, kidneys, spleen, heart, and intestinal coils embedded in pools of Blood clots. As to the cause of death of the deceased, he has opined that the death of the deceased was due to shock and haemorrhage as a result of fire arm injuries. He has stated that the injury Nos. 2 and 4 were grievous and were sufficient in the ordinary course of nature to cause death and the same were caused by gun shot. His evidence would further reveal that he had recovered 3 pellets from the dead body of the deceased and the same were preserved by him for being sent to the fire arm expert as per MO.9. He has issued a postmortem report as per exhibit P. 11.

22. Under the cross-examination done by the defence he has stated that the whole body of the deceased was pale due to haemorrhage. He has also stated that the two external injuries, viz., injuries Nos. 2 and 4 had caused severe damage to the internal organs. He has further stated that out of the 3 pellets that were recovered from the dead body of the deceased, two of them were found lodged in the abdominal cavity. He has stated that the shock was due to bleeding. Apart from this, nothing substantial had been elicited by the defence in the cross examination of the doctor PW. 16, so as to discard his testimony with regard to the injuries that were found on the dead body of the deceased and the cause of death of the deceased. The evidence given by the doctor PW. 16 in the court stands substantiated from the postmortem report Exhibit p. 11.

23. Thus, from the evidence of the doctor PW. 16 and the postmortem report

Exhibit P. 11 issued by him, it can safely be inferred that the deceased Sidray had died due to the injuries sustained by him from the shot fired from the gun. That is to say, he had died of the firearm injuries. Even the defence does not dispute that the deceased had died of firearm injuries. It is no doubt true, that the doctor PW. 16 while giving description of the external injuries had given description as though there were 6 injuries, but in fact it is not so. This is because the punctured wounds were only two in number coupled with blackish discolouration over the umbilicus and lumbar region. The other two injuries were only lacerated wounds. It is only these punctured wounds at injury Nos. 2 and 4 which were proved to be fatal. The pellets from a single shot being disbursed and causing more than one injury cannot be ruled out in the facts and circumstances of this case, more so, when the doctor- PW. 16 had recovered 3 pellets from the dead body of the deceased.

24. Now we will advert to the evidence of the Ballistic Expert- PW. 24, He has stated that he had examined the following articles:

1. I sealed cloth packet containing 1 SBBL gun bg. S. No. A-4749 of Pashupati Dos and Company, marked as Article No. 1 by the I.O.
2. I sealed cloth packet containing 1 fire cartridge case marked as article 2 by the I.O.
3. I sealed cloth packet containing 1 SBBL gun bg. S. No. 2903 marked as article No. 3 by the I.O.
4. I sealed cloth packet containing 1 cartridge marked as article No. 4 by the I.O.
5. I sealed cloth containing 3 deformed ted shots marked as article No. 5 by the I.O.
6. 1 sealed cloth packet containing 1 cut open shirt marked as article No. 6 by the I.O.
7. I sealed cloth packet containing 1 cut open pant marked as article No. 7 by the I.O,
8. I sealed cloth packet containing 1 cut open brief marked as article No. 8 by the I.O.
9. Original PM report of the deceased Sidarai Danappa Naik of Hulyanur.

On examination of the above said articles he has furnished the following opinion:

- i) Presence of combustion product of smoke less gun powder residue was not detected in the barrel of the SBBL, gun in article No. 1.
- ii) Presence of combustion products of smokeless gun powder residue and lead were detected in the barrel of the SBBL gun in article No. 3. Hence, the SBBL gun in article No. 3 bears sense of discharge.

iii) Presence of lead was detected around the edges of the noses on the shirt, pant and brief in article No. 6, 7 and 8 resp. Hence, these holes on the shirt, pant and brief in Article No. 6, 7 and 8 resp. have been caused due to the passage of lead shots.

iv) The lead shots in Article No. 5 are the component of 12 bore cartridge could have been fired from a 12 bored shot gun.

v) It is not possible to state as to whether the cartridge taken in article No. 2 and 4 have been fired from the SBBL gun in article Nos. 1 and 3 pr not since the percussion cap on the cartridge in Article No. 2 is perforated and there are multiple firing pin impression on the cartridge case in article No. 4.

He has issued the Certificate, which is as per Exhibit P/23. On being shown the two guns MOs. 1 and 2 in court, he has stated that these were the very two guns which were examined by him and they were found to be in working condition. He has stated that by pouring water in the barrel of the gun and cleaning the same, the gunpowder residue will get washed. Further on being shown the clothes MOs. 16, 17 and 18 he has stated, that the holes found on them could be caused by firing shot from a gun. According to him, if a person fires a gun from a distance of about 6 to 9 feet, there will be blackening around the injuries caused. He has stated that the length of the guns MOs. 1 and 2 is about 4 feet He has further stated in para 4 of his cross examination as under

