

(1992) 04 KAR CK 0012

In the Karnataka High Court

Case No : Criminal Appeal No. 17 of 1988 (Against Order of Sessions Judge, Uttara Kamada at Karwar, in Sessions Case No. 5 of 1987, D/- 3-9-1987.)

State of Karnataka

APPELLANT

Vs

Atmendra Ganapati Hegde and another

RESPONDENT

Date of Decision : 23-04-1992

Acts Referred:

Arms Act, 1959 — Section 27

Criminal Procedure Code, 1973 (CrPC) — Section 157, 235 (2), 313, 428

Penal Code, 1860 (IPC) — Section 114, 302, 34

Citation : (1993) 1 ALT(Cri) 453 : (1992) CriLJ 2809 : (1992) 3 KarLJ 707

Hon'ble Judges : M. Ramakrishna, J;D.P. Hiremath, J

Bench : Division Bench

Advocate : C.H. Jadhav, Govt. Pleader, for the Appellant; B.V. Acharya, for the Respondent

Judgement

Hiremath, J.—Appellant No. 1 is the son of appellant No. 2 and both are residents of Taddalse in Sirsi taluka of Karwar District Accused No. 2 is an Advocate. The undisputed facts are that Sripati Hedge who died in about the year 1982 or 1983 left behind five sons and two daughters. Accused No. 2 is the eldest, the second son is Venkataramana, the third Adinarayana, the fourth Viswanath and the fifth deceased Ashok Hedge. About a year after the death of Sripati Hedge there was a partition among his four sons and they started living separate. Adinarayana sold away his properties to his other brothers and settled down at Sirsi and has been doing business. Viswanath however continued to live with Ashok but later shifted to Sangli. His properties were also being managed by deceased Ashok. Ashok and accused No. 2 occupied the houses adjacent to each other. There is a dividing wall in between. Ashok also put up a fence on the edge of the land fallen to his share and which is annexed to the house fallen to his share. Between these two backyards of the houses of Ashok and accused No. 2 is a coconut tree. It appears Ashok and accused No. 2 were claiming proprietary rights in this tree.

Yield from this tree was substantial. PW 5 Ramchandra and P.W. 6 Manjunath Hedge who is a relative of accused No. 2 and the deceased were the panchayatdars who partitioned the family properties among these brothers. Even P.W. 5 is the brother of Sripati Hedge though he is living in another village. The distance between the two villages is hardly one mile.

2. About eight months after this partition dispute arose between accused No. 2 and this Ashok Hedge with regard to his ownership of this said coconut tree. Each of them claimed exclusive ownership on it. However P.Ws. 5 and 6 when approached by the deceased and accused No. 2 advised them to get their respective land on either side of the tree measured and till then an arrangement was made between the two brothers under which each of them was entitled to take the coconuts falling on his land. They however advised not to pluck the coconuts till the measurement was over. Thus the right to collect the coconuts falling on their respective land was given to them pending settlement of the dispute. This arrangement was made about one year prior to the death of Ashok. In the house of deceased Ashok lived at the material time his wife P.W. 1 Vijayalakshmi and his three children. The youngest was a son of one year four months. The eldest was a daughter of about seven years. P.Ws. 2 and 3 Parameshwar and Ramadas are the agriculture labourers working in the agriculture of the deceased. Making due allowance to the controversy with regard to condition their service it is not disputed that for quite a long time they had been working under this family and after partition they continued to work under deceased Ashok. The houses of the accused and the deceased face East and the coconut tree in question was on the Western side of these houses. Thus the fencing was only to separate their respective backyard. Even after partition there used to be some minor disputes with regard to taking of water from the tap connected to the pump set installed to draw water from a tank.

3. Accused No. 2 has another son by name Rajendra. As accused No. 2 used to commute between Taddalse and Karwar for his legal practice, his two sons and his wife used to look after their lands. This Rajendra happens to be the elder son of accused No. 2. Sometime prior to the incident in question this Rajendra had assaulted deceased Ashok on his arm for which a police complaint came to be filed and later during the pendency of this case in the Sessions Court he was convicted. On 28-9-1986 both accused No. 2 as well as deceased filed petitions at the Sirsi Police Station which was received by P.W. 19. Under Ex. P-24 deceased Ashok complained that morning at about 10.30 a.m. both these accused persons indulged in removing the stone fencing put up by him and when question both of them threatened him with dire consequences. Accused No. 1 threatened him with a knife and accused No. 2 with a club. His assertion that the deceased had put up the stone fencing at the border of his land fell on deaf ears. The petition given by accused No. 2 is at Ex. D-3 and it was against deceased Ashok, P.Ws. 2 and 3 and one Bangareja Eregowda. Accused No. 2 complained therein that the persons named therein as accused had trespassed on his land and committed theft of 27 betelnut plants from his Bagayat land and this land

was subject-matter of a grant from the Deputy Commissioner. He also complained that the deceased had prevented him from plucking the coconuts from the coconut tree standing on his land. The theft of betelnut plants was earlier to this incident of 28-9-1986 and Ex. D-3 related to the incident of the deceased and others preventing him from taking the coconuts from the said tree. P.W. 19 the Sub-Inspector of Police who received these two petitioners gave endorsements to them as per Exs. P-25 and P-26 respectively. They were so given after he made a local inspection and found that it was a dispute of civil nature. The two endorsements direct them to settle the dispute in a Civil Court and till then not to indulge in acts leading to breach of peace. In spite of that it appears there was no love lost between the two brothers. Ashok Hedge died a homicidal death on account of a firearm injury sustained on 30-10-1986 at about 11 a.m. or so. On a complaint filed by P.W. 2 one of the farm servants a case of murder was registered and on investigation charge-sheet came to be filed against both the accused persons under S. 302 r/w. Ss. 34 and 114, I.P.C. and also under S. 27 of the Arms Act. The Sessions Court at Karwar to which the case was committed acquitted the accused holding that deceased Ashok sustained gun shot wound accidentally. The defence taken by the accused was that when the deceased was getting the coconuts plucked through his servant one Ganapati Gowda and when the two farm servants of the deceased were also there these accused came in their way and when they questioned them the deceased attempted to assault them with a "Reeper" and either due to the swing of the "Reeper" touching the hammer of gun or the creeper pulling it the pin of the cartridge got hit and the deceased was consequently hit by the pellets. This theory appears to have found favour with the trial Court. The State has now challenged this judgment of acquittal of the appellants by the Sessions Court.

4. From the aforesaid resume it could be gathered that the fact that Ashok Hedge did sustain gun shot wound in an incident of that morning is not in dispute. The only controversy is whether it was an accidental discharge of the pellets from the shot-gun which was with accused No. 1 or he fired the shot-gun at the deceased to commit his murder.

