

(1992) 04 KAR CK 0006

In the Karnataka High Court

Case No : Criminal Appeal No. 319 of 1990

Sangappa Shivarudrappa Bargi and Others

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 24-04-1992

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (1992) 3 KarLJ 449

Hon'ble Judges : N. D. V. Bhat, J;D. P. Hiremath, J

Judgement

D.P. Hiremath, J.-Out of six accused charge-sheeted for two murders, charge against accused-6 was that he had abetted the commission of the murder. The rest of the accused persons i.e., accused Nos. 1 to 5 stood charged under Sections 147, 148, 324 read with Section 149 and 302 read with Section 149, IPC. They were charged with committing the murder of Mohan son of Shivappa Baregi in Sy. No. 128/2-B of Sangapura village on 30-10-1987 at about 9 a.m. in prosecution of the common object of unlawful assembly of these accused persons and further they committed the murder of Hanumantha Sangappa Chikkagalagali in Sy. No. 325/4 of the same village soon after the first murder was committed. They were also charged with causing hurt to P.W. 9 Subhas son of Hanmantha at the same time when Hanmantha was murdered by assaulting Subhas with deadly weapons. After the charge was framed it appears Accused-6 died and case against him abated. Rest of the accused took trial before the Sessions Court. The trial Court having found Accused Nos. 1 to 5 guilty under Sections 147 and 148, IPC convicted and sentenced them to rigorous imprisonment for one year each. For causing hurt to Subhas P.W. 9 by virtue of Section 149, IPC they were convicted under Section 324, IPC and sentenced to suffer rigorous imprisonment for one year each. They were also convicted for imprisonment for life for the offences under Section 302 read with Section 149, IPC for causing death of two deceased persons. Accused-appellants have challenged this conviction and sentence in this appeal.

2. There does not appear to be any controversy that the relationship between the

accused on the one hand and the deceased persons and their brothers on the other were not cordial and very much strained on account of boundary disputes and dispute with regard to the taking of water from a bore. That in fact is said to be the motive for the commission of these offences. The deceased Mohan, P.W. 17 Basappa and P.W. 25 Gurupadappa are full brothers. They were separated and cultivating their lands separately. Out of their two sisters Dundavva and Shanthavva, latter had married the deceased Hanmantha. Accused Nos. 5 and 6 are sons of Anandappa who is the brother of Shivappa the father of deceased Mohan. Accused Nos. 1,3 and 4 are sons of Shivarudrappa. Shivappa and Anandappa have separated. Accused-2 is the servant of Accused-6. There were civil and criminal proceedings in regard to disputes as aforesaid. That being so, it is the prosecution case that on the date of this incident i.e., on 30-10-1987 when the deceased Mohan had gone to his land at about 8 or 8-30 a.m. after taking his morning meals, he was assaulted by these accused persons who had formed themselves into unlawful assembly with the common object of murdering him and in the land of Irappa Jadar he was assaulted. P.W. 17 his brother was informed of this assault by one Sangappa Kurihinashetty and P.W. 17 went towards that land on his cycle.

3. When P.W. 17 went to the land where Mohan was assaulted. He was still alive and made a dying declaration as to the persons who had assaulted him. The accused persons then went to the land where Hanmant the brother of P.W. 17 and P.W. 9 Hanmant's son were working. That morning at about 8 a.m. he and his father Hanumanthappa, his brother Sangappa and a servant Ramappa had gone to their garden land for removing weeds in the lemon fruit trees. While he and his father started removing weeds, his servant Ramappa was grazing cattle near the bund. Munihanumaiah (P.W. 12) and Mariyappa (P.W. 11) were in the land of Basappa Baragi. At that time, A-1 to A-5 came from the land of A-6 into their garden land and started assaulting Hanmant. A-1 and A-2 were armed with a stick each, A-4 and A-5 were picking up stones and assaulted Hanmant whereas A-3 beat him with hands. When he went to the rescue of his father, A-4 and A-1 assaulted him with clubs, A-5 threw chilli powder in his eyes and A-2 and A-3 assaulted him with hands. His father fell unconscious due to injuries sustained by him and the accused left the place saying that they had assaulted Mohan and Hanmant as well as P.W. 9 and they should then look for their other brothers. Shivaiah and others brought a carl and took him and his father to their house and Hanmant died of these injuries in their house and later P.W. 9 was sent to Bableswhar Hospital and from there to Bijapur Hospital.

4. Dakayya (P.W. 38) who was H.C. at Bableswhar Police Station on that day and in-charge of that Police Station, received a phone message from Gurupadappa (P.W. 25) the elder brother of P.W. 17 and deceased Mohan at about 11 a.m. from Halagani village that one Mohan was assaulted and that Police should go to Sangapur. An entry was made of the message received in the Station House Diary by P.W. 38 and he proceeded to Sangapur with his staff. First, he went to the house of Hanmant, saw his dead body in that house and then having come to

know that Mohan's body was lying in the land of Irappa Jadar, they went there and recorded the statement of P.W. 17 as per Ex. P-17. The same was treated as an FIR and sent to Bableshwar Police Station for registering a case. The same was received by Mohammed (P.W. 36), Station House Officer and a case in Crime No. 142/1987 came to be registered under Sections 147,148 and 302 read with Section 149, IPC. The investigation was taken up by Girimalla (P.W. 34) and later continued by Mahaveer (P.W. 39), the Circle Inspector of Police. The accused were arrested on 5-11-1987. A-3 took the Police and panchas to a maize haystack and produced two clubs and a knife. It appears, these are all the weapons that were seized and produced during trial. On completion of due investigation, charge-sheet came to be filed.

