

MALLIKARJUN AND OTHERS

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v.

STATE OF KARNATAKA

(Criminal Appeal No.1066 of 2009)

AUGUST 08, 2019

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**[R. BANUMATHI AND A. S. BOPANNA, JJ.]**

*Evidence – Of eye-witness – Appreciation of – As per the prosecution on 14.06.02, PW-7-brother of ‘B’ went to the fields for ploughing in the early morning, at about 09.00am, ‘B’ went outside to attend the call of nature and when he was returning towards his house, accused no.1, 2 & 4(appellants) along with accused no.3 (absconding) arrived there with weapons– Accused persons threatened ‘B’ while chasing him saying that they would finish him off as he continues illicit relationship with the wife of accused No.4/ mother of accused Nos.1-3– ‘B’ came into his house, went to the kitchen and closed the door –Accused persons started pushing the kitchen door and then ‘B’ came outside –Accused No.2 caught the head of ‘B’ whereas accused nos.3 and 4 caught his both the legs and accused no.1 cut the neck of ‘B’ with MO-1-dagger– PW-5, mother of the deceased ‘B’ raised alarm crying for help –Appellants convicted u/s.448 r/w s.34 as also u/s.302 r/w s.34 – On appeal, held: While appreciating the evidence of witness, the approach must be to assess whether the evidence of the witness read as a whole appears to be truthful – If the evidence of eye witness is found to be credible and trustworthy, minor discrepancies not affecting the core of the prosecution case, cannot be made ground to doubt the trustworthiness of the witness – In the instant case, no doubt there are slight variations in the statement of PW-5 as to when and how her statement was recorded by the police, but PW-5 is an ordinary home maker and an illiterate woman– Courts are not to judge the evidence of ruralites by the same standard and exactitude like any other witness– Alleged variations in the statement of PW-5 do not affect the trustworthiness of PW-5 – PW-5 has no reason to falsely implicate the accused– Further, based on the disclosure statement of accused no.1, MO-1-dagger had been seized in the presence of panch witnesses –No merit in the contention that merely because*

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- A *the panch witnesses turned hostile, the recovery of the weapon would stand vitiated– Evidence of the I.O can be relied upon to prove the recovery even when the panch witnesses turned hostile – From the evidence of PW-5 and PW-7, the prosecution has proved the overt act of accused nos.1, 2 and the same is corroborated by the corresponding injuries as spoken by PW-12-doctor – However, serious doubts arise as to the presence of accused no.4 – Benefit of doubt given to him and his conviction is set aside – Conviction of accused nos.1 & 2 is confirmed while that of accused No.4 is set aside – Penal Code, 1860 – s. 448, 302 r/w s.34 IPC .*
- B *Evidence – Of Expert – Evidentiary value of – Held: Expert is not a witness of fact – Opinionative evidence of the doctor is primarily an evidence of opinion and not of fact – It is only a corroborative piece of evidence as to the possibility that the injuries could have been caused in the manner alleged by the prosecution – Unless the medical evidence rules out such possibility of injury being caused in the manner alleged by the prosecution version, the testimony of the eye witness cannot be doubted on the ground of its inconsistency with medical evidence.*
- C *Criminal Trial – FIR – Delay in registration of – When not fatal – Discussed.*
- D *Disposing of the appeal, the Court*

**HELD:** 1.1 While appreciating the evidence of a witness, the approach must be to assess whether the evidence of a witness read as a whole appears to be truthful. Once the impression is formed, it is necessary for the court to evaluate the evidence and the alleged discrepancies and then, to find out whether it is against the general tenor of the prosecution case. If the evidence of eye witness is found to be credible and trustworthy, minor discrepancies which do not affect the core of the prosecution case, cannot be made a ground to doubt the trustworthiness of the witness. Minor discrepancies and inconsistent version do not necessarily demolish the prosecution case if it is otherwise found to be creditworthy. No doubt, there are slight variations in the statement of PW-5 as to when and how her statement was recorded by the police. At one place, PW-5 states that the police came to the village at 11.00 am and took her complaint by

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obtaining her left thumb impression; whereas PW-17-PSI stated that he was not knowing about the incident till PW-5 came to the police station and lodged the complaint at 01.15 PM and before that he has not received any phone call from the village Dalapathi. As pointed out by the trial court, PW-5 is an ordinary home maker and an illiterate woman. While in the witness box, it is quite natural for a witness like PW-5 being overawed by the court atmosphere to give varying statements. The courts are not to judge the evidence of ruralites by the same standard and exactitude like any other witness. As pointed out by the trial court, the evidence of PW-5 as to the place of occurrence is corroborated by the spot panchnama (Ex.-P7) drawn by PW-17-PSI and also the inquest on the dead body of the deceased in the Padasala itself. The alleged variations in the statement of PW-5, does not affect the trustworthiness of PW-5 so as to doubt her testimony. [Paras 13-15] [619-E-F; 620-F-H; 621-A-B]

