

(2000) 06 KAR CK 0084
In the Karnataka High Court
Case No : Criminal Appeal No. 1004 of 1996

Laxman Channappa Divate and Others APPELLANT
Vs
The State of Karnataka RESPONDENT

Date of Decision : 21-06-2000

Acts Referred:

Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 109, 302, 304, 34

Citation : (2000) 4 KCCR 2740

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

Bench : Division Bench

Advocate : C.H. Jadhav and R.B. Deshpande, for the Appellant; Mohan Shantanagoudar, State Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

B. Padmaraj, J.—Heard the learned Counsel for the Appellants and the learned State Public Prosecutor for the Respondent-State and carefully perused the case records with their assistance.

2. Original accused Nos. 1 to 3 are the Appellants. They were tried for the offence u/s 302 read with 34 Indian Penal Code for committing the murder of one Dhareppa Divate of Kanamadi Village, by assaulting him with axes on 5.10.1993 at about 3 p.m. in the land of Suresh Bhimaraya Yadav situated within the limits of Kanamadi Village and have been convicted of the said offence and sentenced to undergo imprisonment for life and also to pay a fine of Rs. 500/- each, in default, to undergo S.I. for a period of 3 months each.

3. The accused No. 4, the father of accused Nos. 1 to 3, who was tried for the offence u/s 109 read with 302 Indian Penal Code for abetting the accused Nos. 1 to 3 to commit the murder of the deceased, has however been acquitted of the said offence. The State has not preferred any appeal against an order of acquittal of the accused No. 4.

4. It is only the convicted accused Nos. 1 to 3, who have preferred this appeal assailing their conviction as well as the sentence imposed by the trial Court for the offence u/s 302 read with 34 Indian Penal Code.

4. The case of the prosecution as unfolded at the trial is:

The Appellants and the deceased as well as the material witnesses for the prosecution belonged to Kanamadi Village, Tq and District Bijapur. The accused Nos. 1 to 3 are the sons of accused No. 4. PW-10 Srishail Divate is the brother of the deceased. PW-7 Jakkavva is the sister of the deceased and PW-10. The accused No. 4, who is the father of the Appellants, is the uncle of PW-10. Thus, the accused, the deceased and the material witnesses in the case are closely related to each other and they are from the same village Kanamadi. Their lands are situated by the side of a road leading to Kakkamari village. While going from the village, the land of PW-7 (her husband's land) is the first one and the same is nearer to the land of one Suresh Yadav. By the side of the land of the deceased, there is a land originally belonging to one Sharanappa PW-14, who had sold the same to the accused. After the accused purchased the said land of PW-14 Sharanappa situated by the side of the land of the deceased, it is stated that they had made a request for a pathway, which was stoutly declined by the deceased on the ground that they had an alternate way to reach the said land. There were ill-feelings between the accused and the deceased. At the relevant time of the incident, the abovesaid land of Suresh Yadav was being cultivated by one Kenchappa, the father of PW-4. The deceased Dhareppa and his brothers including PW-10 Srishail were living jointly. But PW-10 Srishail at the relevant time of this incident was working under one Subhash Gowda in his land. Infact, on the day of the incident also, PW-10 had been working in the land of the said Subhash Gowda. The deceased Dhareppa was looking after the affairs of their family and was also supervising the cultivation work of the lands belonging to their joint family, as he was the eldest among his brothers. On the day of the incident, while PW-7 Jakkavva was in her house, she saw the deceased Dhareppa going from his garden land. Within a short while, thereafter, PW-7 Jakkavva heard the screams of the womenfolk. On hearing such screams, PW-7 went there. On reaching there, PW-7 saw the accused Nos. 1 to 3 committing assault on the deceased Dhareppa. They were all armed with axes and were assaulting the deceased. She was followed by her brother-in-law Gangappa-PW-13, whose house was situated nearby the house of PW-7. On seeing their arrival to the spot, it is stated that the accused left the spot along with the weapons on two different bicycles. The deceased Dhareppa was lying at the spot with bleeding injuries on his person. The deceased was still alive when they reached the spot and they attended on the deceased by giving him water to drink. Thereafter, they put the injured Dhareppa in a bullock cart and brought him home. On the way, PW-10 also joined them. But unfortunately, the deceased Dhareppa died on the way to the village. PW-7 Jakkavva informed of what she saw to PW-10 Srishail, who in his turn, got the complaint prepared through one Erappa PW-9 and went to the Police Station. At the Police Station, the PSI PW-30 received the complaint