5. It could thus be seen that the accused were tried for the murder of two persons Mohan Shivappa Baragi and Hanmant Sangappa Chikkagalagali in Sy. No. 128/2-B of Sangapur and Sy. No. 325/4 of the same village on the same day but at different times. Mohan is stated to have been assaulted with sticks or clubs by A-1 and A-2, with knife by A-3 and with stones by A-4 and A-5. A-6 was the abettor and the charge against him was one under Section 302 read with Section 109, IPC. Thus, the principal charge of unlawful assembly, rioting and being armed with deadly weapons was against A-1 to A-5. A-6 died during trial and, therefore, the case against him abated. P.Ws. 1 to 8 and 10 were examined as eye-witnesses to the murder of Mohan who excepting P.W. 10 did not support the prosecution. They were cross-examined being treated as hostile. P.W. 10, however, supported the prosecution story as an eye-witness. For the dying declaration made by Mohan, P.W. 17 and P.W. 25 gave evidence but the trial Court did not believe the same. However, it relied on the evidence of P.W. 10 and other circumstantial evidence and found A-1 to A-5 guilty of all the charges including that of murder of Mohan. On the charge of murder of Hanmant, P.Ws. 9, 11, 12 and 13 gave evidence as eye-witnesses and there was also dying declaration on three occasions by Hanmant. The same witnesses supported the assault on P.W. 9 as well. Believing the same and other circumstantial evidence, the Sessions Court convicted the appellants on all the charges.

6. In challenging this Judgment of conviction and sentence imposed by the learned Sessions Judge, it was urged on behalf of the appellants by their learned counsel that as far as the first murder of Mohan was concerned, the trial Court having rejected the alleged dying declaration of Mohan could not have based conviction on the testimony of the sole eye-witness P.W. 10. His conduct was wholly unnatural of a person who had witnessed the incident. The FIR never disclosed the names of any of the assailants though P.W. 25 was said to be the person at the time who heard Mohan talking to P.W. 17 with regard to the cause of the injuries sustained by him.

7. As for the second murder, the only evidence given by the eye-witness is that A-1 and A-2 were armed with sticks, A-3 had no weapon at all and A-4 and A-5 had not carried any weapons with them and only picked up stones from the

ground. Even P.W. 9's evidence does not in any way establish that there was any intention on the part of these accused persons to commit his murder. In the first place, there is no evidence worthy of acceptance to prove that his murder took place in the very land which is spoken about by these witnesses. The probability of the dead bodies having been found in another land of one Kulkarni cannot be ruled out. Therefore, according to the appellants' counsel the very genesis of the incident has not been proved. He also submitted alternatively that in case the Court were to find that the evidence of these witnesses is reliable, at any rate, charge under Section 302, IPC cannot be held proved. It was the head injury on Hanmant that resulted in his death. There were no other injuries on the vital part of his body and even A-4 and A-5 picked up stone from the spot, it was at the spur of moment and A-3 never used any weapon but only assaulted with hands. Therefore, the common object of unlawful assembly, if any, cannot be anything else than at the worst to cause, hurt to deceased Hanmant and at the most, these accused may be found guilty of a lesser offence namely, under Section 325, IPC. It is also submitted that there was longstanding ill-will between P.W. 17 and his brothers on the one hand and the accused on the other, the evidence of enmity becomes double-edged weapon and the possibility of these accused being falsely involved cannot be ruled out. We have examined these contentions in the light of the arguments advanced on both sides, the learned State Public Prosecutor supporting the Judgment of the Sessions Court.

8. As we have already referred to above, the FIR, Ex. P-17 makes mention of the motive to commit this offence. P.W. 17 whose evidence is sought to be corroborated by the contents of Ex. P-17 deposed that "Waddin Hola" measuring 6 1/2 acres came to be shared in a partition amongst himself and his brothers. He raised lime fruits in half an acre of land. He was taking water from the well situate in the land of Anandappa Baragi, his uncle who is none other than the father of A-5. A-6 Shivarudrappa happens to be his uncle's uncle. A-5 is the brother of A-6. This P.W. 17 had sunk a borewell in the well in the land of Anandappa and started drawing water from it by fixing a pump-set. He had spent Rs. 2,500/- to sink a borewell. As the accused did not share the expenses in digging of his well he did not allow them to take water from that well. Therefore, they got angry and developed ill-will against him. Though there was a settlement in the presence of panchayatdars asking the accused to share the expenses for digging a borewell they did not comply. Therefore, he continued to obstruct them from taking water from that well. Similarly, between the land of the accused and that of deceased Hanmant, there is a north-south bund and the accused started cutting and damaging this bund, for which Hanmant had raised objection. Secondly, Hanmant was allotted 6 acres of land in "Gundi hola" in which he had raised lemon plants. With regard to the bund in between the land of Mohan and the accused there was some dispute for about one year prior to this incident and there was even a criminal case with regard to quarrel and assaults. A case and a counter-case was filed in the Court of the JMFC at Bijapur. P.W. 17 was one of the accused in the criminal case filed by one of the accused persons. Even that

dispute was not at all settled inspite of intervention of the panchas. His evidence is that for these reasons the relations between him and his brothers and the accused were not cordial. The case, however, does not depend on circumstantial evidence alone though motive evidence is one of the circumstances relied upon by the prosecution. Suffice it to note that this evidence with regard to strained relations between P.W. 17 and his brothers and the accused is not very seriously challenged.

