

(2011) 03 KAR CK 0046
In the Karnataka High Court
Case No : Criminal Appeal No. 1844 of 2005

State of Karnataka

APPELLANT

Vs

Gadigeppa, Malakannanavar @ Yallur and Others

RESPONDENT

Date of Decision : 22-03-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 313
Evidence Act, 1872 — Section 45
Penal Code, 1860 (IPC) — Section 109, 120 (b), 143, 148, 149

Citation : (2013) 1 AKR 707 : (2013) 1 KCCR 441

Hon'ble Judges : Subhash B. Adi, J;N. Ananda, J

Bench : Division Bench

Advocate : V.M. Banakar, Additional S.P.P, for the Appellant; K.L. Patil, Advocate for R1 to R5 and Sri. R.G. Kodli, Advocate for R6 to R8, for the Respondent

Final Decision : Dismissed

Judgement

Subhash B. Adi, J.—This is a State appeal against the judgment of acquittal of accused made in S.C. No. 4/2004 dated 01.08.2005, on the file of the learned Sessions Judge at Haveri. Accused No. 1-Gadigeppa S/o. Kuruvatteppa Malakannanavar @ Yallur, accused No. 2-Shambanna Urf Shambu s/o. Kuruvatteppa Malakannanavar @ Yallur, accused No. 3-Nagappa S/o. Bilappa Savanur, accused No. 4-Mallikarjun S/o. Basappa, accused No. 5-Virupanna S/o. Mallanagouda Doddagoudra, accused No. 6-Basanagouda s/o. Motanagouda Patil, accused No. 7-Fakkiragouda s/o. Basanagouda Patil and accused No. 8-Puttanagouda, adoptive s/o. Shankaragouda Naregal were tried for offences punishable under sections 120(b), 143, 148, 302, 109, 447, 341, 504, 506 & 324 r/w 149 IPC.

2. Accused No. 6 is the younger brother of deceased Veeranagouda Patil. Accused No. 7 is the son of accused No. 6. Accused No. 8 is the sister's son of the deceased. Accused 1 & 2 are the sons of another sister of accused No. 6. Accused Nos. 3 and 8 are the younger brothers of accused No. 6. Accused No. 4

is a relative of accused No. 1 and 2. Accused No. 5 is the cousin brother of deceased.

3. PW1-Shettappagouda Patil is the son, PW2-Vinodawa is the wife, PW5-Puttawa Ballary is the mother-in-law of deceased Veeranagouda Patil.

4. The case of the prosecution is that the deceased had purchased land in survey No. 15/A, measuring 4 acres and land bearing survey No15/2B, measuring 4 acres and 1 gunta. In this regard, there was a dispute between the deceased and accused No. 6. There used to be frequent quarrel in regard to the said lands and there were complaints and counter complaints against each other.

5. On 15.06.2003 at about 8:30 a.m. to 9:00 a.m., PW6 had come from Savanur Village to the house of deceased to collect water pipe. The deceased and PW6 left to the land of the deceased as the deceased had told that water pipe is lying in the land, they left the house at about 8:30 a.m. to 9:00 a.m. to land bearing survey No. 16/2. After some time, PW9-Virupaxappa Ajjannavar telephoned to the PW2, the mother of PW1 and the wife of the deceased, stating that accused 1 to 5 are assaulting the deceased. PW2 had called her son PW1 and told him to go to the land. PW1 went running to the land and saw Imamsab (PW10) was present in the land. Accused 1 to 5 were assaulting the deceased with clubs and stones. Accused 1 to 3 were holding clubs. Accused 4 & 5 were holding stones. The deceased was beaten on the western side of the land near jasmine flower land. PW1 saw the incident from a distance of 10 to 15 steps and requested the accused not to beat his father. PW6-Khurushidbasha, PW10-Imamsab Mulla and PW11-Huchappa Pujar were also present near the place of incident. They were also watching the incident from a distance of 15 to 20 feet. When PW1 made a request not to beat his father, the accused left the deceased and followed him stating that you have seen the incident and identified the accused and clubs and stones, the accused threw the clubs and stones there only and chased PW1. When PW1 reached Madar Oni, PW5-Puttavva Ballary, the grand mother of PW1 also came. Accused 2, 3 & 5 assaulted PW1. Accused No. 2 assaulted PW1 with a club below the left knee. Accused 1 to 8 also assaulted PW5. PW6, PW10 and PW11 rescued both PW1 & PW5. After the incident, PW2 also went to the spot.