of PW-10 which is as per Ex.P. 10 at about 8.30 p.m. in the night of 5.10.1993 and registered the case. The further investigation of this case was taken over by the CPI-P.W-34 and after completion of investigation, he submitted the charge sheet against the accused. During the course of the investigation, the accused Nos. 1 and 2 were arrested on 10.10.1993 and in consequence of the voluntary information furnished by each of them, MO-9 Axe was recovered at the instance of the accused No. 1 while MO-8 Axe and MO-6 Cycle were recovered at the instance of accused No. 2. Subsequently, on 14.10.1993, PW-34 arrested the accused Nos. 3 and 4 and in consequence of the information furnished by accused No. 3, the cycle MO-7 and the axe MO-10 were recovered. The deadbody of the deceased was subjected to post-mortem examination by the doctor PW-24 as per the post-mortem report Ex.P. 24. He held autopsy over the dead body of the deceased on 6.10.1993 between 1.15 p.m. and 3 p.m. and found the following external injuries on the dead body of the deceased.

External Injuries:

1. Lacerated wound $1\frac{1}{2}$ " x $\frac{3}{4}$ " x scalp deep over the left parietal region.
2. Left shoulder is swollen and there is lacerated wound $\frac{3}{4}$ " x $\frac{1}{2}$ " x bone deep. There is evidence of the fracture head of the left humerus.
2" x $\frac{1}{4}$ " x skin deep 2 $\frac{1}{2}$ "
3. Incised wound 2" x $\frac{1}{4}$ " x skin deep 2 $\frac{1}{2}$ " below the injury No. 2.
4. Incised wound 1" x $\frac{1}{4}$ " muscle deep over the posterior aspect of left upper arm.
5. Abrasion 1" x $\frac{3}{4}$ " over the posterior aspect of left forearm.
6. Incised wound 1" x $\frac{1}{2}$ " muscle deep over the dorsour of the left hand.
7. Lacerated wound $1\frac{1}{2}$ " x $\frac{1}{2}$ " x $\frac{1}{4}$ " over the front of the left knee.
8. Lacerated wound $\frac{3}{4}$ " x $\frac{1}{2}$ " x skin deep over the front of left 4" above the ankle.
9. Lacerated wound $\frac{3}{4}$ " x $\frac{1}{2}$ " x muscle deep over the left poplifialofassa.
10. Lacerated wound $\frac{3}{4}$ " x $\frac{1}{2}$ " x muscle deep just below the medial mallolus of the right ankle.
11. Lacerated wound $\frac{1}{2}$ " x $\frac{1}{4}$ " muscle deep over the front and middle of the right leg.
12. Lacerated wound $\frac{1}{2}$ " x $\frac{1}{4}$ " muscle deep over the posterior aspect of right forearm 3" below the elbow.
13. Lacerated wound $\frac{1}{2}$ " x $\frac{1}{4}$ " bone deep 2 $\frac{1}{2}$ below the injury No. 12. There is evidence of fracture of both the bones of right forearm at their middle.

14. Contused abrasion 3" x 2" over the right shoulder.
15. Abrasion 1 1/2" x 1", 1" above the injury No. 14.
16. Contusion 4" x 2" over the right seapular region.
17. Contused abrasion 10" x 6" over the left seapular region.

All the abovesaid injuries were found to be antimortem in nature. On dissection, he found the following internal injuries.

Internal Injuries:

1. Lower lobe of the left lung is contused.
2. Upper one third of the left humerus including the head is fractured into multiple pieces, the muscles, vessels and nerves are ruptured at the fracture site. A big haematoma is present.
3. Both the bones of the right forearm are fractured. A bog haematoma is present at the fracture site. Muscles, vessels and nerves are lacerated.

According to the Doctor PW-24, the death of the deceased was due to haemorrhage and shock as a result of multiple injuries. He has further opined that all these injuries could be caused with weapons like MOs 8 to 10. He has also stated that the Rigor Mortis was present in the limbs and the post-mortem lividity was present in the buttocks. The stomach was found to contain six ounces of semi-digested food materials. These are the post-mortem findings of the Doctor PW-24. The reports received from the FSL as per Exs. P-41 and P-42 revealed that the shirt, mundichat, dhoti and the underwear of the deceased and three axes recovered at the instance of these Appellants were found to be stained with blood and that further, the blood-stained soil and the sample soil were found to be similar.