9. The evidence of P.W. 17 discloses that the deceased Mohan left at about 8 or 8-30 a.m. after taking his meals and had gone on a cycle. At about 9 or 9-15 a.m. when he came out of his house to go to Jamkhandi, Sangappa Kurvinshetti came on a cycle and told him that in the land of Irappa Jadar, all the accused persons had assaulted his brother Mohan and he was lying injured there. He went along with Mahadevappa Badri to the land of Irappa Jadar on a cycle and even his elder brother Gurupadappa Baragi (P.W. 25) and Kasturi, wife of Mohan and his son Ravi followed him on foot. Having reached the land at about 9-30 a.m. he found Mohan lying injured, his legs were broken and he had sustained injuries all over his body. P.Ws. 2,3,5 and 6 as well as P.W. 1 were present. He gave water to Mohan and when asked who assaulted him, Mohan told him that all these accused persons assaulted him. Having so given these names, Mohan succumbed to the injuries. P.W. 25 was sent by him to inform the Police and sometime later, Shivayya (P.W. 12) came running from the land of Hanmant and told that his maternal uncle Hanmant and his son Subhas were assaulted by the same accused persons in the land of Hanmant. This land where Hanmant was assaulted is about 1 or 11/2 kms. from the land of Irappa Jadar. Rachappa (P.W. 11) the son of P.W. 17 was also present there and when questioned, Hanmant also told the names of these accused persons as assailants. He also assisted in removing Hanmant to his house.

10. It thus follows from the evidence of P.W. 17 that P.W. 25 was also present when the deceased revealed the names of his assailants. Even P.W. 25 deposed that Mohan told that all the accused persons had assaulted him with "badiges", stones and jambia and when he was feeling acute pain, P.W. 17 asked this witness to go to Halgani and inform the Police on phone. Accordingly, he went to Halgani on cycle and then to the house of the Post Master Kulkarni and sent a phone message to Bableshwar Police Station. He is also assertive that he informed Bableshwar Police that A-1 to A-5 had assaulted Mohan in Irappa Jadar's land. It was about 10 a.m. when this information by phone was given to the Police Station and then he returned to Sangapur village. Having gone to the house of Hanmant, he found Hanmant injured. But, he also succumbed to the injuries by about 12 Noon. The evidence of these two witnesses brings on record the earliest information sent to the Police Station revealing the names of the accused persons as the assailants of Mohan.

11. Very surprisingly, what was recorded at the Police Station by P.W. 38 is quite different from what P.W. 25 deposed about. This P.W. 38 was the Station House

Officer on 30-10-1987 at the Bableshwar Police Station from 7 a.m. to 2 p.m. At about 11 a.m. he received phone message from Gurupadappa (P.W. 25) from Halagani that one Mohan was assaulted, he was serious and that the Police should go to Sangapur. Accordingly, he made an entry in the Station House Diary of this message received and proceeded to the spot with some of his staff. The relevant entry at Ex. P-30(a) in the Station House Diary does not make mention of the names of any of the accused persons. The near translation of the entry made in Kannada is as follows:

"At 11 the phone message sent by Gurupadappa Shivappa Baragi of Sangapur from Halagani is that Mohan Baragi was assaulted and he is serious. Accordingly, having handed over charge of SHO to HC 1133, proceeded to Sangapur along with HC 1249, PC 929 and PC 1257 to know about the incident....." P.W. 38 then went to Sangapur and then to the house of Hanmant where the body of Hanmant was lying. Thus, the statement of P.W. 17 was recorded in the house of Hanmant as per Ex. P-17 and then forwarded to the Police Station for registering a case. Thereafter, he went to the land of Irappa Jadar along with panchas and held inquest over the dead body of Mohan. P.W. 25 denied to have not stated before the Police in his statement under Section 161, Cr.P.C. that Mohan told to P.W. 17 in his presence that A-1 to A-5 had assaulted him. P.W. 39 the Investigating Officer admitted in his cross-examination that P.W. 25 had not stated before him that on phone he gave names of A-1 to A-5 as the persons who had assaulted Mohan. The distance between Halagani and Bableshwar may be about 3 to 4 Kms. and even from Sangapur to Bableshwar is 3 to 4 Kms., and even from Sangapur to Bableshwar is 3 to 4 Kms. In spite of that, it cannot be made out why P.W. 25 did not go to the Police Station and lodged the complaint. The assertion of P.W. 25 that he did give the names of the assailants of Mohan to P.W. 38 on phone is falsified by the evidence of P.Ws. 38 and 39. It is, therefore, clear that perhaps deceased Mohan did not reveal the names of his assailants to P.W. 17 and if only he had so revealed the same could have been heard by P.W. 25 and consequently transmitted to the Police Station in the earliest message. P.W. 18 is another witness who according to P.W. 17 had accompanied him to Irappa Jadar's land on his cycle. According to him, he was near the house of P.W. 17 when the latter left for Irappa Jadar's land but he did not state in his statement before the Police that he was in front of the house of Basappa at 9 a.m. The contradiction is only with regard to timings. That, however, does not matter much. He did not state before Police that Kasturi, Gurupadappa and Ravi followed him by running to the said land. He also did not state about Sangappa Kurihinasetty informing Basappa that Mohan was lying injured. What is more important is that he did not state in his statement before Police that Mohan gave the names of his assailants in the presence of Kasturi, Ravi and Basappa. He also did not state before the Police about P.W. 17 asking P.W. 25 to go to Halagani and contact the Police over phone. Contrary to this he has now deposed that the names of the assailants were given by injured Mohan in the presence of Kasturi and Ravi. Very significantly, neither Kasturi nor Ravi has been examined. Again, if