6. On 15.06.2003, at about 12 noon, PW1 went to Savanur police station, which is at a distance of 12 kms from the place of incident and filed a written complaint. Ex. P. 1, same was registered in Crime No. 78/2003. PW22 sent first information to the JMFC at Savanur as per Ex.P. 15 and went to the spot at 12.45 p.m., conducted inquest panchnama and prepared the spot mahazar as per Ex.P.3 between 04:00 p.m. to 06:25 p.m., seized 3 clubs and two stones as per M.O.1 to M.O.5 were seized and from the second place of incident, M.Os.11 to 15 were seized. PW4-Dr.K.V.Achutha conducted post-mortem examination on the dead body of deceased and found that the deceased had suffered 11 injuries. PW4 opined that death was due to shock and haemorrhage due to external and internal bleeding as a result of multiple external and internal injuries. The time of death was stated as 6 to 12 hours prior to post-mortem examination. The post-

mortem report and the wound certificates of PW1 & PW5 were examined by PW4 on 20.06.2003 and collected FSL and serological report. After completion of investigation, PW22 filed charge sheet against the accused for aforesaid offences.

7. On committal, the learned Sessions Judge secured the presence of accused and framed the following charges:-

That on 14-6-2003 night you the above said accused in Kalmadu village in relation to land dispute between complainants father Veeranagouda Patil and accused No. 6 formed criminal conspiracy in the house of accused No. 6 to murder that Veeranagouda Patil and with common object and thereby committed an offence punishable u/s 120(B) r/w section 149 IPC, and within my cognizance.

On the same date, time and place you the above said accused being members of an unlawful assembly, formed an unlawful assembly with an intention to commit offence against Veeranagouda Patil in Kalmadu village in relation to land dispute of Sy. No. 15/1A and 15/2B about taking their possession, thereby committed an offence punishable u/s 143 IPC and within my cognizance.

On the same date, time and place you the above said accused being members of an unlawful assembly and with common object on 15-6-2003 at about 8.30 a.m. when Veeranagouda Patil was in a land Sy. No. 16/2 of Kurubaramallur village armed with clubs and stones, committed rioting and thereby committed an offence punishable u/s 148 r/w Section 149 IPC and within my cognizance.

On 15-6-2003 at about 8.30 a.m. when Veeranagouda Patil was in land Sy. No. 16/2 of Kurubaramallur village, you the above said accused No. 1 to 5 at the instigation of other accused attacked and assaulted him with clubs and stones and committed his murder with common object and thereby committed an offence punishable u/s 302 r/w Section 149 of IPC and within my cognizance.

On the same date time and place you the above said accused Nos. 6 to 8 abetted A1 to A5 and with common object to commit murder of Veeranagouda Patil and thereby committed an offence punishable u/s 109 r/w section 149 IPC and within my cognizance.

On 15-6-2003 at about 8.30 a.m. you the above said accused with common object criminally trespassed into a land Sy. No. 16/2 of Kurubaramallur village with an intention to commit criminal offence against Veeranagouda Patil in relation to land dispute, thereby committed an offence punishable u/s 447 r/w section 149 IPC and within my cognizance.

On the same date, time and place you the above said accused with common object wrongfully restrained Veeranagouda Patil from moving that land Sy. No. 16/2 of Kurubaramallur village with common object, thereby committed an offence punishable u/s 341 r/w Section 149 IPC and within my cognizance.

On the same date, time and place you the above said accused with common object threatened complainant-Shettappa Gouda Patil and Puttavva Ballary and

thereby committed an offence punishable u/s 506 r/w section 149 IPC and within my cognizance.

On the same date, time and place you the above said accused with common object threatened complainant-Shettappa Gouda Patil and Puttavva Ballary and thereby committed an offence punishable u/s 506 r/w section 149 IPC and within my cognizance.