1.2 Evidence of a witness is not to be disbelieved simply because he/she appears partisan or is related to the deceased/prosecution witness. It is to be ascertained whether the witness was present or not and whether he/she is telling the truth or not. The place of occurrence being the house of the deceased, PW-5-mother of the deceased is a natural witness to speak about the occurrence. PW-5-mother of deceased also explained that how she was present in the house and how she happened to be in the place of occurrence. As pointed out by the courts below, even after cross-examination, the defence was not able to establish anything that can create doubt as to the evidence of PW-5. That apart, PW-5 has no reason to falsely implicate the accused. Being the mother of deceased, it is highly improbable that PW-5 would have falsely implicated the accused at the instance of the police or anyone else. In his evidence, PW-7 stated that he went to the field for ploughing and as usual came back to his house for meals at 08.30 am. PW-12-Doctor was of the opinion that the death was due to haemorrhage and shock as a result of injury to vital structures of the neck i.e. large vessels and trachea. MO-1-dagger is 2 feet 6 inches in length and its blade is 1/1/2 inches in width. By looking into MO-1-dagger and nature of injury No.1,

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- A PW-12-doctor has opined that “....external injury No.1 in Ex.-P11 is not possible by using MO-1 or MO-2....”. PW-12-doctor further stated that if a man is assaulted with MO-1-dagger on his throat two or three times, the death is possible. [Paras 16-18][621-B-F; 622-E-F]
- B 1.3 The expert is not a witness of fact. Opinionative evidence of the doctor is primarily an evidence of opinion and not of fact. It is only a corroborative piece of evidence as to the possibility that the injuries could have been caused in the manner alleged by the prosecution. Unless the medical evidence rules out such possibility of injury being caused in the manner alleged
- C by the prosecution version, the testimony of the eye witness cannot be doubted on the ground of its inconsistency with medical evidence. Though at one place, PW-12-doctor has stated that injury No.1 could not have been caused by MO-1-dagger, on being further questioned, he has stated that injury No.1 could have been
- D caused by MO-1 either by attacking on the throat two or three times or by inflicting injury on the throat and twisting the weapon. Considering the evidence of PW-12-doctor, there is no merit in the contention as to the alleged variance between the medical evidence and the ocular evidence. There is, of course, delay in registration of FIR and the receipt of the same in the court. There
- E may be cases where the delay in FIR gives rise to the suspicion as to the false implication; but when the delay is satisfactorily explained, delay in registration of the FIR or receipt of the same in the court would not affect the prosecution case. PW-6-husband of PW-5 and father of deceased was away from the house and naturally, it would have taken some time for PW-5 and her son
- F PW-7 to lodge the complaint about the occurrence. The effect on the mind of PW-5 on seeing the death of her son, cannot be measured. Being grief-stricken because of death of her son, it might have taken some time for PW-5 and PW-7 to lodge the complaint. FIR in Crime No.44/2002 was registered at 01.15 pm
- G and the same was received by the Magistrate at 08.00 pm nearly after six hours. There is, of course, some delay in receipt of the FIR in the court. In his evidence, PW-10-Constable then attached to Saidapur Police Station has stated that the distance between Saidapur and Yadgir is 40 kms. PW-10-Constable has stated that

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at the relevant time, there was no train from Saidapur to Yadgir. PW-10-Constable further stated that though eight buses were plying to Yadgir, at the relevant time, there were no buses enabling him to reach Yadgir at an earlier time. There was no inordinate delay in the receipt of FIR in the court. The findings of the trial court and the High Court that the delay in lodging the complaint and receipt of FIR in the court have been properly explained, do not suffer from infirmity.[Paras 20-22] [623-A-C, E-H; 624-A-B]