4. There will be 8 components in a 12 bored cartridge, namely, cartridge case, brass base, powder, over powder wad, cushion wad, under shot wad, pallets above that, above the pallets there will be over shop wad, and it is true in a 12 bored cartridge there will be 4 wads, and these wads will be made up of some times wad plastic and sometimes a special quality cardboard of the thickness of 3 to 3 1/2 mm. It is true, that the cushion wads will be slightly bigger in size than the bore of the fire arms. In LG cartridge there are 6 shots and in No. 1 cartridge there will be 80 pallets. By looking to the empty cartridges one will not be able to say as to how many pallets were there. By seeing the empty cartridge marked as MO. 11 one cannot say. as to how many pallets were loaded in that cartridge. If the cartridge is No. 1 it will be having more than 80 pallets depending upon the no of the cartridge, and as and when the pallet size increased, the number of pallets will be increased. MOs like 10 and 11 can also be used in country pistols. The guns MOs 1 and 2 which have been numbered as articles 1 and 2 by the I.O. are legally manufactured ones. If a shot is fired from a 12 bored gun, there would be dispersion of shots as and when the range increases. The 4 wads can travel roughly to a distance of 30 to 40 feet. If cartridges like MOs. 10 and 11 are fired they will travel enemas to a distance of 1 mt And not upto 3 mts. If ascot is fired from guns like MOs. 1 and 2, the holes that would be created look like a rat hole, if the gun is fired from a distance of 6 to 7 intra. It is true, that from 1 shot if individual holes are to be created, the gun should have been fired from a distance of about more than 10 mtrs. The effective range from MOs. 1 and 2 is to a distance of about 40 yards. He has denied the suggestion made by

the defence that the holes that were found on MOs. 16, 17 and 18 could be caused if the shots were fired from a distance of about 40 feet or even 15 feet to 20 feet. On being reexamined by the learned Public Prosecutor he has stated that when a cartridge is fired in an open air, due to air and weather condition the wads are likely to spread due to less weight.

25. A careful perusal of the evidence given by the Firearm Expert- PW. 24 would show that, the cartridges like MO. 10 and MO. 11 when fired from the guns like MOs. 1 and 2 will travel enemas only to a distance of about 1 meter and thereafter they will disburse. His evidence will also show that when a cartridge is fired in an open air, due to air and weather condition the wads are likely to spread due to less weight. The expert testimony given by the witness PW. 24 is in conformity with the medical evidence of the doctor PW. 16 who held the autopsy on the dead body of the deceased. It may be stated even at the cost of repetition that the evidence of the fire arm expert- PW. 24 would clearly indicate that if the cartridges like MO. 10 and MO. 11 are fired they will travel enemas to a distance of about 1 meter and if a shot is fired from the guns like MOs. 1 and 2 from a distance of about 6 to 7 meters, the holes that would be created would look like rat holes. The possibility of dispersion of the pellets beyond 1 meter cannot, be ruled out from the evidence of the Firearm Expert- PW. 24. He has clearly denied the suggestion that since the holes were created on MOs. 16, 17 and 18 the firearm must have been fired from a distance of about 40 feet or even 15 to 20 feet. He has also stated that when a cartridge is fired in an open air, due to open air and weather condition, the wads are likely to spread due to less weight. He has also stated that if a person fires a gun from a distance of about 6 to 9 feet there will be blackening around the injuries caused. In this context if the evidence of the doctor PW. 16 who conducted the postmortem examination is to be looked into, it would appear probable or it is quite possible that such injuries could be caused even from only one shot fired from the gun MO. 1 by using the cartridges like MO. 10 or MO. 11. It is pertinent to note that the doctor-PW. 16 had recovered 3 pellets from the body of the deceased. No doubt, the firearm expert PW. 24 has stated that the presence of combustion product of smokeless gunpowder residue was not detected in the barrel of the gun MO. 1. But he has clearly stated that by pouring water in the barrel of the gun, if the same is cleaned the gunpowder residue is likely to be washed away and hence cannot be detected. The incident in question took place on 25.4.1996 whereas the gun-MO. 1 was recovered at the instance of the A-1 on 11.5.1996 and the same was sent along with other articles for their chemical examination to the FSL on 18.6.1996. In other words, there was a gap of about a month from the date of the incident to the date of recovery. Therefore, the possibility of the gunpowder residue being washed off by water in so far as the gun - MO. 1 is concerned, cannot be ruled out. The evidence of the Assistant Engineer - PW. 17 would show that the house of the deceased was to the South of the road and the house of the accused was to the North of the road and the width of the road as per the sketch map - Exhibit P. 13 was 14 feet. His evidence would further show that the distance in

Exhibit P. 13 where A-1 was standing is shown as 8 feet and where A-2 was standing is shown as 9 feet. This would show the possible distance from where the shots were fired at the deceased and PWs. 4 and 5.

26. Therefore, from the above evidence of the prosecution witnesses it is quite clear that the deceased and the two injured witnesses PWs. 4 and 5 had sustained injuries due to the shots fired from the guns like MO. 1 and MO. 2.