5. The prosecution relied on motive evidence, direct evidence and medical evidence in support of the charge. As far as motive is concerned it springs up only from the ill feeling between the parties after the partition. Though there used to be quarrels with regard to the boundary between the two lands and also with regard to the stone fencing put up by the deceased the events leading to the incident in which Ashok died have got genesis in the dispute between the parties regarding the ownership of the coconut tree. That another son Rajendra of accused No. 2 had earlier assaulted the deceased and Rajendra was convicted by the criminal Court is not in challenge though it is suggested that an appeal is preferred by him. P.Ws. 5 and 6 who are the close relatives of both the deceased and accused have spoken about they advising the deceased and accused No. 2 to restrain themselves from precipitating the matters till the lands on either side of the fence were measured. However they made an arrangement that both the

deceased and the accused should take only the coconuts that fell on their respective land but not to pluck them. Therefore, the plucking of the coconuts that morning is the cause that led to this fatal incident.

6. At the outset it is necessary to determine who did the provocative act of climbing the tree which is said to be about 30 to 40 feet in height that morning to pluck the coconuts. It is the prosecution case that on that morning P.Ws. 2 and 3 had gone for work under the deceased and the deceased, his wife and children were in the house. Both these servants having gone for work at about 8 a.m., cut cardamom in the cardamom garden of the deceased, returned to his house and then got engaged in filling water to the Gas Plant and to the cow-shed. Thereafter they started carrying water to his bathroom and at that time they heard the sound of coconuts falling from the tree when it was about 11 a.m. Similarly when P.W. 1 Vijayalakshmi and her deceased husband were in the house they also heard the sound of the falling of coconuts from the coconut tree in the backyard. They came out to see what was going on and simultaneously P.Ws. 2 and 3 also came into their backyard. She and her husband stood on the Chadi or a raised platform behind their house and saw C.W.-7 Vittal Bhandari on the top of the coconut tree plucking coconuts in clusters and throwing them down. Both the accused were also standing on the Chadi behind their house. The deceased asked Vittal Bhandari not to pluck the coconuts as there was dispute concerning the tree. When the deceased so questioned Vittal Bhandari accused No. 2 instigated his son to finish him off whereupon accused No. 1 fired at the deceased with the gun. Her husband fell down shouting "Ayyo Ayyo" on account of the gun shot wound. P.Ws. 2 and 3 also swear about they seeing Vittal Bhandari on the top of the coconut tree plucking the coconuts and throwing them down. In their defence the accused stated that it was one Ganapatigouda who was on the tree plucking the coconuts for the deceased. Accused No. 1 also categorically states that Vittal Bhandari was not on the tree. A little distance away from the tree the deceased was standing holding a wooden "Reeper". By the side were standing P.Ws. 2 and 3 holding a scythe beach. The said Ganapathi was throwing coconuts from top of the tree one after the other. Having seen this he felt dejected and asked them why they were plucking tender nuts. When the deceased replied who he was to question them accused No. 1 told them there need not be any quarrel between them. The near translation in English of his statement in Kannada reads thus :

"I bent down saying there should not be any quarrel between us and the butt portion of the gun in my left hand was touching the ground. Ashok Hedge apprehending that I would carry away the fallen coconuts which I was picking up after bending swung the "Reeper" in his hand at me. When I was turning to avoid the blow from the "Reeper" even my gun turned in the same direction and I felt pulling of the gun on account of there having grown wild creepers on the ground. At the same time the "Reeper" swung by the deceased accidentally touched the hammer of the gun, it went off and hit Ashok Hedge. He fell down at the spot. Having seen this I was very much obsessed and went inside my house. At that

time my father was not present there."

Accused No. 2 stated that he having plucked the coconuts from the trees in front of his house went to his land at about 9.30 a.m., got some work attended to by the coolies in the land and at 11.30 a.m. when it started raining he left the land and come near the house and saw many people assembled there. His son accused No. 1 was weeping and when questioned he told him the same thing now stated in his defence. He asked his son to get ready so that they could go to the Police Station by catching 1.30 p.m. bus and by the time accused No. 1 completed his Pooja, the Circle Police Inspector (C.P.I.) arrived at the spot and he told him about this incident. On being demanded he handed over his gun as well as the licence. Thus accused No. 2 pleads his total absence from the spot of incident that morning. It is now clear that according to the accused as stated in their defence the deceased was getting the coconuts plucked through a servant by name Ganapatigouda. As already stated the prosecution witnesses P.Ws. 1 to 3 have sworn about they seeing CW-7 Vittal Bhandari on the tree plucking the coconuts and throwing them one by one and even some clusters were also thrown. It is significant that at no stage in the cross-examination suggestion was made to any of these witnesses that it was Ganapatigouda that was plucking the coconuts at the instance of the deceased.

7. It was elicited in the cross-examination of P.W. 1 that one Ganapatigouda was also working as a cooly under them for six or seven years before. A very strange suggestion was made that though Ganapatigouda was also present that morning when this incident occurred because he refused to oblige the prosecution the witnesses are denying about his presence. P.W. 1 clearly stated that he was not present that morning at all. It is significant here that it was not at all suggested that it was Ganapatigouda that had claimed the tree at their instance to pluck the coconuts and that the deceased was standing near the coconuts tree perhaps to observe the plucking and to collect the fallen coconuts. To a further question put in this behalf in para 9 of her evidence the witness stated as follows :

"CW-7 Vittal Jatti Bhandari was the person engaged by the accused to pluck the coconuts in front of accused house. I cannot say from how many trees he got the coconuts plucked at that time. They might have been did so for about 15 to 20 minutes. It did not strike me that after sometime, accused will attempt to pluck coconuts from the disputed tree. I have not seen their coming to the disputed tree of plucking the coconuts. I do not know how much time CW-7 took to climb the disputed tree. I cannot say the height of the disputed tree. CW-7 was using a scythe to pluck the coconuts. I have not heard the sound of cutting the coconuts on the tree. I heard the sound of one cluster falling from that tree. I cannot say how many coconuts contained in that cluster. I heard only one sound of the cluster falling down. Thereafter, myself and my husband came out through kitchen room. It is not true to suggest that if one comes out through the door, one cannot able to see the persons standing behind the house of the accused near Chadi."

C.W.-7 is none else than Vittal Bhandari. It is thus clear that the same Vittal Bhandari was engaged by the accused even to pluck the coconuts from the trees in front of their house. Again at a later stage the following was elicited in the evidence :

"When my husband questioned CW-7 Vittal Bhandari while he was plucking the coconuts from the disputed tree, the said Vittal has not said anything. When my husband was questioning CW-7 Vittal, A-2 asked Vittal not to get down from the tree. A-2 told my husband as "Vernacular omitted". It is not correct to suggest that as a result of the words used by A-2 my husband got angry and his face became red. It is also not correct to suggest that thereafter my husband picked up a Reaper and calling the name of P.Ws. 2 and 3 went to assault A-1."

