

(2008) 12 KAR CK 0010
In the Karnataka High Court
Case No : Criminal Appeal No. 572 of 2001

State of Karnataka

APPELLANT

Vs

M. Rama, M. Lakshmana and Shanmugam

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

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

Citation : (2008) 12 KAR CK 0010

Hon'ble Judges : V.G. Sabhahit, J;S.N. Sat Yanarayana, J

Bench : Division Bench

Advocate : P.M. Nawaz, Addl. Spp, for the Appellant; Hashmath Pasha, for R1 and 3, Appeal Abated Against R3, for the Respondent

Final Decision : Dismissed

Judgement

V.G. Sabhahit, J.—This appeal by the State is Filed being aggrieved by the judgment of acquittal passed by the IV Additional City Civil and Sessions Judge, Mayo Hall, Bangalore, in SC.No. 389/1998 wherein the respondents-accused before the trial court have been acquitted of having committed the offences punishable under Sections 302 r/w. 34 IPC,

2, The respondent herein stood charged before the trial court of having committed the offences punishable u/s 302 r/w, 34 IPC, on the accusation that, on 31.5.1998 at about 9 pm near Sanjay Bar and Restaurant, Suranjandas Road, J.B. Nagar, in furtherance of their common intention to cause the death of Mani @ Manivannan that accused 1 and 2 assaulted Mani (a) Manivannan with knives on his chest and back and accused No. 3-Shanmugam assaulted Mani @ Manivannan with hands and caused his murder and thereby committed the offence punishable u/s 302 r/w. 34 IPC.,

3. It is the case of prosecution that on 31/5/98 at about 10.15pm when PW.20 who was working as Police Inspector in J.B. Nagar Police Station was in the Police Station. Smt.Lakshmi (PW.1) appeared before him and lodged the complaint as

per Ex. PI averring that herself and her husband were residing at house NO. 345, Anandapura, Bangalore. Her husband was a social worker. They have three daughters and a son. On 31.5.98 at about 6pm her husband went out saying that he would return in the night. At about 9.10pm some boy came and informed her that three persons had stabbed her husband near Sanjay Bar and he had been taken to Manipal Hospital. Immediately, she went with her sister her husband-Devaraj to Manipal Hospital at 9.30pm and found the body of her husband in the casualty ward and she was informed by the Doctor that he was dead and her husband had been killed by stabbing by some persons. On the basis of the said statement as per Ex.P1, PW.29 registered Crime No. 178/98 for the offence punishable u/s 302 IPC, and submitted FIR to the court as per Ex. F22. As it was late in the night, he deputed the staff to keep watch over the dead body. He went to the spot of occurrence near Sanjay Bar, he could not prepare mahazar as it was night and he deputed the staff to keep watch over the spot. Thereafter he went to Manipal Hospital and saw the dead body of Maui. He deputed his staff to trace the accused. On 1,6.98 at 6am he went to Manipal hospital and held inquest proceedings over the dead body as per Ex. P.14 in the presence of witnesses. During inquest he recorded the statements of John, Anand, Devaraj, Shoba and Gnanam. Thereafter he made arrangement for shifting the dead body from Manipal Hospital to Bowring Hospital, thereafter he proceeded to the spot and drew up spot mahazar as per Ex. PS in the presence of panchas and during the said mahazar, he seized blood stained mud, sample mud and a pair of chapels as per MOSIO to 12. Thereafter, he seized the clothes which were found on the body as per Mos. 1 to 3 as per Mahazar Bx. P 10. He sent requisition to PWD to prepare sketch of the spot of occurrence. On 5,6.98 at about 12.30pm ASI-Krishnappa and other staff produced before him accused 1 and 2 along with motorcycle bearing No. KA 03 U 6945, He arrested the said accused and seized the motorcycle. He interrogated accused 1 and 2 and accused 1 and 2 gave voluntary statement as per Exs.PI to P23 volunteering to produce the knife and clothes which they have concealed. PW.29 along with the staff lead by accused 1 and 2 to Sir C.V. Raman Nagar to point out accused No. 3, Accused No. 3 was coming in the opposite direction and accused No. 3 was arrested with the help of his staff and brought to Police Station and the same accused 1 and 2 lead PW.29 and the panchas to their respective-house in Sampangirama Nagar at about 5pm. Both the accused went inside the room which was in the first floor and accused No. 1 produced MOs. 4, 6 and 9-knife and clothes and accused No. 2 produced MOs. 5,7 and 8-knife and clothes, same were seized under mahazar Ex.P7. On 6.6.98 accused were produced before the Magistrate. Weapons seized were sent to the Medical Officer for examination and opinion. PW.29 received medical report from the Medical Officer as per Ex. P18 and the opinion regarding weapons as per Ex. P19. He sent the seized clothes and weapons for FSL examination and received FSL examination report as per Ex. P16 and after completing investigation, filed charge sheet against accused 1 to 3 punishable u/s 302 r/w.34 IPC, All the accused pleaded not guilty and claimed to be tried.