On the same date, time and place you the above said accused with common object A1 to A5 assaulted complainant Shettappa Gouda Patil and Smt Puttavva Bellary with clubs and stones and other accused instigated to do so and caused bodily hurt and thereby committed an offence punishable u/s 324 r/w section 149 IPC and within my cognizance.

8. All the accused pleaded not guilty and claimed to be tried. Before the trial court, the prosecution in order to prove the charges, examined PW1 to PW22, marked Ex.P.1 to Ex.P.32, produced M.O.1 to M.O.3-clubs, M.O.4 & M.O.5-stones, M.O.6 86 M.O.7-Clubs, M.O.8 to M.O.10-three stones, M.O.11-a pair of chappalls, M.O.12-a green towel, M.O.13-jasmine flower plant with roots, M.O.14-blood stained mud, M.O.15-sample mud, M.O.16-shirt, M.O.-17-Banian, M.O.18-Dhoti and M.O.19-waist thread of the deceased.

9. Before the trial court, from amongst the witnesses examined, PW1, PW2, PW4, PW5, PW16 to PW18, PW20 and PW22 supported the prosecution case. However, PW7, PW9, PW10, PW12 & PW13 were treated as hostile and they were cross-examined by the prosecution.

10. The evidence of PW1, PW5 and PW6 was disbelieved by the trial court, observing that though PW1 & PW5 have stated that they were assaulted by clubs and stones, PW5 has not sustained any external injuries and has only tenderness on the chest and left arm. The evidence of PW5 is doubtful as to whether she was assaulted by the accused with clubs and stones as she was aged about 80 years at the time of incident. If PW5 was assaulted by clubs and stones, certainly she must have sustained serious external injuries on her body. The evidence of PW1 was also disbelieved, observing that five of the accused chased PW1, PW6 has stated that accused 1 to 5 took M.O.6 to M.O.10 clubs from the nearby land to assault PW1 to PW5. When the accused were already armed with clubs and stones, where was the need to throw the said arms and pickup M.O.6 to M.O.10, as they were chasing the PW1 from the first place of incident. Further, the name of another eye-witness was not mentioned in the complaint Ex.P. 1 as in the complaint it is stated that PW6 accompanied the deceased father to the land with another person.

11. PW6 has stated that, when the accused started assaulting PW1 at Madar Oni, the accused picked up M.O.6 to M.O.10. The trial court disbelieved the evidence of PW6 as an eyewitness. PW6 has admitted that he did not make any hue and cry. PW6 has stated that people had gathered and they were simply watching the incident of murder of deceased. PW6 was present near the body of deceased till

12 noon and thereafter he left the place of incident at 1 p.m. and went to Savanur. If PW6 was there at the place of incident till 12 noon and had left to Savanur at 01:00 p.m., the statement of PW6 would not have been recorded at 6:30 p.m. or 07:00 p.m., on the date of incident. PW6 had gone to Savanur and there is no evidence that he returned to Kalmadu Village again. PW6 has admitted that he had not disclosed the incident to any one as the incident was reported in the newspaper on the next day morning. However, the charge sheet shows that the statement of PW6 was recorded on the same day, which cannot be accepted. In his statement before the police, PW6 has not stated that he had gone to the house of deceased to fetch a water pipe. The land where the incident took place is adjacent to the road and the evidence shows that the movement of villagers will be there at 8.30 a.m. If the incident had occurred at that time, it should have attracted the attention of at least some of the villagers. Except PW6, no other witness has given the evidence. The trial court, referring to the prosecution evidence has held that the prosecution has failed to prove the charges beyond reasonable doubt.

12. PW1, PW5 & PW6 are the direct witnesses. The evidence of PW1, PW5 & PW6 was disbelieved by the learned Sessions Judge, observing that the presence of these witnesses at the place of incident is doubtful. There is inconsistency in their evidence. Their evidence do not prove the charges beyond reasonable doubt and accordingly has acquitted the accused.

13. We have heard Sri V.M.Banakar, learned Additional State Public Prosecutor for the appellant and Sri K.L.Patil, learned counsel for accused 1 to 5 and Sri R.G.Kodli, learned counsel for accused 6 to 8.