In para 5 of his cross-examination P.W. 2 admitted that till he heard the sound of falling of coconuts trees he had not noticed CW-7 climbing the disputed tree. When he heard the sound CW-7 had already plucked 25 to 30 coconuts. He was cutting clusters of coconuts and not individual coconuts. To the further question he replied thus :

"The deceased was standing about six feet from Chadi. Then he told Vittal Bhandari not to cut the coconuts and that tree belongs to him. Vittal Bhandari has not answered anything. We also did not say anything to the said Vittal. At that time A-2 said that "Vernacular matter omitted." Except these words, A-2 has not said any other word. The deceased has not asked anything with A-2 about plucking of the coconuts. A-2 also did not tell anything regarding plucking of coconuts from the disputed tree."

In the cross-examination of P.W. 3 the following was elicited :

"It is a plain open ground. When we went there, about 20 to 25 coconuts were already plucked from the disputed tree. They were lying on the ground. It is not correct, to suggest that the deceased informed us to carry the coconuts to his house as he was got right over that tree. CW-7 Vittal was plucking the coconuts by using his hand. He was removing the coconuts one after another by turning them. When the deceased questioned CW-7 as to why he was plucking the coconuts, he did not give reply to him. The deceased had not asked with anybody as to why CW-7 climbed the tree. The deceased also informed CW-7 to get down from the tree as the same belongs to him. Nobody asked Vittal not to get down from the tree and to remain there itself. Then A-2 told the deceased that he has got share in the fruits of the tree."

8. Above reference to the evidence of these three witnesses clearly demonstrates that at no stage to any of these witnesses a suggestion was made that it was Ganapatigouda and not CW-7 Vittal Bhandari who was plucking the coconuts from the tree. To P.Ws. 2 and 3 even the presence of Ganapatigouda was not suggested. On the other hand as though Ganapatigouda was also an eye witness as to how the incident occurred a suggestion was made that he was kept back. Therefore only during the statement u/S. 313, Cr.P.C. accused-1 alone came

forward to state that it was not Vittal Bhandari but Ganapatigouda who was plucking the coconuts. Vittal Bhandari no doubt has not been examined though cited as C.W.-7 and it was urged on behalf of the respondents that it is fatal to the prosecution case. The trial court observed that on 20-7-1987 the Public Prosecutor filed a memo giving up C.W.-7. It also observed that CW-7 was perhaps another witness to the incident and he ought to have been cross-examined branding him as unreliable. Therefore according to the trial court it raises a suspicion in the unfolding of the prosecution case. It is no doubt true CW-7 is said to be the person who was plucking the coconuts and he has not been examined. To that extent exception could be taken. But what is material now is to see whether the version given by the accused could at least be probable as the cause of death of Ashok Hegde is due to firearm wound is not in challenge. There being no whisper as to Vittal Bhandari not being the person who plucked the coconuts it should be said that the prosecution has established that it was he and none else who was plucking the coconuts and his non-examination during trial is not of much consequence.

9. It is the case of the prosecution that accused Nos. 1 and 2 were standing on the Chadi of their house when PW-1 and deceased came out from the back door of their house and stood on the Chadi. When the deceased questioned CW-7 about the plucking of the coconuts accused-2 asked accused-1 to finish him off and then accused-1 shot at the deceased. Again it is the consistent story given by P.Ws. 1 to 3. The medical evidence given" by PW-9 the Assistant Surgeon who conducted autopsy over the dead body of the deceased is that he found during autopsy the central wound on the right side of the chest anteriorly over the 2nd, 3rd, 4th and 5th ribs at their anterior ends irregularly shaped measuring 2" horizontally and 2 1/2" vertically. This wound was surrounded by a multiple pellet wounds spread over an area of 18" transversely from costal margin to the root of the neck. Pellet wounds were all surrounded by abrasion collar, distributed uniformly around the wounds. There was also fracture of proximal and middle phalanx of the left index finger with laceration of the skin over that. Internally the right pleura was lacerated, upper and middle lobes of the right lung were lacerated and multiple pellets embedded in it and in his opinion death was due to firearm injuries. He stated in the cross-examination that 22 pellets were collected from the body during autopsy and when questioned in the cross-examination if it is not true that at a close range the injuries made to a single wound of a large size by travelling in a compact mass he agreed with the suggestion but added that there would be associated changes if the firing is from the close range and the associated changes are blackening, tattooing, scorching and singeing of hair. He referred to Ex. P-7 opinion give by him to a query made by the Investigating Officer and this Ex. P-7 states that the approximate range from which the firearm was fired was 10 to 15 feet and the same was fired from the front of the deceased. It was also elicited that blackening, tattooing and charred marks occurred if the firing is from a close range i.e. within a distance of two feet. Beyond two feet usually the scorching marks do not actually occur.

Nowhere in his evidence it was elicited that these conditions were present when he conducted autopsy. It is particularly important to note that the central wound was surrounded by multiple pellet wounds over an area of 18" upto the root of the neck. That only shows that while entering the body the pellets had spread to a large area which is one of the material indications that firing could not have been from a very close range as understood by the witness.

10. According to the learned counsel for respondents this firing range assumes importance in view of the distance shown in the sketch Ex. P-2 between the spot where the deceased was said to be standing and that where accused-1 & 2 were standing. Approximately it comes to about 13 feet. Therefore if a shot gun MO-1 was fired from a distance of about 13 feet the wound could have been different from the one noticed by PW-9. In this context the evidence of the ballistic expert PW-14 is material. Among other things he had received for his examination a sealed cloth packet containing one air cushion wad and one sealed bottle containing 3 wad pieces and 22 lead pellets. At para 9 of his evidence he stated that on the shirt sent to him for examination the main hole was surrounded by few individual pellet holes on the shirt and there was no scorching, blacking and tattooing mark around the main hole. For this reason he fixed the approximate range of firing as beyond 8 feet and within 20 feet from the muzzle end of the gun. Presence of lead was detected around the edges of the hole on the shirt and on the banian. These holes were due to passage of lead pellets. He also added that if the shot was made within a distance of four feet there will be scorching, blackening and tattooing marks and only one whole would be found. He denies the suggestion that to an ordinary man tattooing marks may appear as burnt marks. When questioned that it is not easy to give definite opinion regarding distance from which a firearm was discharged his reply was that if sufficient number of live cartridges are available and assimilated target is given then the range can be determined. For such a test there could not have been a human being as a target and therefore there are bound to be certain variations. PW-20 the Investigating Officer received a sealed bottle containing 22 pellets and cardboard wads from the Medical Officer PW-9 and sent them for the examination of the ballistic expert. Depending on this evidence it was argued for the respondents that the wads were found in the body of the deceased along with the pellets and that determines the range of firing. We have gone through the evidence of PW-9 in the light of this submission made by the learned Counsel. Unfortunately no attempt was made either by the prosecution or the defence as to the finding of the wads in the body along with the pellets.