1.4 Based on the disclosure statement of accused No.1, MO-1-dagger which was kept hidden in the haystack of fodder in the loft of the cattle shed behind the house of accused No.1 had been seized under Ex.-P9-Panchnama in the presence of panch witnesses. There is no merit in the contention that merely because the panch witnesses turned hostile, the recovery of the weapon would stand vitiated. The evidence of the Investigating Officer can be relied upon to prove the recovery even when the panch witnesses turned hostile. When a grave crime is registered, the PSI who is in-charge of the police station cannot wait for the arrival of the Circle Inspector or wait for the instruction to commence the investigation. From the evidence of PW-5 and PW-7, the prosecution has proved the overt act of accused Nos.1 and 2 and the same is corroborated by the corresponding injuries as spoken by PW-12. Accused No.4 was stated to be working as teacher at Balichakra who is said to have attacked the deceased with the wooden handle of the axe (MO-3) on the back of deceased. By perusal of post-mortem certificate (Ex.-P11), there is no injury corresponding to the alleged overt act of accused No.4. As seen from the FIR, in the complaint, PW-5 stated that at the time of attacking, the accused stated that "this bastard is having illicit relationship with our mother". The above words stated in the FIR *prima facie* indicate the presence of accused Nos.1 & 2 and the absconding accused No.3 only who have attacked the deceased. Serious doubts arise as to the presence of accused No.4 and the benefit of doubt has to be given to him. The conviction of accused No.1 and accused No.2 are based upon proper appreciation of evidence and the reasonings are well balanced and no reason is found warranting interference with their conviction. Conviction of accused No.1 and accused No.2 and

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- A the sentence of imprisonment imposed upon them are confirmed. Conviction of accused No.4 is set aside and he is acquitted from all the charges levelled against him. [Paras 23-26][624-C, E; 625-F-H; 626-A-D]

- B *Bakshish Singh v. State of Punjab and another (2013) 12 SCC 187: [2013] 16 SCR 589; Rameshbhai Mohanbhai Koli v. State of Gujarat and others (2011) 11 SCC 111 : [2010] 14 SCR 1 – relied on.*

**Case Law Reference**

<b>[2013] 16 SCR 589</b>	<b>relied on</b>	<b>Para 14</b>
<b>C [2010] 14 SCR 1</b>	<b>relied on</b>	<b>Para 23</b>

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1066 of 2009

D From the Judgment and Order dated 30.05.2008 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 124 of 2005

Ms. Kiran Suri, Sr. Adv., Ms. S. J. Amith, Ms. Aishwarya Kumar, Dr. (Mrs.) Vipin Gupta, Advs. for the Appellants.

Joseph Aristotle S., Mrs. Priya Aristotle, Rijuk Sarkar, Mrs. Farah Hashmi, Advs. for the Respondent.

E The Judgment of the Court was delivered by

**R. BANUMATHI, J.**

F 1. This appeal arises out of the judgment dated 30.05.2008 passed by the High Court of Karnataka in Criminal Appeal No.124 of 2005 in and by which the High Court affirmed the conviction of the appellants-accused Nos.1, 2 and 4 under Section 302 IPC read with Section 34 IPC and the sentence of life imprisonment imposed upon each of them. The High Court also affirmed their conviction under Section 448 read with Section 34 IPC and sentence of imprisonment imposed upon each of them.

G 2. The appellants-accused No.1-Mallikarjun, accused No.2-Ravi and co-accused No.3-Maruti (absconding) are the sons of accused No.4-Balappa. It is alleged that deceased Bhimraya was having illicit affair with Bhimawwa-wife of accused No.4-Balappa since 4-5 years prior to

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the incident and therefore, all the accused were said to be having enmity with the deceased Bhimraya. PW-5- Kamalamma is the mother of deceased. Case of the prosecution is that on 14.06.2002, PW-6-Mareppa-father of the deceased went to village Kaulur to attend marriage. PW-7-Hanmanth-brother of deceased went to the fields for ploughing in the early morning. At about 09.00 am, deceased-Bhimraya went outside to attend the call of nature. When he was returning towards his house, accused No.1-Mallikarjun, accused No.2-Ravi and accused No.4-Balappa (appellants herein) along with accused No.3-Maruti (absconding) arrived there armed with weapons in their hands. All the four accused persons were threatening the deceased while chasing him saying that they would finish him off as he continues with illicit relationship with the wife of accused No.4/mother of accused Nos.1 to 3. Deceased-Bhimraya came into his house, went straight to the kitchen and closed the door. Kamalamma (PW-5), mother of deceased tried to persuade the accused persons not to kill her son. PW-7-Hanmanth came from field but seeing weapons in the hands of the accused persons, he did not go inside the house; but he saw the incident. All the four accused started pushing the kitchen door and then deceased came outside the kitchen. Accused No.4-Balappa is alleged to have exhorted other accused to kill deceased saying that he should not be left alive as he has been having an affair with his wife for 4-5 years and both are tarnishing the image of their family. Accused No.1-Mallikarjun inflicted an injury on the left side of waist of deceased with MO-1-dagger; accused No.2-Ravi assaulted deceased with dagger-MO-2 on his nose and on left eye-brow. Accused No.1 again inflicted the injuries with MO-1-dagger on the chest, right elbow and right thigh of the deceased. After that accused No.3-Maruti dragged the deceased and knocked him to the ground. Accused No.4-Balappa assaulted the deceased on his back with the handle of the axe (MO-3). Accused No.2-Ravi caught the head whereas accused No.3 and 4 caught both the legs of the deceased and accused No.1 cut the neck of the deceased with MO-1-dagger. PW-5-mother of deceased raised alarm crying for help. PWs 1 to 4 and PW-7 and others came near to the spot and on seeing them, all accused ran away from there leaving one dagger (MO-2) and handle of the axe (MO-3) on the spot.