The prosecution had examined at the trial PWs 1 to 34. Out of them, PWs 1, 2, 3, 4, 5, 6, 8, 11, 13, 14 to 22, 25, 27, 31 and 32 have turned hostile. PW-7, the sister of the deceased (also accused-4 is her uncle), supported the prosecution case and she is an eye witness to the incident. PW-9 is the scribe of the complaint Ex.P-10 and PW-10, the brother of the deceased is the complainant who had lodged the complaint as per Ex.P-10 with the PSI-PW-30 at the Police Station and they have both supported the case of the prosecution. PW-10 is a panch for the seizure of the clothes of the deceased under a panchanama Ex.P-12. PW-14 Sharanappa is the one who had sold his land to accused No. 4, but turned hostile to the prosecution. PWs 23, 28, 29 and 33 are the Police Officers who took the articles to the Forensic Science Laboratory, carried the FIR and the body of the deceased for the post-mortem examination and produced the clothes of the deceased MOs 1 to 5 before the Investigating Officer after the Post-mortem examination was over. PWs 30 and 31 are the Investigating Officers. It would be of some relevance to note here itself that though some of the witnesses have turned hostile, they have supported the prosecution case to a

certain extent.

The trial Court on consideration of the entire evidence placed on record and after hearing the arguments on both sides, convicted the accused Nos. 1 to 3 (the Appellants herein) for the offence u/s 302 read with 34 of Indian Penal Code and sentenced them accordingly as stated supra. It is against this judgment and order of conviction as well as sentence, the Appellants have preferred this appeal challenging their conviction and sentence.

Learned Counsel for the Appellants has vehemently contended before us that the evidence of PW-6 cannot be relied upon and that further his name does not figure as an eye witness in the FIR. He also contended that except PW-7, who is the sister of the deceased, no other eye witnesses to the incident have supported the case for the prosecution which would certainly create a doubt on the prosecution case as set up at the trial. While elaborating this submission, he contended that all is not well with the case of the prosecution. According to the learned Counsel even the scene of incident has been shifted from place to place. He therefore contended that the evidence of the sole eye witness PW-7 is not capable of being relief upon to convict these accused for the offence u/s 302 read with 34 Indian Penal Code. He also contended in the alternative, that on that day, some incident might have occurred, resulting in a quarrel giving rise to this incident, in which eventuality, the acts attributed to these accused would attract the offence u/s 304 Indian Penal Code and not 302 Indian Penal Code. He also contended that the evidence of the doctor PW-24 who conducted the post mortem examination on the deadbody of the deceased would show that except one injury on the head, the rest of the injuries were on non-vital parts of the body and all the injuries according to the doctor were simple in nature except 2 and 13 and in that event, it would only attract the offence u/s 304 Indian Penal Code and not 302 Indian Penal Code. While elaborating this submission, he further contended that looking to the nature of the injuries sustained by the deceased, in all probability, both the blunt edge as well as the sharp edge of the weapon must have been used in the commission of the offence and the injury to the head which has been described as lacerated injury would have been inflicted by the blunt edge of the weapon. He further contended that if really the Appellants had intended to commit the murder, they would not have certainly used the blunt edge when the task could have expedited and assured with the sharp edge. In support of this submission, learned Counsel for the Appellants has relied upon a decision reported in State of Punjab Vs. Tejinder Singh and another, . He therefore contended that on the facts and circumstances of this case, the conviction of the accused may be altered from Section 302 to 304 Part I of Indian Penal Code.