11. In this context as it assumes some importance it is necessary to again look into the evidence of PW-9. At the commencement of the evidence he states that the anterior aspect of the right side of the shirt was found torn and there were two punctured scars on the right side of the front of the banian. It is unnecessary to refer to surface wounds as nothing significant to throw light on the present discussion was noticed. But on dissection he noticed the following features in para 5 :

- (1) Wound as described under 13(a) and 13(b) of the post-mortem report;
- (2) right pleura was lacerated anteriorly corresponding to the wound described under 13(a);
- (3) upper and middle lobes of the right lung were lacerated and multiple pellets embedded in it;
- (4) there was about 600 ml. of hemorrhagic fluid present in right fluid cavity; and
- (5) in the stomach there were semi-digested food particles present.
- (6) The other organs were normal, intact and pale.

This is all that the witness had deposed about the internal injuries and finding of foreign material, namely, multiple pellets. In para 9 referring to these pellets he says :

"I have collected the pellets embedded in the dead body. They were innumerable. But the pellets that were collected were 22 in number, I put pellets in a sealed box and sent it to the C.P.I. It is not possible to say of what substance those pellets were prepared."

A question was put that if the central wound were to be caused by mass of pellets the range of the gun should be close. The witness replied that taking only the central wound one cannot decide the range of gun shots because there were associated wounds surrounding the central wound caused by multiple pellets. The other question has already been referred to above. He also deposed that before the pellets get embedded in the first and the middle lobe of the lung the pellets have to pass through the skin, subcutaneous tissue, muscles, bones, cartilage, pleura and then lungs. When pellets travel through all these tissues the velocity would be reduced. He was not able to say for the fracture of the ribs what could be the minimum of pellets. Thus though the medical witness was cross-examined at length with regard to the nature of the injuries, the pellets taken from the body, the determine factor for the fixation of range of shooting it is nowhere elicited that wads were also collected from the body or that they were embedded in the lung or any other part of the body. Therefore from the only fact that the bottle sent for ballistic opinion contained 22 pellets and some wads a presumption does not arise that the wads were found embedded in the body.

12. The learned Counsel for the appellant elicited in the cross-examination of PW-4 that he generally refers to the treatise on "Identification of Firearm Injuries by Dr. M. Jauhari" who was then Director of Central Forensic Science Laboratory in Calcutta. Though he had also brought the book with him no observations of the author were confronted to the witness when he was in the box. However some of the observations of the learned author have been referred to during arguments. A Government of India Publication of 1980 on the subject by the same Dr. M. Jauhari has been made available for our reference and some portions on different topics were read over to us. At page 57 the learned author

discusses the subject under caption "Wadding". He says that in some of the cartridges one does sometimes come across a wad made of glazed board or similar material such as in case of 303, bail MK7, K.F. cartridges. There wads generally break up on emerging from the muzzle and are not of much significance. The wadding that is important is the one used in shotgun cartridge. The make up of a shotgun cartridge consists of a over powder card, a air cushion wad or a felt wad, an undershot card and a closing disc. In some cartridges, the closing disc may be omitted. Of all the wadding components, the air cushion or the felt wad is the heaviest, next come the over-powder and undershot cards and then the closing disc, which is probably the lightest. When a shotgun cartridge is fired, the wadding is projected from the muzzle with the same velocity as the shot charge. It is, however, not carried to long distances on account of the light weight and poor ballistic shape of its components. The maximum distance of projection of wadding in open space may be 40-50 feet depending upon the weight, shape and the velocity of the components. It may also be affected by direction and speed of the wind the elevation of the gun. At close ranges of firing, the wadding does not separate from the main charge of pellets and it may, therefore, be found embedded in the wound. At longer ranges, it separates from the main charge or pellets and on striking a human body may produce a minor injury depending upon the circumstances. It, therefore, appears that the marks of wad and their dispersion with respect to the shot charge may provide some clue regarding the range of firing. According to Burrard, the closing disc or the overshot card is the first to separate from the main shot charge and the rest of the wadding and seems invariably to have dropped before a range of 6 feet is reached. Thus the presence or absence of the closing disc inside the wound gives a clue regarding the range of firing. The wadding is even otherwise important as its size enables one to know the bore of the cartridge used. The make, shot number, type of powder, etc. may also be ascertainable in some cases because details to this effect are often printed on the closing disc. Care, however, is to be exercised in measuring the size of the wadding as it has a tendency to swell if soaked in blood or other body fluid. At extremely close ranges, wadding is capable of penetrating the body and cause a fatal injury. He then cautions that before forming any opinion with respect to the range of firing on the basis of wadding, it is advisable to conduct experimental tests using same firearms cartridge-target combination as the one involved in crime. A discussion of this topic by the learned author shows that the wadding aspect is not always a conclusive factor. To repeat, the projection of wadding in open space depends on the weight, shape and velocity of the components as well as the elevation of the gun. From PW-14 these factors were not elicited. PW-14 also did not conduct test firing. In the cross-examination itself with regard to distance the following question and answer assume importance :-

"Question : Normally, it is not easy to give a definite opinion regarding the distance from which firearm is discharged ?

Answer : If sufficient number of same batch of live cartridges are available and

assimilated target can be prepared then the range can be determined.

For such a test, we will not have a human being as a target. Therefore there is bound to be certain variations."

Only to find out if the gun MO-1 was in working condition he tested firing from 5 live cartridges of 12-bore KE special and found the results in positive. He also deposed that the lead pellets in article No. 3 and wad in article No. 2 were the component parts of a 12-bore cartridge. In article No. 2 it is stated that a sealed cloth packet containing one air cushion wad marked as article No. 2 was sent to him and under article No. 3 a sealed bottle containing 3 wad pieces and 22 pellets marked as article No. 3 were also sent. It could thus be seen that no opinion is given with respect to 3 wad pieces in article No. 3. In the cross-examination it was elicited that if there was no shirt or banian intervening the range there could be blackening, tattooing and scorching marks and the tattooing is usually due to deposit of unburnt and semi-burnt grains of gun powder. Thus the question of determining range cannot be solved without test firing under similar circumstances and without there being any definite date with regard to the nature of the components of a cartridge used in a shotgun. Therefore from the evidence of PW-14 it is not possible to conclude that the firing was from a very close range, i.e. 2 to 3 feet as now sought to be made out. It was argued that the Chadi is shown to be at a distance of about 13 feet from the place where the deceased was standing and the injury found does not fit into the evidence given. In our view the opinion evidence alone is not a concluding factor. As already pointed out the other characteristics of firing from a short distance of 2 feet to 3 feet were totally absent.