14. Though the prosecution has examined 22 witnesses, PW1, PW6, PW9, PW10 & PW11 were examined as eye-witnesses to the incident. PW7 was examined to prove the conspiracy between accused 1 to 5 and accused 6 to 8. PW4-Dr.K.V.Achutha conducted autopsy on the deadbody of deceased and also examined PW1 & PW5 and issued postmortem examination report of the deceased and wound certificates of PW1 & PW5. PW11-Huchappa Pujar is the witness to seizure mahazar of M.O.1 to M.O.10. PW12-Basanagouda Mannagoudara is also witness to seizure mahazar of M.O.1 to M.O.10. PW13-Rudrappa Jaddi is the witness to seizure mahazar of M.O.1 to M.O.5. PW14-Megharaj Doddamani, carried the first information to the JMFC at Savanur. PW15-C.T.Karekall is the police constable, who took the dead body of deceased to hospital for post-mortem examination. PW16-B.D.Talwar was engaged for search of accused No. 5. PW17-Jayaram carried 11 sealed articles to FSL at Bangalore. PW18-Kashinath Navalkeri arrested accused 1 to 7. PW19-Hemareddy Kalakeri brought FSL report from Bangalore. PW20-Ashok Basappa is a Junior Engineer, prepared the sketch of scene of occurrence. PW21-B.S.Bepuri is the police constable, who secured M.O.1 to M.O.10 from the doctor. PW22-Shivabasappa Sandigavad is the Circle Police Inspector, who conducted investigation. The material witnesses such as PW9 & PW10, who were examined as eye-witnesses,

whose names are referred in the evidence of PW1 have turned hostile.

15. The material witnesses, who supported the case of prosecution are PW1, PW5 & PW6. PW1 is the complainant, he has stated that his father was having 75 acres of land and out of said land, survey No. 15/A, measures 4 acres and survey No. 15/2B measures 4 acres 1 gunta of land was purchased by the deceased. In this regard, there was dispute between the father of PW1 (deceased) and accused No. 6 (his brother). The cases were pending between the deceased and accused No. 6. Accused No. 6 and his sons-in-law and other relatives had threatened the deceased stating that they would kill him. On 15.06.2003 at about 8.30 a.m., while PW1 was at home, PW9 telephonically informed PW2 that the deceased was being assaulted by accused 1 to 5. PW2 informed PW1 and PW1 went to the land and saw accused NO.6 and his sons-in-law were assaulting the deceased with clubs at different parts of the body of the deceased. When PW1 begged before the accused not to assault the deceased, the accused left beating and chased the PW1 towards the Madar Oni and stopped PW1 and threatened him and assaulted him with stones and clubs. At that time, PW5, his grand-mother, hearing the news of assault came there, she was also assaulted by the accused. From amongst the people assembled near the place of incident, PW6-Khurushidbasha, PW10-Imamsab Mulla & PW11-Huchappa Pujar came to the rescue of PW1 & PW5 from there, PW1 went to the land and found that his father (the deceased) was assaulted on his head, chest and other parts of the body, causing grievous injuries. PW1 alleged that the incident had taken place because of the land dispute between the deceased and accused No. 6. PW1 named five accused and others in his complaint.

16. In his evidence, PW1 has stated that on the date of incident, his father Veeranagouda Patil and PW6-Khurushidbasha went to the "Mallige land". However, in the complaint (Ex.P. 1), PW1 does not state that his father went along with PW6 or PW6 had come to the house of deceased, but he makes reference to PW6 as one amongst the villagers, who had assembled at Madar Oni and witnessing the incident. PW1 has stated that he was at home when PW2 received phone call from PW.9 and she informed PW1 to go to the land and PW1 immediately went towards the land. PW20-Ashok Basappa, a Junior Engineer, who has drawn sketch of the place of occurrence, in the cross-examination has stated that from the place of incident, Kalmadu may be around 2 kms.