27. Now the question for consideration is, who fired the shots from the guns MOs. 1 and 2 which caused the death of the deceased and the injuries to PWs. 4 and 5 ?

28. In order to seek answer to this question, we shall first refer to the evidence of the two injured eyewitnesses PWs. 4 and 5. The testimony of the injured eye-witnesses has its own relevancy and efficacy. The fact that these two witnesses PWs. 4 and 5 were injured at the time and in the same occurrence lends support to the testimony that they were present during the occurrence and they saw the happening with their own eyes. Further they are the most natural witnesses to the occurrence. The Hon'ble Supreme Court in the case of State of Andhra Pradesh v. Rayappa and Ors. reported in (2006)2 SCC (cri) 353 has held as under:

6. ...By now it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as an interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons.

7. On the contrary it has now almost become a fashion that the public is reluctant to appear and depose before the court especially in criminal case because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are harassed a lot. They are being threatened, intimidated and at the top of all they are subjected to lengthy cross-examination. In such a situation, the only natural witness available to the prosecution would be the relative witness. The relative witness is not necessarily an interested witness. On the other hand, being a close relation to the deceased they will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is that the testimony of the relative witnesses should be examined cautiously....

29. Of the two injured eye-witnesses PWs. 4 and 5, who have testified to the occurrence, one is a child aged about 12 years and another is a rustic woman aged about 40 years. Their evidence is quite consistent and corroborative that it is the Accused No. 1 who had fired the shots from the gun and killed the deceased and that further the shots that were fired by the Accused No. 2 in the

course of the same occurrence had caused injuries to them.

30. PW. 4 Basappa was aged about 12 years when he gave evidence in Court. He knew full well that he should only tell the truth and nothing but truth in the Court. He is an younger brother of the deceased. He has stated that on that relevant day at about 7 a.m. in the morning when his brother deceased Sidarai was brushing the teeth by standing at the threshold of their house, all these accused persons came near their house and among them, the Accused Nos. 1 and 2 were holding the guns in their hands. He has stated that the Accused No. 3 was holding an iron bar, the Accused Nos. 4 and 8 were holding the axes in their hands, the Accused No. 7 was holding a sickle in his hand and Accused Nos. 5 and 6 were holding the sticks in their hands. Then the Accused No. 1 asked the deceased to pay the dues of his shop, for which the deceased told him that he has already paid the dues and nothing is due from him. Thereupon, the Accused No. 1 while saying that they should take away his life, fired the shot from the gun that was possessed by him at his deceased brother. The said shot fired from the gun by the Accused No. 1 hit his brother resulting in injuries on the lower part of his abdomen and that his deceased brother fell to the ground. The Accused No. 2 fired the shot from the gun possessed by him towards him and PW. 5. From the shot fired by the Accused No. 2, he received injury to his upper lip, which was torn, and also to his two teeth which fell to the ground and PW. 5 was injured on her left palm. Thereupon they raised hue and cry and on hearing their cries, when some people living in their lane came there, all these accused persons went away from the spot alongwith the weapons that were held by them. Thereafter his mother PW. 1 alongwith PWs. 2 and 3 took the injured including him to the hospital for treatment in a tempo. The doctor who examined his deceased brother at the hospital declared him to be brought dead. Thereafter, his mother PW. 1 went to the Police Station in order to lodge a complaint of the occurrence to the Police and that he and the other injured PW. 5 were admitted for treatment to the hospital. Under the cross-examination, the defence had elicited from this witness PW. 4 that he was not enquired by the Police and that farther his mother and brother had brought him to the Court to give evidence by telling him that he is required to give evidence in regard to death of his brother and he was also told by them as to how and what he should state in Court. It was further elicited by the defence from this witness PW. 4 in the cross-examination that while his brother was brushing a teeth in the morning, he was standing by his side. His brother deceased Sidarai was standing at the door step of their house with one foot outside the door. He was standing there by the side of his deceased brother while he was brushing the teeth for about three minutes. He has stated that he had first sighted the Accused No. 1 who came near their house asking the deceased to pay his dues and for which his deceased brother told him that he has already paid the dues and that nothing is due from him. Thereupon the Accused No. 1 without any loss of time fired the shot from the gun at his deceased brother. He has stated that the Accused No. 2 at that time was sitting in front of the shop of Accused No. 1 and the Accused Nos. 3 to 8