13. The learned author at page 56 of the Book referring to range estimation says :

"The other method of range determination depends upon the quantization of certain metallic elements in the firearm discharge residue deposited around the bullet hole. It is obvious that as the range of firing increases, the amount of residue deposited around the hole decreases. Thus it may be possible to provide an estimate of the range by quantization this residue. Different instrumental methods have been proposed for quantization the metallic elements like copper, lead antimony and barium present in the firearm discharge residue."

He prescribes the method of test by stating that in the method proposed by Krishnan, the samples are taken away from the bullet hole and not at the hole. One usually takes up to eight concentric circular samples each 0.25 cm. in width. If the same samples can be removed from around the bullet hole, they are irradiated as such in the reactor. If the removal of the samples is not possible, solution samples are prepared. For this purpose, each circular area is carefully washed and the washings are collected and made 10 ml. Again at page 59 under the same topic he says that the method of range determination by pellet dispersion consists of in firing test shots from various distances using the same

firearm cartridge combination as the one used in crime. Several shots are fired from each distance to assess the round to round variations. The average dispersions of the test patterns are then compared with the average dispersion of the evidence pattern and an attempt is made to determine the limits of the range within which an average dispersion corresponding to the evidence pattern can be obtained. These limits then represent an interval estimate of the range of firing. As already pointed out above the medical witness has found dispersion of pellets in an area of 18" up to the neck. To repeat there were no scorching, tattooing or blackening marks around the wound. It is not possible to make out whether they were found around the hole on the shirt.

14. Because of the absence of such characteristics on the shirt article No. 7 at page 9 of his evidence PW-14 stated that the approximate range of firing was beyond 8 feet and within 20 feet from the muzzle of the gun. PW-14 cannot and need not be blamed for not carrying out tests to determine the range factor for the simple reason that there was no competing version of the gun having gone off due to accident. There was a complaint of P.W. 1 alleging shooting by accused-1 by he standing near the Chadi of his house in the backyard and the deceased sustaining a fatal wound. Though accused No. 2 happens to be a practising Advocate he never bothered either to advise his son to inform the Police about this accidental firing nor did he personally go and inform the Police. What all he stated in his statement u/S. 313, Cr.P.C. is that having returned home from his land after 11-30 a.m. he saw his son accused No. 1 sitting on the Jagali of his house weeping and when questioned told him as now stated by accused-1 in his statement. Having gone to the spot where the deceased had fallen he noticed that the deceased was removed into his house and there was none else. Blood had fallen at the spot. He went inside, asked his son to perform Pooja and then go to Police Station by catching 1-30 p.m. bus and inform the Police. In the meanwhile the C.P.I. arrived at the spot and he was informed about it. His gun licence as well as the gun were seized. Having entered in the house of the deceased the Police came out saying that he was dead. When such a ghastly incident involving the death of his brother was involved by accidental firing it is rather inconceivable that accused No. 2 could have kept quite without immediately going to the Police Station and giving information in writing. If only such a version was made available to the Police immediately after the incident the Police could have sought the opinion of PW-14 with regard to the range and other factors probalising accidental firing. Therefore we have only to see if the oral evidence now given by the prosecution witnesses is reliable and dependable on the version suggested during the cross-examination and repeated in the statement of accused No. 1 is probable. The accused no doubt need not prove his defence but at the same time the defence should be probable and appeal to reason.

15. Here again a material suggestion made to PW-14 to probalise the defence story and the answer elicited assumed importance. His evidence at para 16 is as follows :

"I see MO-1 which has got a hammer. This hammer is exposed and there will not be any cover. This gun is manufactured in the year 1968. It is not correct to suggest that if a person holding the gun on his shoulder making it to rest on his shoulder and the hammer is in an off position and at that time, if a wooden reeper were to be swung in its direction and if it were to fall on the hammer, there will be a discharge of the cartridge. If a man standing near a cement platform holding the gun in his hand, pointing the barrel to the upwards and in the confusion if he were to lift the gun and the hammer were to touch to the sharp edge of the cement platform, there is likely discharge of the cartridge. In that process, the discharge of the cartridge depends on direction in which the gun was tilted in the process of the striking. Suppose if a person holding the gun and walks in the garden with full of creepers and vines and by, any chance the said creepers or vines were to entangle the hammer allowing the hammer to jerk then its discharge is possible."

It can be seen from these answers that certain possibilities have been elicited in the cross-examination and we have to see whether any of such possibilities fits into circumstances of the case. It is noteworthy that the gunshot wound is on the right chest causing internal damage to the lung, fracture of ribs, damage to pleura etc. That goes to show that the thrust must have been very violent and not just touch and go. There is no vertical penetration within. Though these probabilities have been elicited accused No. 1 in his statement has categorically stated that resting the butt of the gun on the ground he bent down to collect the coconuts and at that time the deceased swung the "Reeper" towards him and when he was turning to avoid it he felt a jerk of the gun due to entangling of the creeper grown on the ground and at the same time the "Reeper" hit the hammer of the gun and it went off and hit the deceased. If one reconstructs such a situation in his imagination in all probability the muzzle of the gun would be facing the sky if the butt were to rest on the ground and even if a bent man turns to avoid any assault without lifting the gun the possibility of the muzzle directly pointing towards the right lung would become wholly out of question. It is not the case of accused-1 that when he bent to collect the coconuts the gun was resting on his shoulder horizontally. Even then it all depends on the height of the victim and the holder of the gun and unless the shoulder is at the level of the chest or lung of the victim again this probability becomes out of place. Another suggestion was made to the ballistic expert that if the edge of the Chadi meaning thereby the Ghadi of the house of the accused would touch the hammer the cartridge could get discharged. Though the possibility is spoken to by PW-14 that is not the case of the accused at all. Therefore we have only to consider the story now told by accused No. 1 before the court that there was a jerk due to entangling of the creepers and due to the swing of the "Reeper" the hammer got struck. In any event pellets could not have penetrated into the right lung creating a hole of 2" directly and the only possibility is of the aiming of the gun towards the deceased, whatever be the distance and then shooting at him. We secured the short gun MO-1 and examined it closely. Its butt portion measures

12" in length and above the butt portion the length of the barrel is 36 1/2" and thus the muzzle end would be 48 1/2" from the butt end. This roughly comes to 4 feet which would be much above the waist of a common person of normal height. We also examined the hammer and even with violent push with fingers we did not find the hammer to get released. It got released only when the trigger was pulled and this trigger is within a semi-circular metallic cover. Therefore the "Reeper" hitting the trigger is wholly impossible and that is not the case of accused-1 either. The hammer hitting the pin is sufficiently tight and though generally PW-14 spoke about the probability of the hammer getting released due to the swing of a "Reeper" he was not called upon to demonstrate when he was in the box or to try the particular hammer on this gun to see whether it could get released by a mere swing of a "Reeper" or pushing violently with fingers. Therefore even applying the standard required in order to make the defence probable we do not find the least probability of accidental discharge of the cartridge from this gun.