17. PW1 in the cross-examination has denied suggestion that the land is 2 kms away from his house, but has stated that it may be around 100 steps from Madar Oni. In the cross-examination, PW1 has also stated that when he went to the land, he saw his father from a distance of 10 to 15 steps, by that time, his father had fallen. PW1 has also admitted that as on the date of giving evidence before the court, he was a practicing lawyer. The evidence of PW1 shows that immediately after he saw the incident, accused chased PW1 towards "Madar Oni" and assaulted him. In the cross-examination, PW1 has stated that he was assaulted only after the arrival of his grand-mother (PW5). According to him,

PW5 was aged about 80 years at the time of incident and he has also stated that he was not knowing the death of his father when he was assaulted. The evidence of PW1 shows that immediately after he witnessed the assault on his father by the accused, accused 1 to 5 chased PW1 towards Madar Oni and he was assaulted. PW4-Dr.K.V.Achutha, who had examined PW1 & PW5, issued Ex.P.6 & Ex.P.7, wherein it is stated that PW1 and PW5 were examined on 20.06.2003. The date of incident is 15.06.2003. No doubt, PW4-Dr.K.V.Achutha has stated that the injuries are about 5 to 7 days old. All the three injuries stated by PW4 found on the body of PW1 are simple in nature and the two injuries found on PW5 were tenderness over front of chest on both sides of middle line upper part and tenderness over left arm upper and outer parts and they were simple in nature.

18. PW1 has stated that PW5 was 80 years old and she was assaulted with the clubs and stones, no corresponding injuries found on the person of PW5. If PW5 had been assaulted with the clubs and stones at the age of 80 years, such simple injuries could not have been caused. Apart from this, there is no explanation as to why the PW1 and PW5 were examined by the doctor after 5 days after the incident

19. The evidence of PW6 shows that he is the native of Savanur. The distance between Savanur and Kalmadu, where the incident had taken place is about 12 kms. According to PW6, he had reached the house of deceased at 07:00 a.m., to fetch a water pipe.

20. In the cross-examination, PW6 has stated that, he owns about 15 acres of land in Savanur and he knew the deceased for the last 20 years. The deceased had a Dalai shop at Savanur and PW6 was also supplying agricultural produce to the shop of the deceased. PW6 having land of 15 acres at Savanur, why he came at 7 a.m., on the date of incident to collect water pipe from the deceased. It appears to be unnatural, that PW6 having 15 acres of land of his own and having supply of agricultural produce to the deceased shop could he not purchase the pipe, was it so urgent to come at 7 a.m. to the house of deceased to collect. PW1 in his complaint does not refer the arrival of PW6 to his house and going to the land along with deceased. In turn, PW1 in his complaint has stated that PW6, who was present in Madar Oni came to his rescue. Though PW6 has stated that he had boarded the bus at 07:00 a.m., plying from Savanur to Tavaramcllalli and got down at Kalmadu village, prosecution evidence does not show bus was available at that time. It has come in the evidence that the land where the incident is stated to have taken place is between 08:30 a.m. and 09:00 a.m. According to PW1, the place of incident is 100 steps from Madar Oni and it has come in the evidence of PW1 that people had gathered near the place of incident. But PW6 has stated that he did not rise alarm or hue and cry. The presence of PW6 is doubtful as Ex.P1 - F.I.R. given by PW1 does not refer to PW6 arriving to the house of deceased at 07.00 a.m. and going along with the deceased towards the land.

21. In the cross-examination, the defence has specifically suggested that in Ex.P1, it is not stated that PW9 had telephoned PW2. It is also not stated that PW2 has received a telephone call and asked PW1 to go to the land. The presence of PW6 near the place of incident is not stated in Ex.P1. The name of PW6 is referred only when PW6 came to rescue PW1, when PW1 was assaulted at Madar Oni. In the evidence of PW1, he has specifically alleged that he was in the house, when his father left with PW6 at 08:30 a.m. or 09:00 a.m. PW1 could not have omitted to mention the name of PW6 accompanying his father, in turn he has mentioned that PW6 was one of the onlooker who came to his rescue. It is also doubtful as to whether PW6 had come from Savanur, which is at a distance of 12 kms. from Kalmadu at 07:00 a.m., to fetch a water pipe. It is in these circumstances, the evidence of PW1 was disbelieved as having seen the incident. According to PW20, the distance is about 2 kms. or less from Kalmadu village. Though the evidence of PW1 shows that PW2 received telephone call from PW9. PW9 has not supported the case of prosecution. If PW9 had gone to call PW2 over telephone, he must have left the place of incident and called PW2 from the telephone, the availability of the telephone not stated. It is in this circumstance, it is doubtful that PW1 could have come to the place of incident when the accused were beating the deceased.