As against this, learned State Public Prosecutor on behalf of the Respondent-State has contended that though in the case, large number of witnesses have turned hostile to the prosecution, the evidence of PW-7 is quite consistent and corroborated by the other circumstances appearing in the case and the evidence

of the sole eye witness PW-7 is itself sufficient to convict the accused for the offence u/s 302 read with 34 Indian Penal Code. While elaborating this submission, he contended that PW-7 is related to both the deceased and the accused and there was absolutely no reason for her to falsely implicate the accused in the case. He contended that the facts and circumstances of this case would clearly indicate that on hearing the screams of certain womenfolk, PW-7 immediately rushed to the spot and witnessed the whole incident which took place at the spot. He also contended that though some of the witnesses have turned hostile, to an extent, they have supported the prosecution case which would substantially corroborate the version of PW-7 regarding the incident. He therefore contended that the trial Court was justified in placing reliance upon the evidence of PW-7 and the other circumstances appearing in the case and convicting the accused for the offence u/s 302 read with 34 Indian Penal Code. He further contended that on the facts of this case, it cannot be said that the injuries were inflicted on the deceased without premeditation. While elaborating this submission, he contended that the question with regard to the nature of offence has to be determined on the facts and in the circumstance of each case. According to the learned State Public Prosecutor the nature of the injury whether it is on the vital or non-vital part of the body, the weapons used, the circumstances in which, the injuries were inflicted on the deceased and the manner in which those injuries were caused are all relevant factors which may go to determine the required intention or knowledge of the accused and the offence committed by them. In the instant case, he contended that the very fact that all these Appellants armed with axes committed a conjointed assault on the deceased would clearly indicate that they had an intention to cause the death of the deceased. He therefore contended that the acts attributed to the accused would certainly attract the offence u/s 302 Indian Penal Code and this is not a case for altering the conviction from Section 302 Indian Penal Code to Section 304 Indian Penal Code. He further contended that the decision relied upon by the learned Counsel for the Appellant has no application to the facts and circumstances of this case. He therefore contended that the judgment and order of conviction made by the Trial Court needs no interference at the hands of this Court in the appeal.

The probative items placed before the Court by the prosecution, there is no defence evidence adduced, falls into three groups. Firstly, we have the eye witnesses account of the mortal attack as given by PW-7 and corroborated or supported by the testimony of the other witnesses including the hostile witnesses. Secondly, the motive for the accused to commit such crime. The last set of incriminating facts are the abscondence of the accused, the discovery u/s 27 of the Evidence Act of certain material objects pursuant to the statements made by the Appellants/accused Nos. 1 to 3 and the report of the Chemical Examiner.

The fact that the deceased Dhareppa Divate died of violence on 5.10.1993 is not in serious dispute. Even otherwise, the medical evidence placed on record

coupled with the other circumstances including the inquest proceedings held on the dead body of the deceased would conclusively establish this fact. After going through the relevant material on record including the medical evidence, we have no manner of doubt that the deceased had met with a homicidal death. Hence, we confirm the findings of the Court below that the deceased died a homicidal death.

Now the question is whether the Appellants/accused Nos. 1 to 3 are responsible for the death of the deceased Dhareppa Divate as held by the Court below.

In order to bring home the guilt, the prosecution mainly relied on the evidence of the eye-witness PW-7 who claimed to have seen the assault committed on the deceased. In addition to the ocular evidence, the prosecution also relied on the evidence relating to the motive and recovery. As far as the circumstance regarding the recovery is concerned, except the evidence of the Investigating Officer PW-34, there is no other evidence on record as the panchas to the recovery have turned hostile.

PW-2 Subhash Gowda, a resident of Kanamadi village, though turned hostile to the prosecution has stated that there was a dispute in respect of a pathway between the accused and the deceased and in that regard, they (the villagers) had advised the deceased to give them a way, but the deceased was reluctant and not agreeable for the same. It would thus show that there was a possibility of some ire for the accused towards the deceased.

PW-4 Somakka is a resident of Somadevanahalli. She knew both the accused and the deceased. She is the daughter of one Kenchappa, who was cultivating the land of one Suresh Yadav, which was situated by the side of Kakamari Road. The land of the deceased Dhareppa was lying next to the land cultivated by PW-4 and her father. On the day of the incident, she was working in the land of Suresh Yadav alongwith some others including PWs 5 and 11. At about the afternoon time, she saw some persons gathered near the road and she went there to see what it is. On reaching the spot, she saw the deceased Dhareppa lying dead with injuries. This was seen by the other labourers also. She has however stated that she did not witness the incident of assault committed on the deceased by the accused and as such, she was treated as hostile to the prosecution.

PWs 5 to 11 have turned hostile wholesale to the prosecution and they did not support the case for the prosecution to any extent.