3. On the same day at 01.15 pm, PW-5- Kamalamma, mother of deceased lodged complaint before Saidapur Police Station which was reduced to writing by PW-17-PSI S.Y. Hunshikatti; based on which,

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- A FIR was registered in Crime No.44/2002 at Saidapur Police Station under Sections 448, 504 and 302 IPC read with Section 34 IPC. PW-17-PSI went to the scene of occurrence and conducted inquest (Ex.-P6) and initial part of the investigation viz. preparation of the spot panchnama (Ex.-P7) in the presence of PW-8-Chandrappa and PW-9-Mahadevappa Needgera. Bloodstained dagger (MO-2), bloodstained handle of the axe (MO-3), bloodstained mud (MO-10) and sample mud (MO-11) were recovered from the scene of occurrence. PW-12-Dr.H.R. Kumar conducted the post-mortem (Ex.-P11) on the dead body of deceased Bhimraya on 14.06.2002 at 04.15 pm. PW-12-Doctor opined that the death was caused due to shock and haemorrhage due to injury to the vital organ i.e. neck. PW-12-doctor further opined that the injury could have been caused by the knives.

- 4. Accused No.1 to 3 were arrested on 15.06.2002 at about 11.00 am. Confessional statement of accused No.1 led to the recovery of dagger (MO-1) hidden in the haystack of fodder in a loft of cattle shed D of his house. On completion of investigation, charge sheet was filed against all the four accused under Section 448 IPC read with Section 34 IPC and under Section 302 IPC read with Section 34 IPC.

- 5. To prove the guilt of the accused before the trial court, prosecution examined PWs1 to 17 and marked number of documents E and also marked material objects. The trial court rejected the defence plea of *alibi* put forth by accused No.4 who has been working as a teacher at Balichakra village. Upon consideration of oral and documentary evidence, the trial court found that the delay in registration of FIR is not fatal to the prosecution case. Relying upon the evidence of PW-5-mother of deceased corroborated by the medical evidence and F considering other evidence, the trial court held that the prosecution has established the guilt of the accused beyond reasonable doubt and convicted accused Nos.1, 2 and 4 (appellants herein) and also accused No.3 (absconding) under Section 448 read with Section 34 IPC and sentenced them to undergo rigorous imprisonment for six months each. They were G also convicted under Section 302 IPC read with Section 34 IPC and sentenced each of them to undergo life imprisonment. In appeal, the High Court confirmed the conviction of the appellants (accused Nos.1,2 and 4) and co-accused No.3 and also the sentence of imprisonment imposed upon them.

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6. Ms. Kiran Suri, learned senior counsel appearing for the appellants submitted that the incident was at 09.00 am whereas the complaint was lodged only at 01.15 pm and the FIR was received by the Magistrate only at 08.00 pm and there is an inordinate delay in receipt of FIR by the Magistrate and no explanation is given for the delay in registration of FIR. It was submitted that the unexplained delay in registration of FIR and delay in receipt of FIR in the court raises serious doubts about the prosecution case and there is every likelihood of false implication of the accused and this aspect has not been properly considered by the trial court and the High Court. It was further submitted that the evidence of PW-5-Kamalamma-mother of deceased suffers from discrepancies which vitally affect the credibility of PW-5 and the evidence of PW-5 cannot form the basis for conviction. The learned senior counsel assailed the alleged recovery of dagger (MO-1) from accused No.1 and other material objects from the scene of occurrence and submitted that without proper appreciation of evidence, the courts below erred in convicting the appellants.