Mohan were to give the names of these assailants and was heard by all those who were present including P.W. 25 there is no reason why these names did not find place in the information recorded by P.W. 38. The Doctor's evidence nodoubt is that Mohan could not have died instantaneously but could have survived atleast about half an hour after he sustained these injuries. Who exactly gave the news to P.W. 17 becomes most material so that the presence of P.W. 17 could be of considerable help to know the condition of Mohan when he went there. The Court must be in a position to believe that P.W. 17 in fact arrived at the spot before Mohan breathed his last. But, P.W. 8 who is said to have conveyed the news to P.W. 17 has not supported this prosecution story. According to him, on the date of death of Mohan, he was in the village and neither he nor P.W. 17 had gone to his land as the prosecution story goes. He is further assertive that he has not seen the accused assaulting Mohan in the land of Irappa Jadar and further he did not even inform Basappa (P.W. 17) about the accused assaulting Mohan. He was cross-examined by the prosecution. The fact, however, remains that P.W. 17's version that he was informed by P.W. 8 does not find corroboration in his evidence. Consequently, it becomes doubtful as to when exactly P.W. 17 reached the spot. As we have been pointing out repeatedly, the absence of the names of the assailants in the earliest information further renders the evidence of P.W. 17 on the point of the dying declaration unacceptable, and, therefore, we find that the alleged dying declaration cannot be relied upon to connect any of the accused with assault on the deceased Mohan.

12. As we have already pointed out, P.Ws. 1 to 8 who are said to be eye-witnesses to the assault on Mohan, did not support the prosecution case and, therefore, the prosecution relied on the uncorroborated testimony of the sole witness P.W. 10 to project him as an eye-witness and the Sessions Court has relied on his testimony. It is contended on behalf of the appellants that the testimony of the sole interested eye-witness like P.W. 10 is wholly unreliable and cannot be accepted for more than one reason. Before adverting to the argument of the appellants' counsel in this behalf, it is necessary to state what he deposed about the incident. He is the younger brother of Shivayya (P.W. 12). According to him, the land of Irappa Jadar is situate by the side of the cart-track between Yekkundi and Kambagi. On one side of this cart-track to the land of A-6 and P.W. 10 he has got a land of one Kurgi which is situate about 2 or 3 survey numbers away from the land of Irappa Jadar. That land of his is about 11/2kms. from Sangapur Village towards west. He also swears that for going to his land with cattle he has to pass by the side of the land of A-6 and Irappa Jadar. On the date of this incident, he left his house at about 8 a.m. to go to his land and when he came near the land of A-6 he noticed Mohan being assaulted by all these accused persons and he even specifies their overt acts. A-1 and A-2 assaulted him with "badiges", A-4 and A-5 with stones and A-3 with a knife. They were assaulting him all over his body. When deceased Mohan fell to the ground, he saw the entire incident from at a distance of about 2 to 3 marus but he did not try to intervene or to rescue Mohan out of fear. There were also present two witnesses

to this incident P.W. 1 Laxman, P.W. 7. Shankarappa and P.W. 8 Sangappa. However, he again states that it was 3 hours after sunrise when this assault took place. After seeing this incident, he went to his land, attended to his work for two hours and returned to his village by the same cart-track. On his way back, he noticed Mohan lying dead at the place where he was assaulted, large number of persons had assembled at the spot and perhaps from there he went back to his house though he did not particularly say so. He does not speak about the presence of the rest of the eye-witnesses. He also does not speak to the presence of P.Ws. 17,18 and 25 when he was returning home. Even this witness does not speak about his arrival at the spot. P.W. 10 admitted that after the death of Basappa, the agricultural establishments of his and of Mohan became one at the instance of Mohan's wife, but he denies that all along he has been a "Jeetha" servant in the establishment of Mohan. His elder brother P.W. 12 admitted that he was going for coolie work under Basappa but he was not a "Jeetha" servant under him. P.W. 12 also states about he and P.W. 10 living jointly and they having one Kurgi of land as stated by P.W. 10. But, at the same time, he admits about he going in the village to beg alms and doing coolie work. It may be that the produce from their agricultural land may not be sufficient for their maintenance and the possibility of P.W. 10 also going for coolie cannot be ruled out when P.W. 12 admits about it. Apart from this interestedness attributed to P.W. 10, which naturally he has denied, it was argued for the appellants that he cannot be trusted as a truthful witness in such a case involving the capital punishment in view of his most unnatural and reprehensible conduct even after seeing such a ghastly incident as of assault on Mohan. He also swears that when he was returning he saw legs of Mohan fractured and even some persons present there. It cannot be said that he was utter stranger to Mohan so as to ignore what had happened. He and his brother P.W. 12 had perhaps occasion to go to their land passing by the side of this land of Irappa Jadar. Though one could understand that he could not venture to go to his rescue when he was being assaulted, the minimum that one could expect of him was his rushing to the village and informing his brothers in the village. But, he quietly goes to his own land, works for two hours, returns by the same way and then goes to the village without even disclosing this incident to any one in the village till the following day when his statement was recorded by the Police. In para 4 of his evidence his admissions are thus:

".....Next day of incident Police have recorded my statement at about 8.30 a.m. After seeing the incident, for the first time I told about the assault by the accused on Mohan to the Police only on next day, till then I had not told it to any one else. The knife was being used with force for causing injury i.e., by stabbing. I did not stop at one place and had not observed minutely about the assault on Mohan. I had seen the assault while passing on the cart-track. I cannot say specifically on what part of body of Mohan injury was caused using knife, I can say this much that such injuries by knife was caused all over the body. The stones were being pelted at Mohan. I did not notice as to on what part of body of

Mohan, the stones pelted had hit. I cannot say as to on what part of body of Mohan the stick injuries were caused (injury caused by using stick). Neither I talked with the accused persons assaulting Mohan nor accused or Mohan had talked with me at that time".

It is rather unthinkable that this witness could have kept quiet without revealing this incident to any one and not even to his brother P.W. 12 till the following day. Though he denied that he has not stated before the Police he having his land 2 or 3 lands beyond Irappa's land the contradiction by omission is proved by the evidence of P.W. 39. P.W. 39 even admitted that this witness did not state before him that Mohan was assaulted in the land of Trappa Jadar specifically and he also did not state before him the distance from where he saw this incident. It was further brought to our notice during arguments that even during inquest his name did not transpire as an eye-witness muchless his statement being recorded. When he did not reveal this incident to any one, nor did he speak to any one at the spot or at any point of time and without any of this witness speaks about this incident how and when he suddenly sprung up as a witness becomes anybody's guess. In view of this abnormal conduct of P.W. 10 in a small village like Sangapur, it becomes difficult for us to believe that he was a witness to this incident. The likelihood of he being projected as an eye-witness after some due deliberations cannot be totally ruled out. In our view, therefore, the trial Court was wrong in placing unqualified reliance on the uncorroborated testimony of these witnesses to find these accused guilty of causing fatal injuries to deceased Mohan. It was P.W. 12 who according to the prosecution rushed to the land of Irappa Jadar to inform about assault on Hanmant and he found Mohan lying dead in that land and P.W. 17 Basappa was present there. In fact he wanted to go to the village to inform P.W. 17 but, having seen an assembly of persons on the land of Irappa Jadar he went there and informed P.W. 17. He admitted that around the land of Basappa Baragi there is a garden land of A-6, deceased Hanmant, Mallappa Chikkagalagali, Manjappa Badri, Sangappa Chikkagalagali and some people stayed in these lands as well. That was a season for going for Yedi in the jowar crop but was not the harvest time. Even then, he had not seen any other persons in those lands. However, in between the lands of Hanmant and Basappa Baragi there was only the land of A-6. He maintains that from the land of Basappa Baragi the land of Hanmant is visible but persons working there were not visible. What is significant is P.W. 12 does not speak about the presence of P.W. 10 when he went there. If at all P.W. 10 returned from his land and saw Mohan lying dead and some people assembled there atleast he could have stayed there till the body was removed or till the arrival of the Police. Even he figured as an eye-witness to the incident of murder of Hanmant only the following day it 11 a.m. when Police examined him. Though P.W. 1 was cross-examined by the prosecution nowhere it was suggested to him that P.W. 10 was also present when this assault took place. So also in the evidence of P.W. 7 and P.W. 8. On the other hand, it was suggested to P.W. 7 that A-5 threatened him and C.W. 15 to leave the land and go away and, therefore, he left the land and

went to the village. Nowhere such a statement appears to have been made by P.W. 10 because if the accused were bent upon threatening the witness to the incident in the manner suggested to P.W. 7 they could have at the same time threatened P.W. 10, but P.W. 10 does not speak such an overt threatening to him by any of these accused persons. In our view, P.W. 10 appears to be a got up witness and reliance cannot be placed on his evidence. Thus, if the dying declaration relied upon by the prosecution and the evidence of these witnesses are not worthy of acceptance, then, practically there is no evidence of these very accused persons causing fatal injuries to deceased Mohan. Their conviction for the murder of Mohan, therefore, cannot be sustained.

13. Taking the case of murder of Hanmant, another brother of P.W. 17, the evidence seeking to connect the accused with this offence, as already stated is P.Ws. 9,11,12 and 13. It has come in evidence that the distance between these two lands is about 11/2 Kms. When it is the prosecution case that after committing the murder of Mohan, all these accused persons went to the land of Hanmant and then assaulted him and P.W. 9, it is rather very significant that not a single witness is coming forth to depose about these accused proceeding from the land of Irappa Jadar to that of Hanmant. Even Sanga pur village is not far away from these lands. The possibility of some persons working in atleast some of the lands in between cannot be ruled out and the evidence that in none of the lands that morning there was any other person smacks of unnaturalness and artificiality. The evidence with regard to the accused proceeding to this land to the land of Hanmant could have lent some support to the prosecution story that the very accused in the first instance committed the murder of Mohan and then proceeded to the land of Hanmant. Simply because uncle and nephew were murdered on the same day, it does not follow ipso facto that the very accused persons committed the murder of Mohan.