PW-6 Kalappa is a resident of kanamadi village and he is aged about 55 years. He knows the accused and the deceased. He has got a land by the side of Kakamari road. The lands of the accused as well as that of the deceased are also adjoining to the said road. The land of one Suresh Yadav where PW-4 had been working adjoins his land. The road is at a distance of about half a furlong from his land. He is an eye-witness to the incident of assault on the deceased. The incident in question took place on the road nearby the land of Suresh Yadav. The time then was 3 p.m. At that point of time, he was standing on the bund of his

land. He says that he heard the screams or cries of the women folk. On hearing their cries, he went to the spot. There he saw these Appellants. He saw them mounting the bicycles or proceeding on the bicycle after committing the assault on the deceased. According to him, as he came running to the spot, he did not observe as to the weapons with which the accused had assaulted the deceased. He found the deceased Dhareppa lying there on the spot with injuries on his person. He has further stated that the deceased was still alive when he had reached the spot. PW-7 Jakkavva, PW-13 Gangappa and PW-4 Somakka, PW-5 Lakshmibai and others were also there. Thereafter the injured was put in a bullock cart and the bullock cart proceeded towards the village. PW-13 was driving the said bullock cart. PW-7 Jakkavva had also accompanied the deceased with the said bullock cart which proceeded towards the village. He later learnt that the injured Dhareppa has died on his way to the village. He has also stated that PW-4 Somakka had been cultivating the land of Suresh Yadav and that the persons viz., PW-5 Lakshmibai and others have come to the said land for coolie work. MOs 1 to 5 were found on the person of the deceased at the time of this incident. Though PW-6 Kallappa had been treated as hostile to the prosecution, he supported the case of the prosecution to the above extent. He appears to be most natural witness and inspires confidence. Under the cross-examination, he has stated that he was residing in the land alongwith his wife and children, but on the day of the incident, his wife and children were however not present in the land. According to him, when he heard the cries, he was on the bund. He has further stated in the cross-examination when he was attending to his work in the land, he heard the cries and then mounted on the bund in order to see what it was. He has further stated that by the time he could reach the road, the accused were going away from the spot. According to him, everything was over when he reached the spot. He did not talk to the accused. But he had reached the road within five minutes of hearing the cries and by then everything was over. PW-7 Jakkavva, PW-13 Gangappa and other women folk were already there even before he could reach the spot. PW-7 Jakkavva asked him to bring some water and accordingly he brought water and Jakkavva PW-7 put water into the mouth of the injured. Then he returned to his garden land and remained there. These answers elicited in the cross-examination of PW-6 by the defence further confirm his presence as well as the presence of PW-7 at the spot.

PW-7 Jakkavva is the sister of the deceased and the accused No. 4, the father of these Appellants, is her own uncle. The land of her husband is situated by the side of Kakamari Road. She was a resident of the same village. The land of the deceased and also the land of one Sharanappa PW-11 are also adjoining to the said road. The said Sharanappa PW-14 had sold his land to the accused. She says that she is an eye-witness to the incident of assault committed on the deceased by the Accused Nos. 1 to 3. The said incident had occurred near the land of one Suresh Yadav. The time then was 3 p.m. She has stated that on that relevant day, she saw her brother viz., the deceased Dhareppa proceeding towards garden from inside her house. Thereafter while she was so present in

the house, she heard the hue and cry of some women folk and she immediately ran there to see what it was. At that point of time, she saw these Appellants committing assault on the deceased with axes all over the body of the deceased. She has stated that PW-13 Gangappa also came behind her. After she went there, the accused left the deceased and went away from the spot alongwith the weapons held by them on two different bicycles. By that time, PW-6 Kalappa, a neighbouring land owner also came there and they put water into the mouth of the deceased, who was lying with bleeding injuries on the spot. PWs 4, 5 and others were also there on the spot. She has also stated that she had heard the cries of her brother as well as of the women folk while she was present in the house. Thereafter she says that they put the injured Dhareppa into a bullock cart driven by PW-13 and proceeded towards the village. On the way her another brother PW-10 Shrisail also joined them. PW-10 was informed about the incident by her son Mallappa and he had come there. Her son Mallappa had also come to the spot following her. At that time, she had asked or instructed her son Mallappa to go and inform the said incident to PW-10. MOs 1 to 5 are the articles of her brother viz., the deceased. She had identified the two cycles MOs 6 and 7 as the cycles on which these accused had left the spot after the incident. She has also identified the three axes MOs 8 to 10 with which the deceased had been assaulted by the Appellants.