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7. Mr. Joseph Aristotle, learned counsel appearing for the State of Karnataka has submitted that there is no discrepancy in the evidence of two eye-witnesses viz. PW-5-Kamalamma-mother of deceased and PW-7-Hanmanth and their evidence are well corroborated by medical evidence. It was submitted that upon appreciation of evidence of PW-5 and PW-7, the courts below rightly held that the appellants have committed the murder of deceased. The learned counsel submitted that the evidence of Investigating Officers viz. PW-16-Dattappa and PW-17-PSI S.Y. Hunshikatti and the evidence adduced regarding the seizure of MO-1-dagger from accused No.1 and MOs 2 and 3 from the scene of occurrence amply support the case of prosecution and the trial court rightly convicted the appellants-accused Nos.1, 2 and 4 and absconding accused No.3 and the High Court rightly confirmed the same and the impugned judgment warrants no interference.

8. We have heard learned senior counsel appearing for the appellants-accused and learned counsel appearing for the State of Karnataka and carefully considered the submissions and perused the impugned judgment and the evidence and materials on record.

9. PWs 1 to 4 stated to be the independent eye witnesses have not supported the case of the prosecution and turned hostile. On the

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- A morning of 14.06.2002 i.e. date of occurrence, PW-6-Mareppa-father of deceased went to the Kaulur village to attend a marriage. PW-7-Hanmath-brother of deceased had gone to the land for ploughing in the morning. PW-5-mother of deceased Bhimraya is the eye witness and PW-7 who came back from the field for meals also stated that he has witnessed the occurrence.
- B 10. PW-5-mother of the deceased, in her evidence, stated that on 14.06.2002 at 09.00 am, deceased Bhimraya went out to attend the call of nature and when he was coming back to the house, accused No.1 holding dagger-MO-1, accused No.2 holding dagger-MO-2 and accused No.4 holding handle of the axe-MO-3 chased the deceased and the deceased went inside the kitchen and closed the door. PW-5 stated that she pleaded with the accused for mercy and asked them not to do anything to Bhimraya. The accused, however, pushed the kitchen door and Bhimraya came outside to the verandah and at that time, accused No.1 attacked the deceased at his left waist with MO-1-dagger and accused No.2 stabbed on the nose and left eye brow with MO-2-dagger. Accused No.1 again stabbed the deceased on the right elbow. It is alleged that accused Nos.2 to 4 caught hold the legs and hands of Bhimraya and accused No.1 inflicted chop wound on the neck of Bhimraya and Bhimraya died on the spot. PW-7-brother of deceased who came back from the field for meals also witnessed the occurrence and spoke about the overt act of the accused. Motive is stated to be the illicit relationship of the deceased with the mother of accused Nos.1 to 3 and wife of accused No.4. It is alleged that the deceased used to go to the house of accused No.4 and wife of accused No.4 used to go to the house of deceased.
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- F 11. Evidence of PW-5 is assailed on the ground that her evidence suffers from discrepancies and contradictions as to how and when her statement was recorded and when PW-7 came back to the house. In her evidence, PW-5 stated that Saidapur Police came to the scene of occurrence and her statement was recorded. PW-5 further stated that
- G the police took her to the police station and recorded her statement in the police station. In her cross-examination, PW-5 stated at one time "that at about 10.00 am village Dalapathi informed the police and police came at 11.00 am and recorded her statement and obtained her left thumb impression.....". In another version, PW-5 stated that she was at home till her husband (PW-6) came home from village Kaulur and
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thereafter she went to the police station along with PW-6. The learned senior counsel submitted that PW-5 could not have been an eye witness as her evidence suffers from various discrepancies. The learned senior counsel for the appellants submitted that the contradictory versions of PW-5 as to how and when her statement was recorded by the police becomes relevant in the light of delay in registering FIR and delay in sending the FIR to JMFC and this only strengthens the defence plea of false implication of the accused.

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12. In its judgment, the trial court elaborately discussed about the presence of PW-5 in the house at the relevant time where the occurrence had taken place and how PW-5 is the natural witness. The trial court which had the opportunity of seeing and observing PW-5 while she was in the witness box, had observed that PW-5 has given graphic picture of the incident and that her evidence is trustworthy. The trial court also pointed out that PW-5 being an illiterate woman, her varying statements as to when and how her statement was recorded by the police, cannot be the ground for doubting her testimony and this finding was affirmed by the High Court. We do not find any reason to take a different view.

13. While appreciating the evidence of a witness, the approach must be to assess whether the evidence of a witness read as a whole appears to be truthful. Once the impression is formed, it is necessary for the court to evaluate the evidence and the alleged discrepancies and then, to find out whether it is against the general tenor of the prosecution case. If the evidence of eye witness is found to be credible and trustworthy, minor discrepancies which do not affect the core of the prosecution case, cannot be made a ground to doubt the trustworthiness of the witness.