4. The prosecution examined PWs.1 to 29 and got marked Exs.PI to P24, Mos 1 to 20 and Exs.D1 to D4 were got marked in the evidence of PWs,5 and 6. The statement of the accused u/s 313 Cr. PC., was recorded. The defence of the accused is one of denial and it is their case that a false complaint has been foisted against them. Accused did not lead any defence evidence. The trial court after considering the contention of the counsel appearing for the parties and appreciating the ocular and documentary" evidence adduced by the prosecution by its judgment dated 5.12.2000 held that the prosecution has failed to prove "the accused 1 to 3 who have committed offence punishable u/s 302 r/w. 34 IPC and accordingly acquitted them of the said charges. Being aggrieved by the said judgment of acquittal, the State has preferred this appeal. During the pendency of this appeal, accused No. 3 died and case has abated against him.

5. We have heard the learned Addl. SPR, appearing for the appellant-State and the learned Counsel appearing for accused 1 and 2.

6. The learned Addl. SPP submitted that the finding of the trial court acquitting the accused is erroneous as the prosecution has proved beyond reasonable doubt that accused 1 and 2 have committed the offence punishable u/s 302 r/w. 34 IPC; and the trial court has not properly appreciated the material on record.

7. In response to the said argument, learned Counsel appearing for respondents 1 and 2 submitted that the judgment of acquittal passed by the trial court is justified and does not call for interference in this appeal filed against judgment of acquittal.

8. Having regard to, the contentions urged, the points that arise for our determination in this appeal are:

1) Whether the finding of the trial court that prosecution has failed to prove that accused 1 and 2 have committed the offence punishable u/s 302 r/w. 34 IPC and the accused are entitled to be acquitted is justified or calls for interference in this appeal?

2) What order?

and we answer the above points as follows:

Point No1: The judgment of acquittal passed by the trial court is justified and does not call for interference in this appeal.

Point No. 2; In view of our finding on point No. 1, the appeal is liable to be dismissed for the following

REASONS

9. Point NO. 1: The respondents-accused 1 to 3 stood charged before the trial court, on the accusation that on 31.5.98 at about 9pm near Sanjay Bar and Restaurant, Suranjandas Road, J.B. Nagar accused in furtherance of their common intention assaulted Mani @ Manivannan with knives on his chest and

back and accused No. 3-Shanmugam assaulted Mani with hands and caused his murder and thereby committed the offence punishable u/s 302 r/w. 34 IPC, The prosecution in order to bring home the guilt of the accused has to prove beyond reasonable doubt that. Mani @ Manivannan suffered homicidal death and that he was murdered by accused 1 to 3 as charged against them. The prosecution in order to bring home the guilt, of the accused is relying upon the evidence of PWs. 1 to 29, Exs.P1 to P24 and MOs 1 to 12 and Exs.D1 to D4 have been got marked on behalf of the accused in the evidence of PWs.5 and 6. The evidence of PW.9 and the Inquest report produced by him as per Ex.P14 which is supported by the evidence of witness who acted as a panch for the inquest report PW. 17 whose evidence has remained uncontroverted as also the evidence of PW.21- Dr.Bhimappa Havarmr and the documents got marked by him as per Ex. P18- post mortem report would clearly prove beyond reasonable doubt; that Mani (a) Manivannan suffered homicidal death. PW.21 has deposed in his examination in chief about the external and internal injuries found on the body of Mani the deceased and stated that death was due to shock and hemorrhage as a result of multiple stab injuries sustained and he has produced Ex.P18-PM report issued by him. Nothing has been elicited in the cross-examination of this witness to disbelieve his evidence that Mani suffered homicidal death and his death was due to the cause spoken to by PW.21 and nothing has been elicited in the cross examination to disbelieve his evidence or the contents of Ex.P18 which clearly corroborates the evidence of PW.21 that Mani suffered homicidal death. Further, the material on record also shows that the fact that Mani suffered homicidal death is not disputed and what is disputed is that it is not accused 1 to 3 who assaulted and caused the murder of Mani @ Manivannan and therefore, the finding that Mani @ Manivannan suffered homicidal death is proved beyond reasonable doubt as rightly held by the trial court and the said finding is unassailable having regard to the above referred evidence on record.