16. A photographer was examined as DW-1 for having taken photographs Exs. D-5 to D-13 to show that there were creepers grown in abundance in the backyard. We have considered the defence taken by accused-1 even keeping in view the creepers or shrubs to be found in the photographs but as this was only a backyard and not an abandoned land they could not have been that thick. Even otherwise as we have discussed at length the defence theory these photographs do not help the accused any further. DW-2 a practising Advocate of the Karwar Bar, Member of the State Legislative Assembly for nearly three terms, a Lok Sabha Member elected in the year 1977 and also one time Deputy Speaker of the Legislative Assembly has come forward to state about the mechanism of Firearms as he also possessed a few types of Firearms. He held licence to possess a Double Barrel Rifle, a Double Barrel Breach Loader and also a Double Barrel Muzzle Loader. He calls MO-1 as a single Barrel Breach Loader gun. To charge MO-1 after loading cartridge the hammer should be pushed back and then the trigger should be operated. If the hammer hits the pin behind the barrel the pin pushes forward, the percussion cap and then the gun is discharged. Looking to the hammer of MO-1 he stated that sometimes without operating the trigger if the hammer gets jerked and touches the pin the cartridge would be fired and there is possibility of firing if any creeper or twig gives a jerk to the hammer if one moves in a bush or jungle full of creepers. He also swears about there being 2" to 2 1/2" diameter hole on the body if the same is fired from a distance of 5 to 6 feet. Having seen Ex. P-12 the photograph of the deceased he stated that the diameter of the injury if it was 2" to 2 3/4" the firing could be from a distance of not more than 6 feet. If the distance is 13 feet the spreading of pellets could be 10" to 12" in diameter. He states this by his experience of use of such a gun to shoot animals like wild-bears and porcupines. When questioned if there could be blackening or tattooing if the same is fired from a distance of 6 feet he came forward with a reply that if there is wind the mark would be less or difficult but if there is no wind some blackening and tattooing is possible. He

joined the Bar in the year 1948 and continued as an active member till 1972 but in 1972 he became the Deputy Speaker. Accused-2 was also a practising member of the Karwar Bar before 1972. He gave evidence that he possessed such Firearms right from the year 1950 but produced Ex. D-14 a photo copy of his licence which showed that it was granted in the year 1986 and was valid till 31-12-1989. In view of these date of grant of licence and date of expiry it was suggested to him that he was not holding licence for such a length of time as stated by him. He admitted that that was the first time that he gave opinion evidence, that he never handled any murder case involving gun fire and he never saw nor obtained certificate to show his expertise in use of arms. He also admitted that he has not undergone training under any Ballistic Expert and he does not know how many grams of gunpowder would be in a cartridge. It was therefore suggested that he could not give any opinion with regard to effect of firing a firearm over a human being. He was not even a medical expert. It is patently clear that out of fraternal affinity the witness has come forward to save the accused. He was rather in a problem when specifically asked about the presence of tattooing or blackening marks over the skin when firing was from such a short distance as staged by him. His evidence cannot be considered in any way either better or worse than that of PW-14. The same has been discussed at length. Similarly DW-3 Rajendra the eldest son of accused-2 does not add anything more. He swears that he was present when the Advocate for the accused and his maternal uncle had visited the spot to make inspection of the same perhaps to prepare defence of the accused. He speaks about the height of the creepers and also swears that if a person stands on the Chadi of their house he cannot see the person standing on the Chadi behind the house of the deceased. It is this witness who was convicted in a previous case concerning a Papaya tree but states that he has preferred appeal against his conviction. That Judgment was delivered in February 1987, i.e. after this incident. The presence of the creepers and other topography as spoken to by him have been considered while discussing the probability of the defence story. Therefore the three defence witnesses examined by the accused do not add anything more nor does their evidence take away the effect of the credible, reliable and truthful evidence of PWs-1 to 3 and other circumstantial evidence. In our view therefore the defence set up by the accused is only an afterthought which was developed in the course of trial.

17. The respondent's Counsel urged that because this is an appeal against acquittal we should be slow in interfering with the Judgment of the trial court as the innocence of the accused is fortified by the judgment of acquittal in his favour. In the case of Solanki Chimanbhai Ukabhai Vs. State of Gujarat, the Supreme Court held that the appellate court while dealing with an appeal against the order of acquittal has full power to review at large the evidence on which the order of acquittal is founded and to reach to a conclusion that upon such evidence the order of acquittal should be reversed. However, in exercising that power the appellate court should give proper weight and consideration to the

matters like the views of the trial Judge as to the credibility of the witnesses, the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial, the right of the accused to the benefit of any doubt and the slowness of the appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witness, which finding would not certainly be disturbed if two reasonable conclusions can be reached on the basis of the evidence on record. Similar was the view expressed by the Supreme Court in a later case of *Awadhesh and Anr Vs. State of Madhya Pradesh*, Unless the conclusions of the trial court drawn on the evidence on record are found to be unreasonable, perverse or unsustainable the High Court should not interfere with the order of acquittal. A large number of the decisions were cited before the trial court to show that non-examination of one of the witnesses, namely, Vittal Bhandari should go to the root of the prosecution story. At the para 82 of its Judgment the trial court observed that the prosecution made out a case that CW-7 Vittal Bhandari was initially engaged by the accused to pluck the coconuts in front side of the house and thereafter he was found plucking the coconuts from the disputed tree at the time of incident. It was contended before the trial court that non-examination of that witness was with the purpose of suppressing the true facts. We have got the evidence of three eye witnesses whose presence was natural at the time of incident and even though PWs-2 and 3 were farm servants of the deceased they had reason to be there at the material time. The mere fact that even in the previous case of assault by Rajendra the same witnesses were the witnesses to the incident and they were examined during trial according to the learned High Court Government Pleader does not in any way affect their veracity because the accused and the deceased are neighbours. These farm servants had to be in the backyard of the deceased to work for him and if any incident takes place in their presence they cannot be considered as interested witnesses whose testimony should be discarded outright. If the accused indulge in such violent acts time and again nowhere else than in their backyard, necessarily the inmates of the house or the farm servants would be the natural witnesses though their evidence needs cautious approach. The circumstances that appear to have weighed with the trial court are -

- (1) Non-examination of Vittal who was on the tree to pluck the coconuts;
- (2) the witnesses maintained that there were no shrubs or creepers near the place of the incident and that the place was plain ground without any unnecessary plants grown in that place. In Ex. P-20 the scene of offence panchanama there is a recital of growth of small plants near the place of incident and the Chadi of both the houses were parallel; and
- (3) PW-8 not accompanying PW-2 when he gave the complaint.