were also sitting in front of the shop of the Accused No. 1. He has stated that at the material time he was studying in Balawadi. He has clearly denied the suggestion that on 25.4.1996 in the morning there was a news in the village that the dead body of his brother Sidarai was lying on the road leading from Hulyanur to Basavanakolla and that when he had gone there running to see the dead body, he fell down and had sustained the injury to his lip. Under the reexamination, he has clearly stated that he has not been tutored by anybody to depose in a particular fashion in the Court. The said answer elicited in the reexamination clearly rules out his being tutored by anybody to depose before the Court in a particular manner. Further even the defence did not dispute that PW. 4 had sustained the injuries to his person on that relevant day and they could not be self inflicted, but the defence sought to attribute the same due to a fall which has been clearly denied by him. If really the injured PW. 4 had a fall on that day, the injury could not have been sustained only on the upper lip and there should have been some other injuries on the other parts of the body. But admittedly, PW. 4 did not sustain injury on any other part of his body other than the one found by the doctor. Even in the cross-examination done by the defence, PW. 4 has clearly stated that he had lost two teeth and they had fallen near their house. It is pertinent to note that the Investigating Officer who examined the spot, had recovered one of the tooth of PW. 4 from the place of incident of this case and not from any other place. This would corroborate the version of PW. 4 in Court and at the same time it falsifies the suggestion made by the defence. He has deposed regarding the occurrence to the extent possible. To expect exactitude from the evidence of such a witness PW. 4 is asking for the impossible. The pivotal submission of the appellants is regarding acceptability of the evidence of PW. 4 given in Court. As we have already stated, the age of the witness PW. 4 during examination was taken to be about 12 years. The Indian Evidence Act does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age etc. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness like PW. 4 is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other words, even in the absence of oath, the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be

a reliable one and his demeanour must be like any other competent witness and there is no likelihood of being tutored. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence and the said judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the application of an oath. The decision of the trial Court in this regard could be disturbed only when it is pointed out that its conclusions were erroneous. Though it is an established principle that the child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence, the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of child witness like PW. 4. The trial Court has elaborately analyzed the evidence of the eye-witnesses including that of the child witness PW. 4. The trial Court on careful examination was satisfied about the capacity of PW. 4 to understand and to give rational answers. That being the position, it cannot be said that the witness PW. 4 had no maturity to understand the import of the questions put or to give rational answers. This witness PW. 4 was cross-examined at length and inspite thereof, he had described in detail the scenario implicating the accused Nos. 1 and 2 to be the author of the crime committed against the deceased and the injured. The mere fact that the witness PW. 4 was asked to say about the occurrence and as to what he saw, is no reason to jump to a conclusion that it amounted to tutoring and that he was deposing only as per tutoring what was not otherwise what he actually saw. The learned Counsel for the appellants have taken pains to point out certain discrepancies which are of very minor and trifle in nature and in no way affect the credibility of the prosecution version given by this witness PW. 4. The evidence of PW. 4, the child witness, has credibility which reveals a truthful approach and his evidence to put it mildly, has the ring of truth. There are no exaggerations and he has stuck to his statement. No doubt, PW. 4 has stated that he was not enquired by the Investigating Officer, but the evidence of the Investigating Officer would clearly indicate that he had recorded the statement of the injured PW. 4. Hence no much significance can be given to such answer elicited in the cross-examination of PW. 4 by the defence. That being so, the trial Court was justified in placing reliance upon the testimony of PW. 4. In this connection, a reference may be made to the two decisions of the Hon'ble Supreme Court in the case of Suryanarayana v. State Of Karnataka reported in 2002 SCC (Cri 413 and in Dattu Ramrao Sakhare v. State of Maharashtra reported in 1997 SCC (cri) 685. A reference may also be made to a decision of the Hon'ble Supreme Court in the case of Ratansinh Dalsukhbhai Nayak. v. State of Gujarat reported in 2004 SCC (cri) 7. Moreover the evidence of PW. 4 stands corroborated from the evidence of the other injured witness PW. 5.

31. Now coming to the evidence of the other injured witness PW. 5, she has stated that on that fateful day in the morning at about 7 a.m. when she was in

the house and the deceased Sidarai was in front of their house, on hearing the cries she came out of the house and saw all the accused persons who were shouting at the deceased. On seeing the same, when she asked them as to why they are shouting at the deceased, the Accused No. 1 fired the shot from the gun possessed by him at the deceased and that the deceased having sustained injury on the left side of his abdomen fell down to the ground. In the mean time, the Accused No. 2 fired the shot from the gun at her and PW. 4 and she had sustained an injury and so also PW. 4 Basappa. She has stated that as soon as she sustained injury to her person, she became unconscious and she could not know as to what transpired thereafter. According to her, she could regain consciousness at the hospital in Belgaum. She has stated that while she was taking treatment in the Civil Hospital at Belgaum, the Police had recorded her statement. She has further stated that the other accused persons other than the Accused Nos. 1 and 2 were armed with sticks, iron bar, axes and sickle. Under the cross-examination, the defence had elicited from this witness PW. 5 that she had lost her husband about 15 years back and PW. 2 Yallappa is her son. Obviously that may be the reason for PW. 5 to live in the house of her parents alongwith her son. It is also elicited in the cross-examination by the defence from this witness PW. 5 that when she came to the front door, people had already collected there. Then a suggestion was made to her by the defence regarding the injuries sustained by her that when she had gone to collect firewood in the jungle, she had sustained injuries to her left hand which has been clearly denied by her. Even here also the defence does not dispute the injury sustained by PW. 5. The suggestion that she has sustained such injury when she had gone to collect firewood in the jungle is without any basis. Therefore the fact that she had sustained such injury to her person on that day is not disputed even by the defence.