14. Deceased Hanmant was the maternal uncle of P.W. 17 and Mohan. Their elder sister Shantavva was married to him. According to P.W. 9 the son of Hanmant at about 8 a.m. himself, his deceased lather and his younger brother Sangappa and their servant Ramappa went to their garden land for removing weeds in the lemon fruit trees. He and his father started working at different places in the same land. His brother Sangappa was near the well. Their servant Ramappa was grazing their cattle in another bund of the land whereas P.W. 12 Shivayya and P.W. 11 Rachappa were working in the land of Basappa Baragi. At that time, all these accused persons A-1 to A-5 came from the side of the land of A-6 into their land and started assaulting his father. A-1 and A-2 had sticks or "badiges" each, A-3 had no weapon at all but he assaulted his father with hands whereas A-4 and A-5 assaulted him with hands. When he ran towards his father to rescue him and asked the accused as to why they were assaulting his father, A-4 assaulted this witness with a stick or "badige". A-1 also assaulted him with a stick whereas A-5 threw chilli powder on his face. Due to this assault, his father fell to the ground and he also fell down. This witness had sustained injuries to his legs and hands. He was at a distance of 10 marus from his father when he was assaulted. P.Ws.

11, 12 and 13 saw this incident and even after this witness fell down he was assaulted and, thereafter, the accused left the place saying that they were dead. They also uttered that Mohan and Hanmant as well as Subhas (P.W. 9) were finished and they should look to the remaining person Basappa. So saying they went away towards their land. All the witnesses who saw this incident carried him and his father in a bullock cart to their house. His father told them who had assaulted him and at about 12 noon his father succumbed to these injuries. Police who arrived in their house, sent him to Bableshwar Hospital for treatment at about 12-30 p.m. From there, he was shifted to Bijapur District Hospital. During arguments, much was tried to be made out from the evidence of Beerappa (P.W. 28) the panch witness who was cross-examined by the prosecution for being treated as hostile as he deposed that from the land Kambagi Kulkarni sample earth and bloodstained earth were seized. The prosecution suggested in his cross-examination that panchanamas were drawn in the land of Irappa Jadar and that of Hanmant and that articles like a pair of chappalls, stones, cycles and bloodstained earth were seized from this land. P.W. 28 spoke in Court against the recitals in the panchanamas Exs. P-22 and P-23 when he was discredited by the prosecution by being condemned as a hostile witness. The appellants' counsel made efforts to take advantage of admission made by him that blood was noticed only in the land of Kulkarni thus indicating that both the dead bodies were lying in the land of Kulkarni only. In our view, undue importance cannot be attached to the admission of this condemned witness for the reason that he has spoken against the recitals in the mahazar whereas the Investigating Officer has deposed about mahazar having been drawn in the respective lands and various articles seized from these lands as stated in the mahazar. From this stray admission, the entire evidence of the eye-witnesses if the same is reliable cannot be thrown out. Therefore, we proceed to consider the evidence of these witnesses seeking to connect the accused with the assault on the deceased as well as P.W. 9.

15. P.W. 9 was examined by P.W. 14 the Medical Officer, Primary Health Centre, Bableshwar at 12-30 p.m. on 30-10-1987. He had the following injuries on his person:

- 1) Abrasion on the upper 3rd of left leg situated anteriorly measuring 2 cm. x 1 cm.;
- 2) An abrasion on the lower 3rd of left leg anteriorly measuring 2 cm. x 1 cm.;
- 3) Abrasion on the upper 3rd of right leg situated anteriorly measuring 3 cm. x 2 cm.;
- 4) There were eleven contusions on the back two of them were parallelly situated in the upper aspect and crossed each other situated in lower aspect, each measuring about 28 cm. x 4 cm.;
- 5) Abrasion on the right shoulder 4 cm. x 2 cm.

He was referred to District Hospital, Bijapur for management and treatment. He received a report from the District Hospital about the injuries noticed on him as per Ex. P-9 and on that basis he issued the certificate-Ex. P-10. He opined that the injuries on him were simple in nature and could be caused by "badiges" or sticks and stones. Nothing of consequence was elicited in the cross-examination of this witness so as to discredit his testimony given by him. Though some contradictions by way of omissions in the statement before the Police were elicited in his cross-examination including A-5 throwing chilli powder at him and A-2 assaulting him with hands, the fact that he was injured in this incident cannot be denied. He did not state before the Police, however, that A-2 assaulted him with hands. It was suggested to him specifically that some un-known persons during night assaulted Mohan and Hanmant in the land of Prahlad Kulkarni and that while he was rushing to the land on hearing this news he fell down and sustained injuries. It was denied by him. Apart from minor contradictions with regard to the manner of assault, nothing tangible or material was elicited to discredit him.