Regarding the motive this is what PW-7 say in paragraph-4 of her deposition which reads as under:

- KANNADA MATTER -

Thus there were ill-feelings between the deceased and the accused. Nothing substantial has been elicited or brought out in the cross-examination of PW-7 so as to disbelieve her evidence regarding the incident as well as the circumstance regarding the motive. On the other hand the answers elicited or obtained in the cross-examination of PW-7 by the defence, if perused carefully, would confirm her presence at the spot. Even the evidence of PW-6 Kalappa would substantially support the testimony of PW-7. Her presence at the spot appears to be so natural and probable that it inspires confidence to believe her version.

PW-8 who is a panch for the recovery of the two axes and a cycle at the instance of the Accused Nos. 1 and 2 under a panchanama Ex.P7 had been declared as hostile to the prosecution since he did not support the recovery.

PW-9 Eerappa is the scribe of the complaint Ex.P10. He has stated that on 5.10.1993, he wrote the contents of the complaint as per the say of PW-10 Srishail and the contents of the Ex.P10 are in his handwriting. He is a resident of Tikota village which is at a distance of about 20 to 22 kilometers from the village of PW-10. His wife is from the village of PW-10 and he knows both the accused as well as the deceased. PW-10 was also known to him. Under the cross-examination he has stated that one Shivaraya had come alongwith PW-10 and he wrote the contents of the complaint by sitting in front of the police station by

securing a paper from the nearby shop. The complaint Ex.P10 was written before the Police were informed about the incident. He took about half an hour to write the complaint. Thus the evidence of PW-9 would clearly indicate that he wrote the contents of the complaint as per the say of PW-10 by sitting near Police Station.

PW-10 Shrisail is an younger brother of the deceased and he had lodged the complaint with the police. The accused No. 4 is his uncle. During the relevant time of this incident, he was working under one Subhas Gowda in his land. Even on the date of the incident he was in the land of the said Subhas Gowda. While he was so there, his sister's son Mallappa came and informed to him about the incident around 3 p.m. On being so informed, he immediately left for the spot and on the way he met PW-7 who was proceeding in the bullock cart alongwith the injured Dhareppa and PW-13 Gangappa and he also joined them. He has stated that his brother deceased Dhareppa died on the way to the village. They put the dead body of the deceased in the house and after informing their relatives, he left the village for the police station at Tikota where he got written the complaint through PW-9. Then he gave that complaint to the PSI at Police Station. The contents of the complaint Ex.P10 were written on his say and they are true and correct. He has also stated that some mistake had crept into the complaint for want of sufficient information and in the further statement to the Police, the said mistake was got rectified.

Regarding the motive, this is what PW-10 says in paragraph-3 of his deposition:

- KANNADA MATTER -

PW-11 Yallavva was putforward by the prosecution as an eye-witness to the incident, but unfortunately for the prosecution, she did not support its case and she has been declared as hostile.

PW-12 is a panch for the seizure of the clothes of the deceased viz., MOs 1 to 5 under a panchanama Ex.P12.

PW-13 is the brother-in-law of PW-7. He has stated that on the day of the incident he was in their land. At that time he heard the hue and cry of the womenfolk from the land of one Suresh Yadav at about 3 p.m. and he went there to see what it was. He has stated that PW-7 had also went ahead of him. By the time he went there, PW-4 Somakka and his sister-in-law Jakkavva PW-7 were already there on the spot alongwith four or five women folk. He saw the deceased Dhareppa lying there on the spot. On his enquiry with PW-7, he was informed that the accused Nos. 1 to 3 had assaulted the deceased. The deceased had still some life and he had sustained bleeding injuries. Water was administered to the deceased. Then their bullock cart was brought and the injured Dhareppa was put into the said bullock cart and the same proceeded towards the village. But the deceased died on the way to the village. He denied having seen the actual incident of assault. Thereupon the prosecution had treated him hostile.

PW-14 Sharanappa is the person who had sold his land to the accused. The said land is abutting to the road. The land of the deceased Dhareppa was adjoining to his said land. He has denied the suggestion that he had earlier offered to sell the said land to the deceased and since the accused had offered a higher price, he sold it to them. Thereupon the prosecution had treated him as hostile.