10. The prosecution in order to bring home the guilt of the accused must further prove that it was accused 1 to 3 who in furtherance of their common intention assaulted Mani and caused his murder by accused 1 and 2 by assaulting with knife on his chest and back and accused No. 3 assaulting Mani with his hands. The prosecution is relying on the evidence of the complainant in this case who is the wife of the deceased. She is not an eye witness to the incident and her evidence would show that on receiving information about the fact that her husband has been assaulted and admitted to Manipal Hospital, she went to the hospital and found that her husband had died and thereafter she lodged the complaint as per Ex. P1. The prosecution is relying upon the evidence of PWs.2 to 6 who are eye witnesses to the incident as also the evidence of PWs.7 and 15 who are panchas for recovery of knives-MOs.4 and 5 on the basis of the voluntary statement of accused 1 and 2 to bring home the guilt of the accused. The other witnesses examined in the case are formal witnesses and their evidence does not reveal any incriminating evidence against the accused. The evidence of the above referred witnesses has to be appreciated to find out as to

whether the judgment of acquittal passed by the trial court is justified. It is well settled that generally an order of acquittal passed by the trial court will not be interfered with unless there is compelling or substantial reasons for doing so. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented and whether the impugned judgment of acquittal is clearly, unreasonable and irrelevant nominated in the process, it would be a compelling reasons for interference as laid down by the Hon''ble Supreme court in V.N. Ratheesh Vs. State of Kerala,).

11. FW. 2 according to the prosecution accompanied Mani the deceased to Sanjay Bar on the date of incident. He has deposed in his examination in chief that himself and Mani used to go to Sanjay Bar near Shopping Complex, JB Nagar twice in a week. On 30.5.98 at 8.30/9pm himself and Mani went to Sanjay Bar. Mani was talking to him that he had to arrange for money to get his children admitted to school on the next day and when they were talking to each other standing near the cash counter of the Bar, accused 1 and 2 came near the cash counter and abused Mani mistaking that Mani was abusing them in the matter of giving tips. Mani also abused accused 1 and 2 stating that he did not abuse them. Thereafter accused 1 and 2 went outside the Bar and stood there, they also came out of the Bar. Mani again went near accused 1 and 2 and questioned them as to why they abused him in the Bar. There was exchange of words and Mani assaulted accused 1 with hands and also caught hold of shirt of accused No. 1 and Mani also directed him to telephone to Hoysala Police. Soon thereafter accused No. 1 took out a knife from his hind pocket of the pant and assaulted Mani on abdomen and left side of chest Accused No. 2 assaulted Mani with hands. Accused No. 3-Shanmugan was not present at the time of the incident and he did not assault Mani Immediately, he took Mani in an autorickshaw to Manipal hospital and got him admitted. Mani died. He has further deposed that he cannot identify which of the two knives produced before the court was in the hands of accused No. 1. At this stage, he was treated as hostile as he did not support the case of the prosecution regarding presence of accused No. 3 at the time of incident as also the assault by accused No. 2 with knife as he went away to telephone to Police soon after accused No. 1 assaulted Mani and he has denied the suggestion made by the learned Public Prosecution that it is not true to suggest that accused No. 3 was also present when accused 1 and 2 in front of Sanjay Bar. He did not witness accused No. 2 also assaulting Mani with knife. He has denied the suggestion that he has made statement before the Police as per Ex.P2 that accused No. 2 also assaulted Mani with knife and that accused No. 3 also assaulted Mani with hands.