22. According to the prosecution case, accused Nos. 1 to 3 assaulted the deceased with clubs. Accused Nos. 4 and 5 assaulted with stones. PW4 - Doctor K.V.Achutha, had stated that the deceased has suffered 11 injuries and cause of death was due to external and internal bleeding, as a result of multiple external and internal injuries. From the evidence on record, it creates doubt as to whether PW1 reached the place of incident and saw the accused assaulting the deceased, though he left the house after receiving information from PW2, who in turn was informed by the PW9 over the phone, regarding the alleged incident of assault. PW9 has travelled a distance to have a telephone and after informing PW2, PW2 has informed the PW1, even taking distance of 1/2 km from the house of PW1, the accused being 7 in number could keep on assaulting the deceased. PW1 has stated that by the time he reached the place the deceased had already fallen down. It looks unnatural that till PW1 went to the place, the accused were still assaulting. Further, PW1 has stated the accused chased him till the Madar Oni and assaulted him after PW5 came to the Madar Oni. PW1 has stated that he was assaulted with the clubs and stones and further has stated that his 80 years grandmother was assaulted with club and stone. If the PW1 and PW5 had suffered injuries on the date of incident, there is no explanation as to why they did not go to the doctor till 20.6.2003. PW4 doctor has stated the injuries are simple.

23. Considering the delay in getting the treatment and nature of the assault and corresponding injuries, it creates doubt as to whether PW1 and PW5 were assaulted by the accused. Further, PW5 should have suffered grievous injuries. The delay in examination of the injuries by PW4 and distance between the place of occurrence and the house of PW1, the presence of PW5 creates serious doubt

as to whether PW1 had reached the place of incident and witnessed the same. It is also doubtful as to whether PW6 was present near the place of incident.

24. PW6 in the cross-examination has stated that he was present at the place of incident till 12 noon and he left to Savanur at 01:00 p.m. The statement of PW6 was recorded on 15.06.2003. According to PW22, inquest mahazar was prepared between 12:45 p.m. and 03:45 p.m. and thereafter he conducted spot mahazar between 04:00 p.m. and 06:25 p.m. and went to the village and recorded the statements of witnesses. PW22 had recorded the statement of witnesses only after 06:00 p.m., including the statement of PW6. But PW6 has not stated that he came back from Savanur on the same day.

25. It is in these circumstances, the trial Court has disbelieved the evidence of PW1, PW5, PW6 and also PW7. PW.7 only speaks of the conspiracy, stating that he overheard accused 6 to 8 talking to accused 1 to 5, who are the brothers of the deceased . PW7 states that he was not standing near the place where the accused were talking but he was crossing from the said road and overheard the conversation, even the conversation heard by PW7 does not prove the conspiracy it does not refer to any person or alleged offence to be committed. The evidence of PW1, PW6 & PW7 does not prove charges alleged against the accused.

26. The evidence of PW1, PW2, PW6, PW7 & PW9 do not even prove circumstances. There is serious material inconsistency in their evidence.

27. While hearing this appeal, we noticed serious procedural irregularity in conducting trial of this case. The trial court while recording the contradictions has given go by to the settled procedure and has dealt with the same in a casual manner, similarly even while recording the accused statement u/s 313 of the Cr.P.C., has literally defeated the very purpose of recording of the accused statement. It is in this context, we were forced to make certain observations. The burden of proving the charge beyond reasonable doubt against the accused is on the prosecution. It is in discharge of sovereign function to maintain law and order and keep the civilized society free from crime, one of such function is to prosecute criminal case and punish the guilty one. Though in a crime, it is the victim or the family of the deceased suffer the loss, however the State takes the responsibility to prosecute the case against the accused. The expectation of the common man is that the State should prosecute the case fairly. To bring the guilty to punish, it is the responsibility of Investigation Officer to collect the evidence in the case to prove the truth, the prosecutor to place all the evidence for the scrutiny of the court. The duty of the court is to assess and appreciate the evidence on record led by the prosecution and defence if any. The Code of Criminal Procedure provides for the procedure of conduct of trial. The procedure includes opportunity to the accused.