16. Rachappa (P.W. 11) son of Basappa (P.W. 17) deposed that when this incident occurred, he and Subhas and P.W. 12 were in the garden land having stayed there in the previous night and at about 9 a.m. when they started plucking lemon fruits from the plants and were continuing it even at 9.30 a.m. they heard "galata" and altercation in the garden land of Hanmant. He and P.W. 12 ran towards that land and noticed his grand father being assaulted by the accused persons. Even according to him, A-1 and A-2 assaulted Hanmant with sticks, A-4 and A-5 with stones and A-3 with hands. When P.W. 9 went to the rescue of Hanmant he was also assaulted by all the accused. Both of them fell to the ground and due to fear he did not try to intervene. He also speaks about the presence of P.W. 12 and P.W. 13 as well as Ramappa. After all the accused went away, Shivayya (P.W. 12) left the land in search of the father of P.W. 11 and about half an hour later, his father, Dundappa, Gangavva, Shanthavva and others came there, inquired about the assault on them and both the injured were taken in a cart to their house in the village. Due to fear, he did not raise any hue and cry and he also did not go to the rescue of the two persons who were being assaulted. P.W. 12, Shivayya has corroborated the testimony of these two witnesses deposing about the overt-acts of assault committed by the accused. P.W. 13 is a child witness Sangappa of 10 years of age and he was not administered oath. He is another son of Hanmant who had accompanied him to the land that morning and he speaks about assault on his father all over his body as also the assault on P.W. 9 Subhas. When his mother as well as Doddappa and Doddamma arrived in the land, they asked Hanmant what had happened and Hanmant replied that he was assaulted by all these accused persons. There appears to be some material contradictions by way of omissions in the Police statement inasmuch as he did not state about he, his father and P.W. 9 going together to that land, his father being felled to the ground and A-3 assaulting his father with a stick. Considering the age of this witness, such contradictions by

themselves cannot discredit him. His presence is spoken to by all the witnesses referred to above. Therefore, his evidence substantially corroborates the testimony of P.W. 9, P.W. 11 and P.W. 12. In our view, the evidence of these witnesses is unassailable, reliable and truthful. There is practically no reason to doubt their veracity and the participation of the accused persons in the assault of P.W. 9 and deceased Hanmant is proved conclusively by their evidence. The Sessions Court rightly relied on the evidence of these witnesses to hold that the assault on Hanmant and P.W. 9 by these accused persons is proved.

17. The Medical evidence of P.W. 14 who conducted the autopsy over the body of Hanmant reveals that Hanmant had the following injuries on his body:

- 1) Contusion on the right parietal eminence 5 cm. x 6 cm.;
- 2) There are three red coloured abrasions on the lateral left shoulder, each measuring 2 cm. x 1 cm.;
- 3) There were eleven contusions on the posterior aspect of the trunk, including gluteal region measurements being 20 to 27 cms., long and breadth 5 cm. The cut section of the contusions showed red coloured blood;
- 4) There were four contusions on lateral posterior right thigh, each measuring 15 to 17 cms. in its length and breadth being 5 cms.;
- 5) An incised wound on upper 3rd of the left leg anteriorly placed 3 cm. x 1 cm. x 2 cm. deep;
- 6) An abrasion on the lateral right knee 3 cm. x 1 cm.;
- 7) There were subdural haematoma about 100 ml. adjacent to the right parietal area;
- 8) Scrotal layers were congested, cut section showed red coloured blood.

Injury No. 5 which was an incised wound, according to him, could be caused by sharp cutting instrument whereas others could have been caused by hard and blunt substance. The death was as a result of shock due to subdural haematoma and bleeding from contusions and also from scrotal injury. He further deposed that injury No. 1 was sufficient in the ordinary course of nature to cause his death. If the person falls on a sharp edged stone, such an injury as Injury No. 5 could be caused. The charge against these accused in respect of this murder is that being the members of an unlawful assembly with the common object of committing the murder of deceased Hanmant and in prosecution of that common object, the accused assaulted as aforesaid. It was argued for the appellants that out of five accused, only A-1 and A-2 came armed with sticks. Though A-3 is said to have assaulted Mohan with knife in the charge, it cannot be made out what happened to that knife when he came near Hanmant along with other accused but he is alleged to have assaulted only with hands. It was also urged that A-4 and A-5 did not come armed with stones. Infact, they were picked up from the spot itself. It is also in evidence that Hanmant fell down on being assaulted and

there is absolutely no evidence of any of the accused persons having been armed with weapons that could cause an incised wound. All the witnesses are unanimous that none of the accused persons was armed with any sharp edged or cutting instrument. There is no evidence as to who exactly caused the head injury which according to P.W. 14 was sufficient in the ordinary course of nature to Cause the death of the deceased. In such a situation, it is urged by the appellants' counsel that if the cumulative effect of the injuries was fatal and the common object could not be to cause the death of the deceased, the offence under Section 302, IPC cannot be said to have been brought home to the accused.