PW-15 is a resident of the same village and he knows both the accused and the deceased. He has stated that about two months prior to the death of the deceased, in respect of a dispute regarding the pathway and with an intent to resolve such dispute, they had called both the parties. But while the accused persons had come there, the deceased and his brothers did not turn up. He however denied the deceased having come there and declined to give the pathway. He was also declared as hostile to the prosecution.

PW-16 was examined to speak regarding the panchayath held in respect of the dispute between the accused and the deceased, but he did not support the prosecution case and hence he was declared as hostile.

PW-17 was examined on the motive aspect, but he did not also support the prosecution case.

PW-18 is a panch for the inquest and he also did not support the prosecution case.

PW-19 is the wife of the Accused No. 2, naturally she also did not support the prosecution case.

PW-20 Geethabai is the wife of the deceased. She has stated that she was living with the deceased in their garden land situated by the side of Kakamari road. Prior to the death of the deceased, the accused No. 3 had come to attack her and she has informed this to her husband. In that regard there was a quarrel between the accused and the deceased. The accused were also responsible for the sister of the deceased being driven out of her marital house. With regard to the incident in question, this was what she says in paragraph-2 of her deposition:

- KANNADA MATTER - 2754A

The prosecution has treated this witness PW-20 also as hostile to the prosecution and cross-examined her. In the cross-examination, she has further stated as under:

- KANNADA MATTER -2754B 2754C KANNADA MATTER 2755A

It is to be seen therefore that in the cross-examination she has supported the prosecution case. Under the cross-examination done on behalf of the accused nothing substantial has been brought out to disbelieve her evidence.

PW-21 is another panch for the inquest and the spot panchanama and he has also turned hostile to the prosecution.

PW-22 is a panch for the recovery of the cycle at the instance of the accused No.

3 and he has turned hostile to the prosecution.

PW-23 is a Police Constable who carried the articles to the FSL.

PW-24 is the doctor who held autopsy on the dead body of the deceased.

PW-25 Mallappa is the son of PW-7. He has stated in paragraphs 2 and 3 of his deposition as under:

- KANNADA MATTER -2755B 2756

He had however been treated as hostile to the prosecution since he did not speak to the fact of seeing the deceased. His evidence to the extent he has supported the prosecution will lend corroboration to both PW-7 and PW-10.

PW-26 is a panch for the recovery and he did not support the same. Hence, he was also treated as hostile and so also PW-27.

PW-28 is a Police Constable who carried the FIR to the jurisdictional Magistrate. He took the FIR at 9.30 p.m. on 5.10.1993 and delivered the same to the CJM at Bijapur at 00-45 hours. The distance is 20 kilometers and he travelled or covered that distance by means of a lorry.

PW-29 is a Police Constable who guarded the dead body of the deceased at the spot and taken the same for its PM examination to the doctor and after the PM examination was over, he produced MOs 1 to 5 at the Police Station.

PW-30 is the PSI who received the complaint at 8.30 p.m. on 5.10.1993 and registered the case and despatched the FIR.

PW-31 was put forward as an eye-witness and he has turned hostile.

PW-32 is the father of PW-4. He has also turned hostile to the prosecution. He would however admit that at the relevant time, he was cultivating the land of Suresh Yadav and was staying in the land. His daughter PW-4 was attending to the cultivation work in the land till evening and was returning to the village.

PW-33 is the Head Constable before whom MOs 1 to 5 were produced at the police station.

PW-34 is the CPI who took up investigation from PSI and after completion of the investigation submitted the charge sheet. He also speaks to the abscondence of the accused and their arrest. He has further stated about the recoveries effected in respect of the cycles and axes on the information furnished by the accused Nos. 1 to 3. He has clearly spoken to about the disclosure statement made by each of these accused persons to him during the course of interrogation and the recoveries being effected at their instance. The two cycles which were used by the accused to leave the spot and the three axes with which the accused had assaulted the deceased were recovered in consequence to the information furnished by them. No doubt the panchas to the recovery have turned hostile, but there is no reason to disbelieve the evidence of the Investigating Officer

regarding these recoveries.