28. In this case, PW9, PW10 and PW11, are the direct witnesses. They were treated by the prosecution as eyewitnesses. Certainly, their evidence is material for proving the charge against the accused. PW9, PW10 and PW11 have turned

hostile and have denied that they had seen the incident. Since these witnesses detracted from the previous statements, the prosecution sought permission to cross-examine these witnesses. The court also permitted the prosecution to cross-examine these witnesses.

29. In case a witness turns hostile and if the prosecution wants to cross-examine such witness with reference to previous statement and get that portion of statement, which is contrary to the evidence marked in the evidence of that witness.

30. In this case evidence of PW9 to PW14 was vital to the case, but these witnesses have detracted from their previous statements. The public prosecutor instead of following the settled procedure in getting the contradiction marked in the evidence has followed a strange procedure. Whole of the statement made by PW2 to PW14 before the Police u/s 161 of the Code of the Criminal Procedure is marked as Ex.P.9 to Ex.P.14.

31. The law is fairly well settled, in a Privy Council judgment, reported in Emperor Vs. Rahenuddin Mondal considering the scope of section 145 of the Indian Evidence Act, with reference to the First Information Report has observed that, when the evidence of a witness given before the jury is sought to be contradicted by something which he has said on some previous occasion in the course of a statement made by him which has been reduced to writing, the proper course to follow is this: the attention of the witness should be pointedly drawn to that portion of the previous statement which is contradictory to his present statement and he should be asked to give such explanation as he thinks proper in respect of the contradiction. It is only that portion of the previous statement, which is contradictory to the present testimony could be marked. The entire previous statement in which the contradiction appears should not be put in evidence but only so much thereof as is contradictory to his testimony before the jury.

32. The Apex Court in a judgment reported in Bhagwan Singh Vs. The State of Punjab, has observed thus:-

All that is required is that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner.

33. Law as regard to the marking of the contradictory statement u/s 145 of the Evidence Act has been reiterated. No doubt, when witness turns hostile or gives contrary evidence to the statement made u/s 161 of the Code of Criminal Procedure before the Police, the attention of such witness should be drawn to his previous statement which is contradictory so as to enable the witness to explain the same. Though the procedure in this regard is well settled however, we found that in some of the cases the learned Judges have shown very casual approach including senior Sessions Judges. Some times, the case itself stands on material contradictions elicited in the evidence. Without appreciating the importance of

marking the contradictions, the entire previous statement made u/s 161 of the Code of Criminal Procedure is marked. Witness's attention is not drawn to that part of statement, which is relevant, the very purpose for which the contradictions are marked is defeated. Courts must appreciate the importance of marking the contradictions and omission. Section 145 of Evidence Act enables the cross-examiner to elicit such contradictions.

34. In another decision reported in Rammi @ Rameshwar etc. Vs. State of Madhya Pradesh, connected matter, the Apex Court while considering the scope of Section 145 of the Evidence Act and Section 162 of the Code of Criminal Procedure has observed thus:-

26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be "contradicted" would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to "contradict" the witness the cross-examiner is enjoined to comply with the formality prescribed therein. Section 162 of the Code also permits the cross-examiner to use the previous statement of the witness (recorded u/s 161 of the Code) for the only limited purpose i.e. to "contradict" the witness.

27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness.

35. The Apex Court in a decision reported in Delhi Administration Vs. Tribhuvan Nath and Others, while considering the scope of Section 162 of the Code of Criminal Procedure has observed that "the law is well settled that what a witness had said during investigation, cannot be used to discredit him/her unless that statement had been put to the witness while deposing in the court."

36. The object is to draw the attention of the witness to the previous statement made by him/her before the Police and give an opportunity to the witness to explain the same.

37. However, in this case, neither attention of the witness is drawn to the previous alleged contradictory statement made by the witness before the Police, witness does not know which statement is contradictory, in turn the whole of the statement made before the Police u/s 161 of the Code of Criminal Procedure itself is marked which contains certain statements which are not even disputed by the witness. Thereby the court has not even noticed which portion of the previous statement is contradictory. The whole of the statement made u/s 161 of the Code of the Criminal Procedure is marked as marking document. The witness may contradict certain portion in the previous statement, which is useful to the prosecution. If the entire statement is marked, it makes no sense and it defeats the right available to the cross-examiner to get the truth extracted from witness.