14. Observing that minor discrepancies and inconsistent version do not necessarily demolish the prosecution case if it is otherwise found to be creditworthy, in *Bakhshish Singh v. State of Punjab and another* (2013) 12 SCC 187, it was held as under:-

**32.** In *Sunil Kumar Sambhudayal Gupta v. State of Maharashtra* (2010) 13 SCC 657 this Court observed as follows: (SCC p. 671, para 30)

“30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the

- A trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide *State v. Saravanan* (2008) 17 SCC 587.)"
- B 33. .... this Court in *Raj Kumar Singh v. State of Rajasthan* (2013) 5 SCC 722 has observed as under: (SCC p. 740, para 43)
- C "43. .... It is a settled legal proposition that, while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the case of the prosecution, must not prompt the court to reject the evidence thus provided, in its entirety. The irrelevant details which do not in any way corrode the credibility of a witness, cannot be labelled as omissions or contradictions. Therefore, the courts must be cautious and very particular in their exercise of appreciating evidence. The approach to be adopted is, if the evidence of a witness is read in its entirety, and the same appears to have in it, a ring of truth, then it may become necessary for the court to scrutinise the evidence more particularly, keeping in mind the deficiencies, drawbacks and infirmities pointed out in the said evidence as a whole, and evaluate them separately, to determine whether the same are completely against the nature of the evidence provided by the witnesses, and whether the validity of such evidence is shaken by virtue of such evaluation, rendering it unworthy of belief."
- D 15. No doubt, there are slight variations in the statement of PW-5 as to when and how her statement was recorded by the police. At one place, PW-5 states that the police came to the village at 11.00 am and took her complaint by obtaining her left thumb impression; whereas PW-
- E G 17-PSI stated that he was not knowing about the incident till PW-5 came to the police station and lodged the complaint at 01.15 PM and before that he has not received any phone call from the village Dalapathi. As pointed out by the trial court, PW-5 is an ordinary home maker and an illiterate woman. While in the witness box, it is quite natural for a witness like PW-5 being overawed by the court atmosphere to give varying
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statements. The courts are not to judge the evidence of ruralites by the same standard and exactitude like any other witness. As pointed out by the trial court, the evidence of PW-5 as to the place of occurrence is corroborated by the spot panchnama (Ex.-P7) drawn by PW-17-PSI and also the inquest on the dead body of the deceased in the Padasala itself. The alleged variations in the statement of PW-5, in our view, does not affect the trustworthiness of PW-5 so as to doubt her testimony.

16. Evidence of a witness is not to be disbelieved simply because he/she appears partisan or is related to the deceased/prosecution witness. It is to be ascertained whether the witness was present or not and whether he/she is telling the truth or not. The place of occurrence being the house of the deceased Bhimraya, PW-5-mother of the deceased is a natural witness to speak about the occurrence. PW-5-mother of deceased also explained that how she was present in the house and how she happened to be in the place of occurrence. As pointed out by the courts below, even after cross-examination, the defence was not able to establish anything that can create doubt as to the evidence of PW-5. That apart, PW-5 has no reason to falsely implicate the accused. Being the mother of deceased, it is highly improbable that PW-5 would have falsely implicated the accused at the instance of the police or anyone else.

17. In his evidence, PW-7 stated that he went to the field for ploughing and as usual came back to his house for meals at 08.30 am. PW-7 has stated about the overt act of all the accused and thus stated to be the eye witness and in our view, this submission does not merit acceptance. The learned senior counsel for the appellants submitted that the trial court did not treat PW-7 as an eye witness. It was elicited from PW-5 that the land where PW-7 had gone for ploughing, is situated far away and he could not have heard the noise from the land. It is in this context, the trial court proceeded under the footing that even assuming for the arguments sake that the characteristics of an eye witness is not attached to PW-7 and even then the same can be taken into consideration to the extent of the place of commission of offence i.e. in the Padasala of their house and to the extent of injuries found on Bhimraya. The trial court thus did consider PW-7 as an eye-witness. The trial court recorded its reasonings under the alternative footing that even assuming that PW-7 is not considered as an eye witness, his evidence supports the prosecution case to the extent of place of occurrence and the nature of injuries and the injuries sustained by deceased Bhimraya.