32. The evidence of the doctor PW. 15 who had examined these two injured persons on 25.4.1996 at about 9.40 a.m. would substantially support the evidence of the two injured witnesses PW. 4 and 5. Apart from the fact that their evidence stands corroborated from the evidence of the doctor PW. 15, their evidence in the contextual facts seems to be quite natural and probable. It is pertinent to note that both these injured eye-witnesses PW. 4 and 5 though speaks to the presence of all the accused persons, they have not attributed any overt acts to any other accused persons other than the Accused Nos. 1 and 2. It is quite natural because having been injured in the incident and that too by the shot fired from the gun, they must have been greatly shocked and stunned by the incident and they could not have concentrated on what other acts that have followed the incident of firing. Further if really they have been tutored and wanted to depose falsely, they would have clearly deposed against all the accused persons with reference to the overt acts committed by each one of them. But they did not do so and they have deposed only to the extent what they had actually seen and observed with their senses.

33. Therefore for all these reasons, we are unable to reject the evidence of PWs.

4 and 5 merely on the ground that they were relatives of the deceased We have ourselves carefully gone through the entire evidence of these two witnesses PWs. 4 and 5 and we find that shorn of a few embellishments here and there, their testimony read as a whole in its entirety has a ring of truth, a colour of consistency and a sense of straightforwardness, as a result of which, their evidence inspires great confidence. In these circumstances, therefore, we do not see any reason to discard the assessment of the trial Court regarding these two eyewitnesses PWs. 4 and 5. Thus once the evidence of these two witnesses PWs. 4 and 5 is believed, the prosecution case to the extent that the shots that were fired by the Accused Nos. 1 and 2 from their guns had killed the deceased and injured PWs. 4 and 5 stands proved, apart from anything else. There can be no doubt that having regard to the fact that the incident took place in the early hours of the morning near their house, the only natural witnesses who could be present to see the assault would be PWs. 4 and 5 who are admittedly the inmates of the said house. Moreover, they are the injured eye-witnesses to the occurrence. Once PWs. 4 and 5 are held to be trustworthy witnesses, then there does not seem to be any cogent reason for not acting upon their evidence. The fact that the other persons who were present at the spot, and had witnessed the occurrence, have, without any good reason and perhaps with oblique motive, chosen not to state the truth in Court and thereby to obstruct the course of justice would, in our opinion provide a sound reason for accepting the testimony of PWs. 4 and 5 with regard to the incident of firing. To decline to act upon the testimony of these two witnesses merely because of the absence of other independent witnesses to corroborate them in Court, is to defeat the cause of justice in this case. Because of their relationship with the deceased, they cannot be considered to be inclined to spare the real assailants for falsely involving the accused persons and indeed in the circumstances of this case, there is hardly any scope for such a hypothesis. To us, there appears to be an intrinsic ring of truth in the statements of the two injured eyewitnesses PWs. 4 and 5 which disclose no infirmity. There is no general rule that the evidence of the relations of the deceased must be corroborated for securing the conviction of the accused. Each case depends on its own facts and the circumstances. In the present case, the straightforward nature of the deposition of these two witnesses PWs. 4 and 5 and the fact that they were undoubtedly in a position to identify the assailants of the deceased and themselves with the recovery of one of the tooth that had fallen from the mouth of PW. 4 from the spot leave no reasonable doubt about the deceased and PWs. 4 and 5 being shot by Accused Nos. 1 and 2 with the guns that were possessed by them.

34. From the evidence of these two injured witnesses PWs. 4 and 5, the prosecution has been able to establish the fact beyond any reasonable doubt that the deceased was killed by the shot/shots that was/were fired by the Accused No. 1 from the gun Mo. 1 that was held by him at that time and PWs. 4 and 5 were injured by the shots that were fired by the Accused No. 2 from the gun that was possessed by him. Thus the evidence on record would clearly establish that