18. The learned counsel for the appellants invited our attention to a decision of the Supreme Court in the case of *Ram Lal v Delhi Administration*, 1973(1) Cr. L.J. 17, in which the medical evidence was that the deceased had sustained four injuries which included two contusions, lacerated wounds, deformity of nose and deformity on the left side forehead and left parietal region depressed fracture skull. Out of these, two of the injuries on the head were fatal. The appellant was charged in that case along with three others under Section 302 read with Section 34, IPC and also under Section 325, IPC read with Section 34, IPC for having caused grievous hurt to one of the witnesses. The appellant and two others were convicted under Section 302 read with Section 34, IPC. The Sessions Court found that either both or one of the head injuries caused the death of the deceased. The difficulty arose as to which was the injury caused by the appellant. The High Court had found that the appellant had given only one blow on the head and not more than one. In that case, it would be difficult to say whether the blow given by him was the one which ultimately proved fatal. Since the evidence disclosed that two lathi blows were given on the head and the evidence was not given which of those two was by the appellant the benefit of doubt should go to the accused and, therefore, he was found guilty only under Section 325 read with Section 34, IPC and was sentenced to five years rigorous imprisonment. In the case of *Lalman and Others v The State of Madhya Pradesh*, 1973(1) Cr.L.J. 99, it was held that the vicarious liability under Section 149, IPC would arise only when it is proved that the members of the unlawful assembly had certain knowledge as to what the other members are going to do in achieving the common object. The common object of unlawful assembly of 21 persons in that case was said to be to cause grievous hurt to the deceased but the death was caused by one of the members of the assembly. For causing the death, the other members of the unlawful assembly were held to be not responsible. However, conviction for causing grievous hurt in prosecution of the common object of the assembly was maintainable. This was the view taken by the Supreme Court in the case of *Shambhu Nath Singh v State of Bihar*, AIR 1960 SC 725, quoted with approval in that case of *Lalman and Others v The State of Madhya Pradesh*, 1973(1) Cr. L.J. 99. At para 14, referring to the facts of the case, the Supreme Court observed as follows:

"It could not be reasonably inferred from the circumstances of the case that the

assembly which was animated with a common object to chastise could also be imputed with the knowledge that some of the members may give such fatal blows on the head or chest as would result in the death of the victims. As already discussed, it could not be said that the assembly was of such a kind where the members knew what the other members were going to do. It could not be said that it was known to members the extent to which the other man was likely to act in achieving the common object. The word "knew" in Section 149, IPC has been interpreted by Supreme Court to imply the existence of facts from which a certain inference is so irresistible as to amount to a certainty. This knowledge must be shown to exist at the time of commission of the offence and not knowledge acquired in the light of subsequent events....."

Consequently, the Supreme Court set aside their conviction under Section 302 read with Section 149, IPC and convicted them under Section 325 read with Section 149, IPC.

19. In another case of *State of Haryana v Prabhu and Others*, AIR 1979 SC 1019, the common object of the assembly to give merely beating to the members of complainant party, the main target was one M, nature of injuries clearly showing that neither the common object was to kill nor was it possible to infer that any member had the knowledge that death was likely to be caused in prosecution of the common object of assault. The finding of the High Court for an offence under Section 325 read with Section 149, IPC was upheld.

20. Referring to the injuries caused to Hanmant in the instant case, it was argued for the appellants that even if the entire prosecution evidence is believed, the common object could not have been to cause the death of the deceased but, at the most, it may fall under Section 325, IPC. We have found from the evidence discussed above that out of the five accused, initially three of them were not armed with any weapon. A-4 and A-5 picked up stones at the spot and the size of the stones is not considerable. A-3 was not armed with any weapon at all. He only assaulted with hands. Even P.W. 9 does not state which of the accused assaulted Hanmant on his head with what weapon. Such evidence of specific assault by any of the accused is not to be found in the evidence of any of the other eye-witnesses. That being so, we find it reasonable to find the accused guilty under Section 325 read with Section 149, IPC finding that the common object of unlawful assembly was only to cause grievous hurt to the deceased and not at any rate to kill him.

21. The Sessions Court found the appellants guilty under Section 324 read with Section 149, IPC. We do not find any grounds to upset that finding. Similarly, the offence under Section 148, IPC must also be held proved. Out of the five accused, only two were armed with sticks which perhaps could be said to be deadly. There can be no vicarious liability for being armed with such weapon but only such of the accused who were armed so could be held liable under Section 148, IPC. Accordingly, in allowing this appeal partly, we make the following:

ORDER

All the accused appellants are acquitted of all the charges concerning the murder of Mohan. Accordingly, their conviction under Section 302 read with Section 149, IPC for causing the death of Mohan is set aside as also their conviction for offences under Sections 147 and 148, IPC for committing rioting in Irappa's land and the sentences passed for these offences are set aside and the accused are acquitted of these charges.

The accused-appellants are also acquitted of the charge under Section 302 read with Section 149, IPC for causing the death of Hanmant. But, they are convicted under Section 325 read with Section 149, IPC for causing grievous hurt to Hanmant and are sentenced to suffer rigorous imprisonment for six years each. Their conviction and sentence for the offence under Section 324 read with Section 149, IPC imposed by the Sessions Court is maintained. Further, their conviction and sentence for the offence under Section 147, IPC for committing rioting in the land of Hanmant in Sy. No. 325/4 is also maintained. The conviction and sentence of A-1 and A-2 for the offence under Section 148, IPC is maintained but A-3 and A-5 are acquitted of the charge under Section 148, IPC. The substantive sentences shall run concurrently and the appellants are entitled to set off under Section 428, Cr. P.C. of the period of detention from the date of their arrest.