12. PW.3-Mark Mascerhans was working as Cashier in Sanjay Bar and he has deposed in his examination-in-chief that Mani was known to him and he also

knows PW. 2. Accused persons were also known to him. The deceased and PW.2 used to come to their Bar twice or thrice in a week. Accused 1 to 3 had also come to their bar in two or three occasions to have drinks. On 31.5.98 between 8.30 and 9pm when he was in the cash counter of the Bar, Mani and PW.2 came near the cash counter and stood there waiting for some seat in the Bar as the Bar was full of customers. The three accused persons also had come to the Bar on that day. After having drinks, all the three accused persons came to the cash counter to make payment of the bill amount Mani and PW.2 were talking to each other in tamil. There were some exchange of words between the accused persons, Mani and PW.2. The three accused persons went out of the Bar and PW.2 was still in the Bar and he ran out of the bar. After some time, PW.2 went out of the Bar. The customers in the Bar shouted that there was some quarrel, he also went out of the bar and he accused 1 and 2 assaulting deceased with knife. He did not notice the number of the knives in their possession. He saw accused No. 2 stabbing on the back of the deceased with knife. PW.2 requested him to telephone to Police. Thereafter he went inside the Bar to telephone to Police. By the time he returned to the spot after telephoning to Police, he saw Mani lying on the ground. PW.2 shifted him to hospital in an auto. He saw accused No. 3 fisting the deceased. He did not observe the part played by accused No. 1. He cannot say whether the knives before the court are the weapons used by any of the accused for commission of the offence. This witness is also treated as hostile as he did not support the case of the prosecution regarding accused No. 1 assaulting Mani with knife and it is elicited in his cross examination by the learned Public Prosecutor that he has not stated before the Police as per Ex. P4 that both accused 1 and 2 assaulted the deceased with knife and it is not true to suggest that he is deposing falsely.

13. PW.4- K. Chandra who is running a beeda shop near Sanjay Bar, J.B. Nagar has deposed in his examination-in-chief that he knew Mani. He also knows PW.2. Accused 1 and 2 are also known to him. He saw accused No. 3 also on the date of the incident. On 31.3.98 at about 8.30pm he was in his Beeda shop and there was no electricity in his beeda shop, but there is one on the door of the bar. On that day, he saw the deceased and accused 1 and 2 quarreling with each other by the side of the beeda shop. Mani gave blow on accused No. 1 with hands, accused No. 1 stabbed on his chest and abdomen accused No. 2 stabbed on the back of the deceased. Accused No. 3 assaulted the deceased with hands. Thereafter all the accused persons ran away. The deceased proceeded ahead to some distance and fell down. PW.2 took him to hospital in an auto. PWs.3, 5, 6 and 2 were present at the time of the incident MO4 was in the hands of accused No. 1 and MO. 5 was in the hands of accused No. 2. He has identified MOs 4 and 5 as knives in the hands of accused 1 and 2.

14. PW. 5-Purushotham who was working as supplier in Sanjay Bar has deposed in his examination-in-chief that he knows PW.2 and accused persons. On 31.5.98 at about 8.30/9pm he was in the Bar. Three persons have come to their bar to have drinks. They paid the bill amount and went out of the bar. After some time,

the customers in the Bar went out stating that there is some galata. He also came out of the bar and saw accused No. 2 assaulting Mani with a knife on the abdomen. He saw accused No. 1 assaulting deceased with hands. He did not see whether accused No. 3 also assaulted the deceased. Mani fell down and sustained injury. All the accused ran away. PW.2 took Mani to the hospital. He has identified MO.4 as the knife used by accused No. 2 for assaulting the deceased. At this stage witness was treated as hostile, since he did not support the case of the prosecution regarding assault by accused No. 1 with knife and the presence of accused No. 3. It is elicited in his cross-examination by the public prosecutor that it is not true to suggest that in the incident he also saw accused No. 1 assaulting deceased with knife and accused No. 3 assaulting with hands and he did not say before the Police as per Ex. P5. It is not true to suggest that he is deposing falsely.

15. PW. 6-Sridhar was also working as a supplier in Sanjay Bar and he has deposed in his examination-in-chief that he knows PW.2 and accused persons. On 31.5.98 between 8.30/9pm he saw the deceased standing by the side of cash counter. He went inside the room of the Bar to serve liquor. He heard some galata outside the Bar. All the customers in the Bar went out. He saw accused 1 and 2 stabbing the deceased with knife, each of them was having knife. Accused No. 1 assaulted on the back of the deceased with a knife. Mos 4 and 5 are the knives used by accused 1 and 2 for assaulting deceased. But he cannot say which knife was in the hand of particular accused. Accused No. 2 also assaulted on the back of deceased with a knife. Another person with the accused assaulted the deceased with hands. After assault, accused 1 and 2 and another person ran away from the spot and PW. 2 went away to telephone to Police. By then the deceased fell down mid PW.2 took him to hospital in an auto. Since this witness did not support, the case of the prosecution regarding assault by accused No. 3, he was treated as hostile and was permitted to be cross-examined by prosecutor and it is elicited in his cross examination by the learned Public Prosecutor that it is not true to suggest that he has seen accused No. 3 assaulting Mani with hands and that he has given statement before the Police as per Ex.Po.