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A 18. PW-12-Dr.H.R. Kumar who conducted the autopsy, has noted the following injuries on the body of deceased Bhimraya:-

- i. An antemortem chop wound present over the neck in its anterior aspect, extends from the lateral border of right sternomastoid muscles to its left side size  $10 \times 3'$ . Large vessels of the neck and trachea were cut.
- B ii. Cut lacerated wound over the root of the nose present size  $1 \times 1$  cm.
- iii. Cut lacerated wound over the left eye brow region present.
- C iv. Cut incised wound over the left side of the chest, anteriorily  $10'$  below the middle of the clavical size  $4 \times 2$  cm.
- v. An incised wound over the right elbow size  $2 \times 1$  cm.
- vi. Chop wound in the loin region left, posteriorly size  $4 \times 2'$  with coils of intestine seen.
- D vii. An incised wound over the right thigh in the antero medical aspect size  $2 \times 1$ .

Injury No.1 in Ex.-P11-post-mortem certificate shows that it is a chop wound cutting the large vessel of neck and trachea. PW-12-Doctor was of the opinion that the death was due to haemorrhage and shock as a result of injury to vital structures of the neck i.e. large vessels and trachea. MO-1-dagger is 2 feet 6 inches in length and its blade is 1/1/2 inches in width. By looking into MO-1-dagger and nature of injury No.1, PW-12-doctor has opined that “....external injury No.1 in Ex.-P11 is not possible by using MO-1 or MO-2....”. PW-12-doctor further stated that if a man is assaulted with MO-1-dagger on his throat two or three times, the death is possible.

G 19. On behalf of the appellants, the learned senior counsel contended that the opinionative evidence of PW-12-doctor does not corroborate the oral evidence of PW-5 as to the manner in which the injury was caused to deceased with MO-1-dagger. In his evidence, PW-12-doctor has further stated that “by looking into the description of injury No.1 in Ex.-P11, it cannot be ascertained that it could be caused by using MO-1-dagger repeatedly from twisting.” PW-12-doctor was repeatedly cross-examined as to the manner in which injury No.1 could have been caused by using MO-1-dagger and the evidence of PW-5 is

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sought to be assailed on the basis of answers elicited from PW-12-doctor. A

20. The expert is not a witness of fact. Opinionative evidence of the doctor is primarily an evidence of opinion and not of fact. It is only a corroborative piece of evidence as to the possibility that the injuries could have been caused in the manner alleged by the prosecution. Unless the medical evidence rules out such possibility of injury being caused in the manner alleged by the prosecution version, the testimony of the eye witness cannot be doubted on the ground of its inconsistency with medical evidence. Though at one place, PW-12-doctor has stated that injury No.1 could not have been caused by MO-1-dagger, on being further questioned, he has stated that injury No.1 could have been caused by MO-1 either by attacking on the throat two or three times or by inflicting injury on the throat and twisting the weapon. Considering the evidence of PW-12-doctor, there is no merit in the contention as to the alleged variance between the medical evidence and the ocular evidence.

21. The learned senior counsel for the appellants then contended that the occurrence was at 09.00 am whereas the FIR was registered only at 01.15 pm and nearly after a delay of four hours, case was registered and the Magistrate received the FIR at 08.00 pm. The learned senior counsel for the accused contended that there is animosity between the parties and the delay in registration of FIR and the delay in receipt of FIR in the court raise serious doubts that the accused had been falsely implicated in the case. There is, of course, delay in registration of FIR and the receipt of the same in the court. There may be cases where the delay in FIR gives rise to the suspicion as to the false implication; but when the delay is satisfactorily explained, delay in registration of the FIR or receipt of the same in the court would not affect the prosecution case. PW-6-husband of PW-5 and father of deceased was away from the house and naturally, it would have taken some time for PW-5 and her son PW-7 to lodge the complaint about the occurrence. The effect on the mind of PW-5 on seeing the death of her son, cannot be measured. Being grief-stricken because of death of her son, it might have taken some time for PW-5 and PW-7 to lodge the complaint.

22. FIR in Crime No.44/2002 was registered at 01.15 pm and the same was received by the Magistrate at 08.00 pm nearly after six hours. There is, of course, some delay in receipt of the FIR in the court. In his evidence, PW-10-Constable Kalyanamma then attached to Saidapur Police Station has stated that the distance between Saidapur and Yadgir

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- A is 40 kms. PW-10-Constable has stated that at the relevant time, there was no train from Saidapur to Yadgir. PW-10-Constable further stated that though eight buses were plying to Yadgir, at the relevant time, there were no buses enabling him to reach Yadgir at an earlier time. In our view, there was no inordinate delay in the receipt of FIR in the court.
- B The findings of the trial court and the High Court that the delay in lodging the complaint and receipt of FIR in the court have been properly explained, do not suffer from infirmity and we do not find any reason to take a different view.