In this case, the important and relevant witnesses have turned hostile, the prosecution has right to cross-examine such witnesses who have turned hostile and get the truth revealed in the cross-examination of such witness. When the court permit the prosecution to declare the witness as hostile and further permit the prosecution to cross-examine the important right is created in favour of prosecution, to place the truth before the court and if the same lost merely because of the wrong procedure adopted by the prosecution and the court, the edifice of the criminal justice system would be defeated.

38. It has now become common that the vital witness turn hostile for one or the other reason and added to this the cross-examination and the procedure in marking contradiction and omission and corroboration is not followed it may defeat the very purpose of the prosecution. At the same time, it would also affect the defence case.

39. The procedure should not result in defeating the justice. The lapse on the part of the court or the Advocate may result in defeating the evidentiary value.

40. In this case, the learned Sessions Judge has given a go by to the well settled principle of marking the contradictory statement.

41. We are also surprised to notice the recording the statement of the accused u/s 313 of the Code of Criminal Procedure. The object of recording statements of accused u/s 313 of the Code of Criminal Procedure is to bring to the notice of the accused such incriminating statements made by the witnesses during course of the trial, which are against the accused, the purpose is to give an opportunity to the accused to give his explanation. To expect that the accused to reply to such of the incriminating statement, the accused must understand as to what is against him to enable him to admit or deny or give an explanation to the same. With this object, the statement of accused is recorded u/s 313 of the Code of Criminal Procedure in a questionnaire form. Learned Judge will be having entire prosecution case and the evidence. It is from the evidence of the prosecution, the learned Judge must find out as to which is incriminating statement against which accused and such incriminating statement must be put in simple, understandable language, the accused must understand the same and must be able to give his explanation.

42. But what is noticed is that, the recording of the statement of the accused u/s 313 of the Code of the Criminal Procedure has become more a formality rather than the serving any purpose. Either the courts frame the questions in a complex form, some time which will not even understandable to the literate accused or whole of the evidence of the witness is put as one question, without taking out the relevant incriminating statement and framing them in simple separate question.

43. In this case, though the evidence of each of the witnesses contain several incriminating material against the accused, however the evidence is put in one question, which is not understandable even to a learned person to know as to

which is the incriminating statement against him. The learned Sessions Judge has not framed the question on the basis of the incriminating statement against each of the accused. For example, the evidence of PW4 -Dr.K.V.Achutha, who speaks number of injuries, fatal injuries, nature of injuries suffered by the deceased and the cause of death, use of weapons in the incident etc. However, the entire evidence of PW4 is extracted and questions were asked simultaneously to all the accused. Even accused with knowledge cannot understand the questions, how can a rustic villager who is an accused could understand the questions. The recording of statements of accused u/s 313 of the Code of Criminal Procedure arises after recording the evidence of prosecution witnesses so that the learned Sessions Judge will have entire material of the prosecution. The learned Sessions Judge could point out such incriminating statements to the accused in the form of questions, to enable the accused to answer the same. The questions put to the accused will help the learned Judge in deciding the case.

44. We would not have made these observations, but for noticing from several judgments of the Session and Fast Track Court regarding improper recording of the statements of accused u/s 313 of the Code of Criminal Procedure without understanding the importance of the same. It does not matter whether the accused is convicted or acquitted but what matters is whether the trial court has followed just and proper procedure required for conducting fair and proper trial. It is the duty of the learned Judge to follow the procedure and decide the matter in the manner known to law and not as per his own whims and fancies. The learned Judges are required to decide the case as the law requires. If the same is not done, it would be too late for the appellate court to correct the irregularity. The purpose would not be served in redoing the same either on account of time or the purpose may become only formality. However, to protect the criminal justice system, the courts must follow fair and proper procedure, to avoid the defeat of justice merely for not following the correct procedure.

45. In this case, since the prosecution witnesses have not supported the case of the prosecution as discussed above and the prosecution has failed to prove the charge alleged against the accused, we do not find any reasons to interfere with the judgment of acquittal. In these circumstances, the appeal filed by the State fails and accordingly it is dismissed.