The evidence of PW-7 Jakkavva who is an eye-witness to the incident prove beyond reasonable doubt that it is these accused persons who had assaulted the deceased with axes and caused his death. She has nothing against these accused to falsely implicate them and despite searching and severe cross-examination made, nothing could be brought out to discredit her evidence. Further her evidence in Court would receive substantial support from the other evidence on record including the hostile witnesses. The evidence of even hostile witness to the extent the same supports the prosecution version is admissible in trial. We see no infirmity whatsoever either in the manner of appreciation of evidence of PW-7 and other evidence or the reasons assigned in support of the same by the trial Court. Hence, we see no reason to discard the evidence of PW-7 as stands corroborated from the other evidence on record.

Therefore we have to hesitation to agree with the finding that the Appellants herein have caused the death of the deceased by committing a conjointed assault on the deceased. All the three accused persons viz., the Appellants herein shared the common intention and committed a conjointed assault on the deceased with the axes held by them. The evidence placed on record is sufficient to hold that the Appellants/accused Nos. 1 to 3 are responsible for causing the injuries which resulted in the death of the deceased Dhareppa. We are unable to accept the contention of the learned Counsel for the Appellants that the prosecution has shifted the scene of incident from place to place and that the evidence of the sole witness PW-7 is not capable of being believed. Therefore, from the materials placed on record, we are convinced that the Appellants are liable to be convicted for committing a conjointed assault on the deceased Dhareppa with axes resulting in his death.

But then, what is the nature of the offence proved against the Appellants. It would appear from the evidence of the Doctor PW-24 that the deceased/ Dhareppa in all probability, must have been assaulted both with sharp edge and blunt edge of the axes and the nature of the injuries also so indicates. As has been rightly contended by the learned Counsel for the Appellants, if really, the Appellants had intended to commit the murder, they would not have certainly used the blunt edge when the task could have been expedited and assured with sharp edge. From the evidence of the Doctor PW-24, we find that except one injury over the left parital region, all other injuries were on non-vital parts of the body. The evidence of the Doctor PW-24 would further show that even the injury over the parital region was a lacerated wound measuring 1 1/2" x 3/4" x scalp deep. This could not have been caused by a sharp edge of the axes and in all probability, it must have been caused with the blunt edge of the axes. We say so looking to the nature of the injuries as described by the Doctor PW-24 in his Post Mortem Report Ex.P. 24. Taking these facts into consideration, it was contended on behalf of the Appellants that the offence committed by the Appellants is one u/ s 304 Part-I of Indian Penal Code and not u/s 302 Indian Penal Code. There is

considerable force in the submission made by the learned Counsel for the Appellant. In a similar situation, the Apex Court in the case of State of Punjab Vs. Tejinder Singh and another, , altered the conviction from Section 302 Indian Penal Code to Section 304 Part-I of Indian Penal Code. A perusal of the said judgment relied upon by the learned Counsel for the Appellant would show that the facts and circumstances here are almost akin to the facts and circumstances of that case. Therefore, we are persuaded to bring down the offence from first degree murder to culpable homicide not amounting to murder. On the facts and circumstances of this case and in the light of the decision of the Apex Court relied upon by the learned Counsel for the Appellants, we are of the view that the offence committed by the Appellants is one u/s 304 Part-I of Indian Penal Code and not u/s 302 Indian Penal Code. We, therefore, alter the conviction of the Appellants from Section 302 Indian Penal Code to Section 304 Part-I of Indian Penal Code.

For the foregoing discussion, we set aside the conviction of the Appellants u/s 302 read with 34 Indian Penal Code and convict them u/s 304 Part-I read with 34 of Indian Penal Code. Having regard to the fact that since the offence committed is more than 6 years ago, we feel inclined to pass a lesser sentence than they would have normally deserved. Accordingly, we sentence each of them to suffer rigorous imprisonment for seven years and also to pay a fine of Rs. 5,000/- each, in default, to undergo rigorous imprisonment for one year each.

In the result, therefore, this criminal appeal filed by the Appellants/accused Nos. 1 to 3 is allowed to the extent as indicated above. The conviction of the Appellants/accused Nos. 1 to 3 is altered from Section 302 read with 34 Indian Penal Code to Section 304 Part-I read with 34 Indian Penal Code and they are sentenced to undergo rigorous imprisonment for seven years each and also to pay a fine of Rs. 5,000/- each, in default, to undergo further rigorous imprisonment for a period of two years each. The whole of the fine amount, if recovered, may be paid to PW-20, Smt. Itabai, the wife of the deceased by way of compensation.