23. As pointed out earlier, based on the disclosure statement of accused No.1, MO-1-dagger which was kept hidden in the haystack of fodder in the loft of the cattle shed behind the house of accused No.1 had been seized under Ex.-P9-Panchnama in the presence of panch witnesses PW-8-Chandrappa and PW-9-Mahadevappa Needgera. The said panch witnesses have not supported the prosecution case and turned hostile. MO-2-dagger and MO-3-handle of the axe were recovered from the scene of occurrence under Ex.-P7-spot panchnama. On behalf of the accused, learned senior counsel contended that the evidence of PW-17-PSI as to the recovery of MO-1-dagger at the behest of accused No.1 is doubtful and when PWs 8 and 9 have turned hostile, no weight could be attached to the alleged recovery of MO-1-dagger. There is no merit in the contention that merely because the panch witnesses turned hostile, the recovery of the weapon would stand vitiated. It is fairly well settled that the evidence of the Investigating Officer can be relied upon to prove the recovery even when the panch witnesses turned hostile. In *Rameshbhai Mohanbhai Koli v. State of Gujarat and others (2011) 11 SCC 111*, it was held as under:-

F “**33.** In *Modan Singh v. State of Rajasthan* (1978) 4 SCC 435 it was observed (at SCC p. 438, para 9) that where the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses did not support the prosecution version. Similar view was expressed in *Mohd. Aslam v. State of Maharashtra* (2001) 9 SCC 362.

**34.** In *Anter Singh v. State of Rajasthan* (2004) 10 SCC 657, it was further held that: (SCC p. 661, para 10)

"*10. ... even if panch witnesses turn hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated.*" A

**35.** This Court has held in a large number of cases that merely because the panch witnesses have turned hostile is no ground to reject the evidence if the same is based on the testimony of the investigating officer alone. In the instant case, it is not the case of defence that the testimony of the investigating officer suffers from any infirmity or doubt. (Vide *Modan Singh case, Krishna Gopal case and Anter Singh case.*)" B

PW-17-PSI has clearly spoken about the recovery of MO-1-dagger at the behest of accused No.1 and MO-2-dagger and MO-3-handle of the axe from the scene of occurrence and his evidence cannot be discarded merely because panch witnesses have turned hostile. C

24. The learned senior counsel for the appellants contended that in the case registered under Section 302 IPC, only the Circle Inspector of Police is authorised to conduct investigation and PW-17-PSI has no authority to conduct the investigation and the prosecution case is vitiated on account of the investigation done by PW-17-PSI who had no authority to conduct the investigation. If the Circle Inspector was not available in the police station or on other duty, PSI who was in-charge of the police station had the power to proceed with the initial investigation. In his evidence, PW-17-PSI had clearly stated that in the absence of Circle Inspector, he has powers to investigate the cases registered including the one under Section 302 IPC. When a grave crime is registered, the PSI who is in-charge of the police station cannot wait for the arrival of the Circle Inspector or wait for the instruction to commence the investigation. D E F

25. From the evidence of PW-5 and PW-7, the prosecution has proved the overt act of accused Nos.1 and 2 and the same is corroborated by the corresponding injuries as spoken by PW-12-Dr.H.R. Kumar. Accused No.4 was then stated to be working as teacher at Balichakra who is said to have attacked the deceased with the wooden handle of the axe (MO-3) on the back of deceased. By perusal of post-mortem certificate (Ex.-P11), there is no injury corresponding to the alleged overt act of accused No.4. As seen from the FIR, in the complaint, PW-5 stated that at the time of attacking, the accused stated that "this bastard G H

- A is having illicit relationship with our mother". The above words stated in the FIR *prima facie* indicate the presence of accused Nos.1 and 2 and the absconding accused No.3 only who have attacked the deceased. Serious doubts arise as to the presence of accused No.4 and the benefit of doubt has to be given to accused No.4 and the conviction of accused No.4 cannot be sustained. The conviction of accused No.1-Mallikarjun and accused No.2-Ravi are based upon proper appreciation of evidence and the reasonings are well balanced and we do not find any reason warranting interference with their conviction.
- B 26. In the result, conviction of accused No.1-Mallikarjun and accused No.2-Ravi under Section 302 IPC read with Section 34 IPC and Section 448 IPC read with Section 24 IPC and the sentence of imprisonment imposed upon them are confirmed and the appeal is dismissed qua accused Nos.1 and 2. Conviction of accused No.4 is set aside and he is acquitted from all the charges levelled against him. This appeal is partly allowed accordingly.
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Divya Pandey

Appeal disposed of.