it is the Accused No. 1 who caused the death of the deceased by firing the shot from the gun Mo. 1 that was held by him at that time and in the course of the same incident, the Accused No. 2 had caused injuries to PWs. 4 and 5 by firing shots from the gun that was held by him. The very fact that the Accused Nos. 1 and 2 fired shots from the guns that were held by them by picking up a quarrel over a trivial issue with the deceased would show that their intention could be none other than to cause such injuries which would cause the death of the deceased and as also to PWs. 4 and 5. But fortunately however PWs. 4 and 5 were able to escape with some grievous injuries, and unfortunately the deceased could not survive. Therefore the accused No. 1 is clearly responsible for the cause of death of the deceased and the accused No. 2 was responsible for the gun shot injuries suffered by PWs. 4 and 5, but have fortunately survived. Thus they were before the Court to tell the truth. One has to look at the situation in which the crime was committed and also the mental condition of the witnesses who are relatives of the deceased who had witnessed such a ghastly incident. In the heat of the moment, it is quite natural that their attention would be more towards the assailants and the deceased. Merely because PWs. 4 and 5 could not remember as to what transpired after they were injured by the shots that were fired by Accused No. 2, it cannot be a ground for discarding their statement whose presence at the spot was most natural. We do not see any reason to disbelieve the version of both PWs. 4 and 5 whose presence at the spot cannot be denied. Their testimony does not suffer from any material incongruity or falsehood as has been alleged by the appellants. Their evidence is acceptable to the extent to which they have deposed in Court as it is in tune with the established practice followed by the Court while appreciating the evidence of the witnesses. The trial Court has not committed any error in accepting their evidence. Therefore the Accused No. 1 is clearly guilty of an offence of murder which is punishable under Section 302 of IPC for having committed the murder of the deceased and the Accused No. 2 was liable for an attempt to commit murder which is punishable under Section 307 of IPC for having caused injuries to PWs. 4 and 5. But however the Accused No. 2 has been punished by the nature itself as he died even before the commencement of his trial in Court. We therefore find that the Accused No. 1 has been rightly found guilty of the offence under Section 302 of IPC by the trial Court.

35. A contention was also sought to be advanced on behalf of the appellants that on account of the improper examination of the accused persons under Section 313 Cr.PC, the entire proceedings stand vitiated. We are unable to accept this contention advanced on behalf of the appellants. The questioning of the accused is done to enable them to give an opportunity to explain any circumstances which have come out in the evidence against them. It may be noticed that the entire evidence was recorded in their presence and they were given full opportunity to cross-examine each and every witness examined on the prosecution side. They were given copies of all documents which were sought to be relied on by the prosecution. Apart from all these, as part of fair trial the

accused were given opportunity to give their explanation regarding the evidence adduced by the prosecution. However, it is not necessary that the entire prosecution evidence need be put to them and answers elicited from the accused. If there were circumstances in the evidence which are adverse to the accused and their explanation would help the Court in evaluating the evidence properly, the Court should bring the same to the notice of the accused to enable them to give any explanation or answers for such adverse circumstance in the evidence. It would have been better for the trial Court to have put certain questions to the accused other than the Accused No. 1 with regard to the firing incident. But since the shots were fired only by the Accused Nos. 1 and 2 and not by others, it appears that the trial Court did not question the other accused persons on this aspect of the case. In the facts and circumstances of the case, we find that there has been no failure of justice on account of an unfair trial as sought to be made out by the appellants. Be it noted that an omission to bring the attention of the accused to an inculpatory material does not ipso facto vitiate the proceedings. The accused must show that the failure of justice was occasioned by such omission. Further in the event of an inculpatory material not having been put to the accused, the appellate Court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused had as regards the circumstances established against the accused but not put to him. The ultimate test in determining whether or not the accused has been fairly examined under Section 313 Cr.PC would be to enquire whether, having regard to all the questions put to them, they did get an opportunity to say what they wanted to say in respect of the prosecution case against them. If it appears that the examination of the accused persons was defective and thereby a prejudice has been caused to them, that would no doubt be a serious infirmity. But that is not the case here. In this connection, a reference may be made to the two decisions of the Hon''ble Supreme Court in the case of State (Delhi Administration) v. Dharampal reported in 2003 SCC (cri) 1012 and in Jai Dev Vs. The State of Punjab, . In the instant case, we find that the appellants were not in any way prejudiced by not giving an opportunity to answer specifically with regard to the incident of firing attributed to the Accused No. 1, to the other accused persons. Moreover by way of abundant caution, we had in fact questioned or asked the learned Counsel for the appellants to show what explanation the accused have as regards the incident of firing by the Accused Nos. 1 and 2. On our such questioning, the only answer from the side of the appellants was that they did not participate in the incident in question and even otherwise it is stated that the presence of the other accused persons other than the Accused Nos. 1 and 2 was only to terrorize the deceased and his brother who were having criminal antecedents. Be that as it may. We find that the appellants have not been prejudiced in any manner because of non-questioning of the other accused other than the accused No, 1 with regard to the incident of firing which is attributed only to the accused No. 1 and which is an act committed by him alone. Hence it is not possible to accept the contention advanced on behalf of the appellants that on account of such omission, the proceedings stand vitiated. Even

otherwise, we have questioned the learned Counsel for the appellants and their answer in this regard is two fold that is they were not present and even if present, it was only to terrorize the deceased and others.

35 A) It is to be concluded therefore in view of our above discussion that the accused No. 1 is guilty of the offence of murder under Section 302 of IPC for causing the death of the deceased and the accused No. 2 is guilty of the offence under Section 307 of IPC for attempting to commit the murder of PWs. 4 and 5 and since he had died before the trial, the case against him stands abated. The trial Court has convicted the other accused also for the said offences with the aid of Section 149 of IPC.