18. As far as the first point is concerned it must be said that the prosecution has established that it was Vittal who was at the top of the tree to pluck the coconuts. While the precaution has stated that the accused had employed this

Vittal the defence theory is that Ganapatigouda was employed by the deceased and he was plucking the coconuts. We have not accepted the version of the accused in this behalf. It thus follows that it was the said Vittal employed by the accused who was plucking the coconuts. He could not be considered as an independent witness by any standard whereas PWs-2 & 3 were natural witnesses to be at the spot having been employed by the deceased in his establishment and admittedly working in his establishment for considerable time. In the case of State of U.P. Vs. Ballabh Das and Others, the Supreme Court pointed out that there is no law which says that in the absence of any independent witness, the evidence of interested witnesses should be thrown out at the behest of or should not be relied upon for convicting an accused. What the law requires is that where the witnesses are interested, the court should approach their evidence with care and caution in order to exclude the possibility of false implication. The evidence of interested witnesses is not like that of an approver which is presumed to be tainted and requires corroboration but the said evidence is as good as any other evidence. The question here is not whether the incident in which the deceased died took place at all. The question now presents a limited compass, namely, whether accused-1 shot with he shotgun at the deceased or there was accidental discharge of the gun. We have taken for all purposes the story put forward by accused-1 in this behalf to assess and appreciate if the same could be believed. We have given our careful consideration for this probability and even if Vittal had supported the same story it could not have made any difference for the reason that the story as to the manner in which the gun got discharged told by accused-1 is wholly improbable and does not fit into circumstances. Therefore while appreciating the eyewitness account of the three witnesses we have kept before us the version given by accused-1 and found that there is no substance in it. Therefore non-examination of Vittal does not assume any importance.

19. Similarly the presence or absence of shrubs or creepers also is of little consequence because it is not the case of the accused that any of the creepers pulled the hammer. If at all there was any jerk over the butt of the gun due to creepers that had nothing to do with the discharge of the gun. Ultimately the defence put forward is that the "Reeper" that was swung at accused-1 hit the hammer and there was consequent discharge of the cartridge. Photographs no doubt show some shrubs or creepers but they are not of any consequence.

20. Lastly PW-8 not accompanying PW-2 to the Police Station is also not of any consequence because PW-2 went to the Police Station and lodged his complaint at the earliest, i.e. at 12 noon and immediately the Police visited the spot. PW-20 swore that he received information at 1-15 p.m. and immediately he proceeded to the spot. At the material time he was the Circle Police Inspector of the Sirsi Circle with his office at Sirsi. According to PW-16 the Station House Officer PW-2 gave his complaint as per Ex. P-1 at the Police Station at 12 noon. He registered the case on this complaint and sent copies of the FIR and express reports to his superior officers. The C.P.I. came to the Police Station at 1-15 p.m. took the FIR and proceeded to the spot. He admits that the court-house is about 3/4th mile

from the Police Station. P.C. 418 (PW-15) was entrusted with the FIR for the purpose of taking it to the Court of the Magistrate at Sirsi. He reached the court at 2-00 p.m. and found the Presiding Officer in his chamber. When he came out the same was delivered to him at 3-30 p.m. The Magistrate however has endorsed on the FIR that it was received at 5-30 p.m. From this it was argued that the complaint Ex. P-1 could not have been given in the Police Station at 12 noon but it could have been only much later and could be even after the Police arrived at the spot. It is also urged that the complaint must have been manipulated. It cannot be lost sight of that there has been delay in the FIR reaching the Magistrate. Whether every delay is fatal to the prosecution case is a question of fact. If the complaint could be held to have been given at the Police Station at the time at which it is said to have been given then simply because the Police Officials neglect to send it immediately to the Magistrate the conclusion cannot be that there is concoction. In Criminal Appeal No. 396/77 decided on 8-6-1978 by this Court in the case of Basappa Malappa Halemani v. State of Karnataka the offence had taken place at 9 a.m. and the FIR had reached the court at 8-20 p.m. There was evidence of the Police Patil who had received the complaint, that he had personally handed over the complaint, in the Police Station at 12-30 p.m., which was received by the A.S.I. and the A.S.I. instructed the Head Constable to send FIR to court and proceeded to the scene of offence. When he returned to the Police Station that evening, he found that the FIR had not yet left the Police Station. Therefore he personally took it and delivered to the Magistrate. The Sessions Court though criticised the conduct of the Head Constable in not sending the FIR to the court immediately, did not entertain any doubt regarding the complaint coming into existence at the time alleged and therefore there was no delay in filing the complaint, though the delay was attributed to the laches of the Police. This Court did not find that there was any suspicion with regard to receipt of the complaint at the time stated by the witnesses. This circumstance has weighed with the trial court but in our view as there is reason to believe that the complaint was given by PW-2 at the time stated by him the negligence on the part of the Police cannot affect the prosecution case. It is noteworthy that neither of the accused took any step to report to the Police as to how the gun got discharged till the trial commenced. The Supreme Court in the case of State of U.P. Vs. Gokaran and Others, with regard to delayed despatch of FIR said that it is not that every delay in sending special report to the District Magistrate u/S. 157, Cr.P.C. would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been ante timed or antedated or that the investigation is not fair and forthright. Where the steps in investigation by way of drawing inquest report and other panchanamas started soon which could only follow the handing-over of FIR, the delayed receipt of special report by the District Magistrate would not enable the Court to dub the investigation as tainted one nor could FIR be regarded as ante timed and antedated. There is no question of PW-1 or PW-2 or for that matter PW-1 giving some other version of the incident when it is unchallenged that discharge from the shotgun MO-1 was the cause of death of the deceased. That

Firearm MO-1 was the property of accused No. 2 under a licence held by him. Therefore at the most one could conceive of a version to implicate the accused by stating the manner in which the cartridge was discharged from the shotgun and nothing more. When that version given by the accused is available for appreciation there is no question of PW-1 and other two eye-witnesses manipulating a theory of their own. It is also noteworthy that there was not a single scratch mark over the person of either of the accused persons. Therefore the delay in the FIR reaching the Magistrate does not assume any importance. In our view the trial court was not justified in rejecting the eyewitness account of PWs-1 to 3. In the result we find that it was accused No. 1 who shot at the deceased with the firearm he was holding at the material time and the intention could not be anything else than to take away his life by so shooting. Therefore accused No. 1 is clearly guilty of the offence punishable u/S. 302, IPC.