16. The above evidence of PWs.2 to 6 as deposited in examination in chief has to be appreciated in the light of the facts elicited in their cross-examination and the material on record. It is clear from the facts elicited in the cross examination of PWs.2 to 6 that none of these witnesses knew the name of accused 1 and 2 or accused No. 3 on the date of incident. In fact, PW.2 has not even spoken in his examination in chief about the presence of accused No. 3 at the time of incident and PW.6 has also not spoken to about the assault by accused No. 3. It is elicited in the cross examination of PW.2 that it is true to suggest that two persons who quarreled with Mani inside and outside the Bar were not known to him earlier and their names are also not known to him. He did not tell the name of the assailants before the Police but he can identify them. He did not give the facial or other descriptions of the assailants to Police at that time. It is further elicited in his cross examination that from the spot Police took him, the cashier, suppliers

and the proprietor of pan beeda shop to the Police Station and again inquired them and at that time also he informed the Police that he does not know the name of the assailants and Police sent all of them. Till that time, Police were not aware of the names and identify of the assailants. On 5.6.98 Police showed him accused 1 to 3 in the Police Station and on that day, the cashier and other witnesses did not come to the Police Station. Only on that day, he came to know through Police the names of accused 1 and 2 as Rama and Lakshmana. It is specifically stated in his cross examination that in the statement recorded by Police earlier to 5.6.98 he did not give the names of accused 1 and 2 who assaulted the deceased. It is true to suggest that for the first time he has stated before the court in his evidence that accused No. 2 assaulted deceased with hands. The above said facts elicited in the cross examination of PW.2 would clearly show that PW.2 did not know accused before the date of incident and he also did not give the description of the assailants at the time when the statement was recorded by the Police on 1.6.98 and only on 5.6.98 after accused 1 to 3 were shown in the Police Station he know the name of accused 1 and 2 as Rama and Lakshmana. Similarly, the facts elicited in the cross examination of PW.3 would also show that he was not aware of the name of accused 1 and 2 and did not know them before the date of incident and only after he saw the accused 1 to 3 in the Police Station on 6.6.98 he came to know about the name of accused 1 and 2 as Rama and Lakshmana as it is specifically elicited in his cross examination that on 31.5.98 that two persons quarreled with Mani were not known to him earlier and he did not talk to them earlier, it is also elicited that it is true to suggest that only on 31.5.98 he saw them near the cash counter directly. It is further elicited in his cross examination that on the date of incident he was not knowing the name of persons who quarreled with Mani including the person who was stabbing the deceased. He has not given the name of assailants in the statement recorded by the Police. He informed the Police that three persons quarreled with Mani but he did not know their names as he did not know the names of assailants or the description It is further elicited in his cross examination that on 5/6.6.98 he was summoned to Police Station and on that day three accused persons were shown to him in the Police Station and his statement was recorded on that day The facts elicited in the cross examination of PW.4 would also show that he did not know the accused prior to the date of incident and he has also not given the description of the accused in the statement recorded by the Police on 1.6.98 and only after accused were shown to him in the Police Station he came to know about the accused as it is elicited in the cross examination that as on the date of incident he was not aware of the names of the assailants of Mani. Therefore, during enquiry by the Police during that night he did not give the names of the assailants and stated that they were twins. Only on 5.6.98 when he saw the accused persons in the Police Station he came to know their names. It is true to suggest that only on 5.6.98 he made out that accused No. 1-Rama was having dark complexion little more than accused No. 2-Lakshmana. Even in the statement recorded on 1.6.98 he stated that Mani came out of the bar and quarreled with some three persons standing outside.