36. Now the question is whether the other accused persons could be held guilty of the offences punishable under Sections 302 and 307 of IPC with the aid of Section 149 of IPC.

37. The Hon''ble Supreme Court in the case of Munna Chanda v. State Of Assam reported in (2006)2 SCC (cri) 43, while dealing with the question whether all the accused could be convicted with the aid of Section 149 of IPC, has observed in paragraphs-10 to 16 as under.

10. The concept of common object, it is well known, is different from common intention. It is true that so far as common object is concerned no prior concert is required. Common object can be formed on the spur of the moment Course of conduct adopted by the members of the assembly, however, is a relevant factor. At what point of time the common object of the unlawful assembly was formed would depend upon the facts and circumstances of each case.

11. Section 149 IPC creates a specific and distinct offence. There are two essential ingredients thereof:

(i) commission of an offence by any member of an unlawful assembly, and (ii) such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed.

12. It is, thus, essential to prove that the person sought to be charged with an offence with the aid of Section 149 was a member of the unlawful assembly at the time the offence was committed.

13. The appellants herein were not armed with weapons. They except Bhuttu were not parties to all the three stages of the dispute. At the third stage of the quarrel, they wanted to teach the deceased and others a lesson. For picking up quarrel with Bhuttu, they might have become agitated and asked for apologies from Moti. Admittedly, it was so done at the instance of Nirmal, Mori was assaulted by Bhuttu at the instance of Ratan. However, it cannot be said that they had common object of intentional killing of the deceased. Moti, however, while being assaulted could free himself from the grip of the appellants and fled from the scene. The deceased was being chased not only by the appellants

herein but by many others. He was found dead the next morning. There is, however, nothing to show as to what role the appellants either conjointly or separately played. It is also not known as to whether if one or all of the appellants were present, when the last blow was given. Who are those who had assaulted the deceased is also not known. At whose hands he received injuries is again a mystery. Neither Section 34 nor Section 149 of the Penal Code is, therefore, attracted (See *Dharam Pal v. State of Haryana* in 1979 SCC (cri) 61 and *Shambhu Kuer Vs. State of Bihar*,).

14. We are, however, not oblivious that in *Bishna @ Bhiswadeb Mahato and Others Vs. State of West Bengal*, it was stated:

47. For the purpose of attracting Section 149 and/or 34 IPC, a specific overt act on the part of the accused is not necessary. He may wait and watch and the inaction on the part of an accused may some time go a long way to hold that he shared a common object with others. 15. Furthermore, it is evident that no evidence has been brought on record to establish that the appellants Munna and Ujjal had committed any offence. As noticed hereinbefore, they were not named in the FIR. They were not identified in the dock. No witness has taken their names as the persons who committed any overt act. No recovery has been made from them. There is also no evidence that they had chased the deceased. As it had not been established that the appellants were members of an unlawful assembly, in our opinion, they could not have been convicted for commission of an offence under Sections 302/149 IPC.

16. For the aforementioned reasons, the appellants cannot be held guilty for commission of an offence under Sections 302/149 IPC. They are entitled to benefit of doubt.

38. Though the fact, situation here is somewhat different, but the principles applicable would be the same. Although the facts here would show that all the accused persons were armed with one or the other weapon, only two of them viz., the Accused Nos. 1 and 2 who were armed with guns had proceeded ahead towards the house of deceased and out of the two who had so proceeded towards the deceased, the Accused No. 1 having picked up quarrel over a trivial issue with the deceased fired the shot at the deceased from the gun that was held by him and the Accused No. 2 fired the shot at the two injured persons PWs. 4 and 5 from the gun that was held by him. Admittedly, the other accused persons, other than the Accused Nos. 1 and 2 did no harm either to the deceased or to PWs. 4 and 5 or to any other persons including the complainant PW. 1, but they had only caused damage to the house of the complainant PW. 1 by pelting the stones. It is pertinent to note that though they were armed with weapons, they did not use any of those weapons nor did they cause any injury to the deceased and his people, but they only pelted stones at the house of the complainant PW. 1 resulting in certain damage to their house. In the case of *Masalti Vs. State of U.P.*, , a contention on the basis of a decision of the Hon"ble Supreme Court in the case of *Baladin and Others Vs. State of Uttar Pradesh*,

stating that it is well settled that mere presence in an assembly does not make a person, who is present, a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, that an overt act was mandatory, was repelled by the Hon''ble Supreme Court stating that such observation was made in the peculiar facts of the case. Explaining the scope and purport of Section 149 of IPC, it was held as under:

What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained alongwith the other members of the assembly the common object as defined by Section 141 IPC. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case 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 by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly 39. It was further observed:

In fact, 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" 40. It is to be seen therefore that the essence of an offence under Section 149 of IPC would be common object of the persons forming the assembly. It is necessary for constitution of the offence that the object should be common to the persons who compose the assembly i.e, that they should all be aware of it and concur with it Furthermore, there must be some present and immediate purpose of carrying into effect the common object A common object is different from a common intention in so far as in the former no prior consent is required, nor a prior meeting of minds before the attack would be required whereas an unlawful object can develop after the people get there and there need not be a prior meeting of minds. In this case, having regard to the peculiar facts and circumstances of the case, we are of the clear view that the Accused Nos. 3,4,6 and 7 cannot be said to have formed a common object to kill any person or to make any attempt in that behalf in view of the manner in which the

occurrence in question took place. Their common object appears to be to terrorize the deceased and the other members of his family having regard to their criminal antecedents and also being disgusted with their activities in the village as has been suggested by the defence itself to some of the prosecution witnesses. But however after the shots were fired by the Accused Nos. 1 and 2 from the guns that were possessed by them, they developed a common object on the spot to throw the stones at the house of the complainant PW. 1 and others, thereby causing damage to their houses which clearly attract the offence under Section 427 read with Section 149 of IPC. The said acts on the part of the accused persons in throwing stones at the house of the complainant PW. 1 could also be to terrorize them from making a counter attack. In this view of the matter, the Accused Nos. 3,4,6 and 7 could be held liable for the offences punishable under Sections 143, 148, 427, 504 and 506 read with Section 149 of IPC. They cannot however be made vicariously liable for the offences punishable under Sections 302 and 307 of IPC which were committed by the Accused Nos. 1 and 2, with the aid of Section 149 of IPC. Under the circumstances, therefore, we find that the trial Court is not right in convicting the Accused Nos. 3,4,6 and 7 under Sections 302 and 307 of IPC with the aid of Section 149 of IPC. So also the accused No. 1 for the offence under Section 307 of IPC with the aid of Section 149 of IPC as the said act was clearly attributable or committed by the Accused No. 2, who has died before the trial and hence the case against him stood abated. We therefore find that though the trial Court is right in holding the accused Nos. 1 and 2 guilty of the offences punishable under Sections 302 and 307 of IPC and also convicting all the accused persons of the offences punishable under Sections 143, 148, 427, 504 and 506 of IPC with the aid of Section 149 of IPC, it may not be right in convicting the other accused persons viz., Accused Nos. 3,4,6 and 7 other than the Accused Nos. 1 and 2 for the offences punishable under Sections 302 and 307 of IPC with the aid of Section 149 of IPC. So also the accused No. 1 of the offence under Section 307 read with 149 of IPC. Hence to that extent, the impugned Judgment and Order of conviction and sentence passed by the trial Court needs to be modified. We find that the Accused No. 1 who had used the gun for killing the deceased has been rightly convicted by the trial Court under Section 30 of the Indian Arms Act and hence the conviction and sentence passed by the trial Court against the Accused No. 1 for the offence under Section 30 of the Indian Arms Act warrants no interference and hence it is left undisturbed.

41. In the result, therefore, these two Criminal Appeals filed by the appellants succeed in part The impugned Judgment and Order of conviction and sentence passed by the trial Court stands altered or modified in the manner and to the extent as indicated below:

(1) The impugned Judgment and Order of conviction and sentence passed against the Accused Nos. 3,4,6 and 7 for the offences punishable under Sections 302 and 307 of IPC with the aid of Section 149 of IPC is hereby set aside and they are acquitted of the said charges;

(2) The Accused No. 1 who is found guilty of the offence under Section 302 of IPC for having committed the murder of the deceased, is alone convicted for the offence under Section 302 of IPC and he is sentenced to undergo imprisonment for life for the said offence. He is however acquitted of the offence under Section 307 read with Section 149 of IPC and the sentence passed thereunder.

(3) The impugned Judgment and Order of conviction and sentence passed by the trial Court against all the accused persons viz., Accused Nos. 1,3,4,6 and 7 for the offences punishable under Sections 143, 148, 427, 504 and 506 read with Section 149 of IPC is left unaltered/undisturbed and the same stands confirmed;

(4) The impugned Judgment and Order of conviction and sentence passed by the trial Court against the Accused No. 1 for the offence under Section 30 of the Indian Arms Act is also left unaltered/undisturbed and the same stands confirmed.

42. Except for the above modification and alteration in the impugned Judgment and Order of conviction and sentence passed by the trial Court against the Accused Nos. 1,3,4,6 and 7, in all other respects, the impugned Judgment and Order of the trial Court remains unaltered/undisturbed and the same stands confirmed accordingly. If the accused persons viz., the Accused Nos. 3,4,6 and 7 have already undergone the sentence imposed upon them by the trial Court for the above said offences, they may be released forthwith, if their presence is not otherwise required in connection with any other case or if they are not involved in any other offence. Thus these two Criminal Appeals are allowed in part and the impugned Judgment and Order of conviction and sentence passed by the trial Court, stands modified/alterd only to the extent and in the manner as indicated above and in all other respects, it stands confirmed.