21. Accused No. 2 his father is said to have abetted or instigated accused No. 1 to shoot at the deceased. It is no doubt true both Accused Nos. 1 & 2 are proved to have been present near the Jagali of their house when PW-1 came out of her house along with her deceased husband. According to PW-1 accused-2 is said to have told accused-1 Even according to PW-2 the same words were uttered by accused-2. According to PW-3 after there was some exchange of words accused-2 touched the shoulder of accused-1 and asked him to finish off the deceased. The evidence is :

Admittedly accused-2 possessed the licence and it cannot be made out whether accused-1 alone had come out earlier or accused-2 had come out first or both of them had come out together to get the coconuts plucked. At any rate when these PWs-1 to 3 came near the tree Vittal was already on the tree and they were standing near Jagali watching it. Therefore even if accused-2 were to ask accused-1 to finish off the deceased it is pertinent to note that none of the witnesses stated that accused-2 asked accused-1 to shoot at the deceased. It cannot be made out whether accused-2 had the knowledge that the gun was loaded and for what purpose the gun was brought out by accused-1. Licence to posses MO-1 is produced at Ex. P-19. It is in the name of accused-2 Ganapati Hegde. It is further noted therein that Athmendra accused-1 was appointed as a "Retainer" under the licence. The last endorsement of renewal states that it was renewed up to 31-12-1986. The purpose for which the licence was granted was for crop protection only in Sirsi Taluka. In Ex. P-19 condition No. 5 states that the licensee shall not keep Government arms or ammunition. During arguments neither party brought to our notice any provision with regard to the Retainer of the arm. However the right of a Retainer finds place in Ex. P-14 a copy of the licence produced by DW-2. He gave evidence as an expert as he possessed some arms. In this licence condition No. 5 is thus :

"The licensee or any retainer acting under this licence shall not carry any arms covered hereby otherwise than in good faith for the purpose of sport, protection, display; and save where he is specially authorised in this behalf by the District

Magistrate concerned, he shall not take any such arms to a fair, religious procession or other public assemblage."

It is not possible to make out why such condition is not specifically incorporated in Ex. P-19 nor there was any argument from either side in this behalf. We found this particular condition only when we perused the two licences to know what exactly could be the right of a Retainer. At any rate it is pertinent to note that possession of the arm by accused-1 or use of it could be as lawful as that of accused-2. Condition No. 3 in Ex. P-19 relates to lending of the arm by the licensee to a member of his family or servant who may be employed by the licensee to protect the crop or cattle situated in the area specified in the licence and who is mentioned in column 2 of the licence. Though no specific reference is made in these conditions to retainer it would be reasonable to assume that even a retainer's possession may fall under condition No. 3 and he may have even a higher right as his possession has been recognised by the Licensing Authority by stating his capacity as a retainer and his photograph also is affixed in the first page of the licence below that of accused-2, the licensee. A reading of the note at page-6 shows that accused-1 was appointed as a retainer. Section 27 of the arms Act at the relevant time was as follows :

"Whoever has in his possession any arms or ammunition with intent to use the same for any unlawful purpose or to enable any other person to use the same for any unlawful purpose shall, whether such unlawful purpose has been carried into effect or not, be punishable with imprisonment for a term which may extend to seven years and with fine."

Section 3 prohibits acquisition or possession of any firearm or ammunition without a licence issued in accordance with the provisions of the Act and Rules made thereunder. Section 25(1B)(A) provides for punishment for possession or carrying of any firearm or ammunition in contravention of S. 3 and the punishment shall not be less than six months but which may extend to three years and also fine. Section 27 is independent of S. 3 and the possession of any firearm may be under a licence but such possession in order to be penal should be with the intention of using the same for unlawful purpose. In the instant case though the possession of the firearm by accused-1 was lawful being as a retainer, at the material time he possessed it with an intention to use it for unlawful purpose. Therefore S. 27 is attracted and he is liable for punishment under that section. Accused-2 however cannot be convicted under this provision either, for the simple reason that there was no question of he allowing accused-1 to possess it for an unlawful purpose. Accused-1 was independently entitled to carry it as he was licensed to do so as a retainer. Hence accused-1 alone is liable for conviction for this offence. Accused-1 is found guilty under S. 302. IPC for committing the murder of Ashok Hegde and he is also found guilty u/S. 27 of the Arms Act. He is being convicted for the first time by this Court setting aside the judgment of his acquittal. S. 235(2), Cr.P.C. requires the Court to hear the accused on the point of sentence. Looking to the age of the first accused and

also considering the fact that this is not the rarest of rare cases calling for extreme penalty provided by law and the minimum penalty for the offence u/S. 302, IPC being one of imprisonment for life we find it unnecessary to hear him on the point of sentence for the offence under S. 302, IPC. For the offence u/S. 27 of the Arms Act though maximum sentence prescribed is seven years imprisonment and fine as we find it adequate to sentence him to rigorous imprisonment for one year and to pay a fine Rs. 200/- directing substantive sentence of imprisonment to run concurrently with the imprisonment for life there is no need to hear him on the point of sentence.

For the reasons aforesaid we allow this appeal against accused No. 1, set aside the judgment of his acquittal passed by the Sessions Court, convict him for the offence u/S. 302, IPC and S. 27 of the Arms Act. We sentence him to suffer imprisonment for life for the offence u/S. 302, IPC and further sentence him to rigorous imprisonment for one year and to pay a fine of Rs. 200/- and in default to suffer further R.I. for two months for the offence under S. 27 of the Arms Act. Substantive sentences of imprisonment to run concurrently. Accused-1 is also entitled to a set off period of detention from the date of his arrest till he was released from detention under S. 428, Cr.P.C.

We have found that the judgment of acquittal of Accused-2 respondent-2 needs no interference. However a memo was filed on 28-1-1992 by the respondents' Counsel that Respondent-2 died on 8-1-1992. The learned High Court Government Pleader by his memo dated 22-4-1992 confirmed the same and stated that he died on 8-1-92 due to heart attack. The appeal against him however stands abated.

Accused No. 1 forfeits his right to possess the gun MO-1 as a retainer and a suitable entry shall be made in the licence issued to Accused-2 for possession of the gun MO-1.

22. Order accordingly.