Similarly, the facts elicited in the cross examination of PW.6 would also show that he was not aware of the names of accused nor he was not knowing the accused prior to the date of incident 31.5.98 and he has also not given the description of the accused in the statement recorded by the Police on 1.6.98 and only on seeing the accused in the Police Station on 5.6.98 he came to know about the name of accused. As it is clearly elicited in the cross examination of PW.6 that on 31.5.98 he did not inform the name of the assailants of Mani to Police. On 1.6.98 when he went to the Police Station he did not inform the names of the assailants. However, he has deposed that since some persons who are standing outside the Bar stated that Rama and Lakshmana ran away after assaulting Mani, but he does not know the name of said persons who stated that Rama and Lakshmana assaulted Mani and ran away. He has not stated before the Police as per Exs.D2 to D4. On 5.6.98 he gave the statement about the description of assault by accused 1 and 2 after seeing the accused persons in the Police Station. It is clear from the said facts elicited in the cross examination of PWs.2 to 6 that these witnesses though have deposed in their examination in chief about the over act on the part of the accused with reference to their name, the accused were not known to the witnesses prior to the date of incident and in the statement given before the Police on 1.6.98 the name of the assailants has not been given and only after the accused were shown to them on 5.6.98 in the Police Station, they came to know about the name of the accused. It is well settled that when witnesses did not know the accused prior to the date of incident and had also not given the description of the assailants, it was necessary for the Investigation Officer to conduct identification parade and as the accused were not known to the witnesses and they knew the witnesses by face only and not by name and then the evidence of test identification parade can corroborate the substantive evidence of identification in court. However, it is also well settled that if the witness did not know the accused persons by name but can only identify by their appearance, then the test identification parade was necessary so that the substantive evidence in the court about the identification which is held after a fairly long period could get corroboration from the identification parade. However, when the Police have shown accused persons in the Police lock-up to the identifying witness then the so called identification loses its value, inasmuch as it is only because of the police showing the persons the witness is being able to identify the alleged accused as held by the honorable Supreme Court in Mohd Iqbal M. Shaikh v. State of Maharashtra 1998 SCC Cri. 1064 and in Mohanlal Gangaram Gehani v. State of Maharashtra 1983 SC 83. In view of the principle laid down by the Hon'ble Supreme Court and the facts elicited in the cross examination of PWs.2 to 6 that they were not knowing the accused prior to the incident and they have not given the names of the assailants in the statement recorded by the Police at the earliest point of time and they have also not given description of the accused in the earlier statement given before the Police and that they came to know about the name of the accused only after accused were shown to them in the Police Station on 5.6.98, it is clear that identification of the accused before the court would not be of any value in this case and therefore,

the evidence of PWs.2 to 6 is not at all helpful in proving that it was accused who assaulted and caused the murder of Mani. Further, the evidence of PWs.2 to 6 would also show that the evidence of PWs.2 to 6 is not consistent, cogent, truthful and reliable as there is inconsistency in the evidence of PWs.2 to 6 regarding assailants that improbability regarding the participation of each of the accused as according to PW.2 he has not at all stated about the participation of accused no.3. Similarly, PW.6 has also not stated about the participation of accused No. 3 in the incident and the overt-act attributed to accused 1 and 2 by this witness is also not consistent as according to PW.2 accused No. 2 assaulted with hands and he has not spoken about accused No. 2 assaulting with knife and has stated that accused No. 3 was not present However, according to PW.3 he has seen accused No. 2 stabbing on the back of the deceased and he did not see accused No. 1 assaulting deceased with knife and to that extent, he was treated as hostile and nothing has been elicited in the cross examination to support the case of the prosecution. The evidence of PW.4 would reveal that Mani and accused 1 and 2 were quarreled with each other by the side of the road. Accused No. 1 stabbed on the chest and abdomen of Mani with knife, accused No. 2 stabbed on the back of Mani and accused No. 3 assaulted with hands. The evidence of this witness is inconsistent with the evidence of PWs.2 and 3. According to the evidence of PW.5, accused No. 2 assaulted with knife on his abdomen and accused No. 1 assaulted with hands. He did not see whether accused No. 3 also assaulted the deceased and to that extent he was treated as hostile for not supporting the case of the prosecution regarding assault by accused No. 1 with knife and accused No. 3 also assaulting Mani and nothing has been elicited in his cross examination to support the case of the prosecution and according to the evidence of PW.6, accused 1 and 2 assaulted on the back of Mani and another person assaulted Maui with hands and therefore, the evidence of the witnesses PWs.2 to 6 even as per the facts spoken in their examination in chief is not consistent, cogent and reliable and their evidence does not establish the identity of the accused persons who assaulted Mani and caused his murder as already held above and wherefore, the evidence of PWs.2 to 6 ?Q not helpful to the prosecution in proving the guilt of the accused. Though according to the prosecution as deposed by PW.29 MOs 4 and 5 were recovered from the house of accused 1 and 2 on the basis of the voluntary statement given by them as per Ex.P7 in the presence of the panchas-PWs.7 and 15. Both these panchas have not supported the case of the prosecution and were treated as hostile. Nothing has been elicited in the cross-examination to support the case of the prosecution. Further, even assuming that recovery of MOs 4 and 5 were proved on the basis of the voluntary statement given by accused 1 and 2, it is clear from the evidence of PWs.2 to 6 that PW.2 has not been able to identify the knife held by accused No. 1 and he has not spoken to about the assault by accused No. 2 with the knife. Similarly, PW.3 has also not been able to identify the knife used by the accused when they were shown to him before the court as the weapon used by accused. However, according to PW.3 accused No. 1 was holding the knife-MO4 and accused No. 2 was holding the knife-MO5. However, in the cross examination

it is elicited that MO5 is in the hands of accused No. 1 and knife MO4 is in the hands of accused No. 2. PW.5 has identified MO.4 is the knife held by accused No. 2 at the time of incident and according to PW.6 he is unable to identify the particular knife held by the accused at the time of incident by the particular accused and therefore, prosecution has not been able to prove beyond reasonable doubt that MOs 4 and 5 were used by accused 1 and 2 in assaulting and causing stab injury to Mani and therefore, the said circumstance of recovery of MOs 4 and 5-knives at the instance of accused 1 and 2 on the basis of their voluntary statement has not been proved by the prosecution and even otherwise, in the absence of proof of use of the said knife for the commission of offence by accused 1 and 2, the said recovery is not helpful to the prosecution. Further, the material on record would clearly show that even assuming that evidence of PWs.2 to 6 would prove assault on the deceased-Mani, the facts elicited in the cross examination of the witoesses-PWs.2 to 6 would show that Mani also abused accused 1 and 2 and the facts elicited in the cross examination of PW.2 would show that Mani went and caught hold of collar of accused No. 1 and started abusing hint, It is further elicited that it is true that Mani was assaulting one of those persons by holding collar. The evidence of PW.3 would also show that Mani and PW.2 and others were talking to each other in tamil whereas according to PW.2 he did not have any talk with the accused. The facts elicited in the cross-examination of PW.4 would clearly show that Mani had assaulted accused with Pepsi bottle, the bottle was broken and a piece of it fell down. It was accused No. 1 whom Mani assaulted with bottle. It is true to suggest that when Mani was assaulting accused No. 1, other two persons questioning Mani, even though they did not done anything. It is true to suggest that after coming out of the Bar Mani started assaulting one of the three persons with Pepsi bottle. It is true to suggest that Mani was holding broken Pepsi bottle till he fell down with injuries and Mani was trying to assault his assailants with broken bottle. It is true to suggest that in the first instance those persons who assaulted Mani with hands only and thereafter Mani assaulted the said persons.

17. The above facts elicited in the evidence of prosecution witnesses would clearly show that the material adduced by the prosecution would clearly show that the accused might have assaulted Mani in exercise of right of private defence as it is well settled that private defence need not be taken as a defence of the accused even on the basis of the material adduced by the prosecution before the trial court. The accused can plead private defence and having regard to the above said material on record, it is clear that the only finding that could be arrived at on appreciation of the evidence adduced by the prosecution in the present case is that prosecution has failed to prove the guilt of the accused and the trial court on proper appreciation of the material on record has rightly arrived at the said conclusion and acquitted the accused of having committed the offence punishable u/s 302 r/w. 34 IPC., The said finding of the trial curt is justified and does not suffer from any error or illegality. On appreciation of the evidence as referred to above, we find that the prosecution has miserably failed to prove the

guilt of the accused of having committed the offence punishable u/s 302 r/w. 34 IPC., Accordingly, we answer the first point for determination.

18. Point No. 2: In view of our finding on point No. 1, we hold that the appeal is liable to be dismissed and pass the following order:

The appeal is dismissed. The judgment of acquittal passed by the IV Addl. City Civil and Sessions Judge, Mayo Hall, Bangalore in SC. No. 389/1998 dated 5.12.2000 is confirmed.