

CASE NO.:
Appeal (crl.) 298 of 2000

PETITIONER:
Mallanna and Ors

RESPONDENT:
State of Karnataka

DATE OF JUDGMENT: 20/020K/07

BENCH:
B.N. AGRAWAL & P.P.NAOLEKAR

JUDGMENT:
JUDGMENT

WITH
CRIMINAL APPEAL NO. 1159 OF 2006

B.N. AGRAWAL, J.

1. Sixteen accused persons were tried and by judgment rendered by the Trial Court all of them were acquitted of the charge under Section 302/149 of the Indian Penal Code [021IPC\022 for short]. Against the order of acquittal the State of Karnataka filed an appeal before the High Court, during the pendency of which, Basavara Jappagouda [A-4], who was respondent no. 4 in that appeal, died, as such the appeal in relation to him abated. The High Court considered cases of the remaining fifteen accused persons and out of them confirmed the order of acquittal in relation to Mallinathreddy [A-8], Basureddappa [A-10], Channareddy [A-11], Sanna Chennareddy [A-12]. So far as the remaining eleven accused persons viz., Mallanna [A-1], Lalesa [A-2], Bhimangouda [A-3], Mahboobsab [A-5], Buddesab [A-6], Khasimsa [A-7], Appasab [A-9], Sharnappa [A-13], Bapugouda [A-14], Chandappa [A-15] and Rajsekhar [A-16] are concerned, High Court reversed the order of acquittal and convicted them under Section 302/149, IPC and sentenced them to undergo imprisonment for life and to pay a fine of Rs. 10, 000/- each. Before this Court the aforesaid eleven convicted accused persons preferred appeal bearing Criminal Appeal No. 298 of 2000 challenging their conviction, and during the pendency of the appeal A-14 [appellant no. 9] died, as such his appeal before this Court abated. So far as State of Karnataka is concerned, it filed an appeal by special leave against the order of the High Court whereby order of acquittal in relation to A-8, A-10, A-11 and A-12 has been confirmed which gave rise to Criminal Appeal No. 1159 of 2006. Thus, in these two appeals cases of only fourteen accused persons are required to be considered.

2. Prosecution case in short was that one Siddanna Patil, who was father of A-1 and A-4, was murdered in the year 1983 in which Bhimanagowoda Desai and thirteen other persons were accused which gave rise to Sessions Case No. 47 of 1984, in which trial proceeded against the other thirteen persons and the same in relation to Bhimanagowoda Desai was separated because he was absconding and numbered as Sessions Case No. 83 of 1988. The aforesaid thirteen persons were convicted by the Trial Court and their conviction was confirmed by the High Court, against which Special Leave Petition was filed before this Court in which bail was granted and Bhimanagowoda Desai was instrumental in securing release of the aforesaid thirteen persons on bail from this Court. Bhimanagowoda Desai was granted anticipatory bail and thereafter his trial proceeded and the date fixed for hearing of that case was 22.4.1989. One day prior to the aforesaid date, i.e., on 21.4.1989 in

the afternoon all the sixteen accused persons aforementioned met at the residence of A-11 at village Hadnoor and in the said meeting A-10 stated that as Bhimanagowoda Desai had secured bail of thirteen accused persons from this Court he should be done to death.

Shivashranappa [PW-10] went to the house of A-11, who was his neighbour, in the same afternoon at about 3.00 pm with an intention to meet A-10 and saw all the sixteen accused persons in the room and overheard their aforesaid conversation whereafter the accused persons left the house of A-11. In the same evening one Sangappa [PW-12] visited the house of one Nangouda at Shantinagar in Gulbarga town where he found that all the sixteen accused persons excepting A-8, A-10, A-11 & A-12 were talking and he heard their conversation in which A-4 was telling other accused persons to finish Bhimanagowoda Desai on the next day, i.e., 22.4.1989.

3. Further prosecution case was that on 21.4.1989 at 9.30 pm Bhimanagowoda Desai along with his bodyguard-Mallappa [PW-3], Bhimarreddy [PW-1], Bhimaraya and Basavraja went to village Gulbarga for appearing in morning court at Gulbarga on 22.4.1989 in the aforesaid Sessions Case No. 83 of 1988 and stayed that night in the house of his nephew-Rudragouda [PW-2]. On the next day, i.e., on 22.4.1989 Bhimanagowoda Desai along with the aforesaid persons, excluding PW-2, went to court at 7.30 am to appear in the said case. Thereafter PW-2 also left for the court and arrived there. Bhimanagowoda Desai was standing on the katta of Civil Judge's Court and was waiting for his case to be called out. Between 7.45 am and 8.15 am all the twelve known persons viz., A-1 to A-8, A-10 to A-13 and five to six other persons arrived there, out of whom, A-1, A-2, A-3, A-6, A-7 and A-13 ran towards Bhimanagowoda Desai with jambiyas in their hands and out of these seven persons A-1, A-2 and A-3 assaulted him whereas others caught hold of him. PW-1, PW-2 and PW-3 and others tried to save Bhimanagowoda Desai who after receiving injuries fell down on the ground.

4. Prosecution case then was that thereafter PW-2, PW-3 and Bhimaraya lifted injured Bhimanagowoda Desai and took him in an auto-rickshaw to the hospital and PW-1 followed them in another auto-rickshaw. On the way to the hospital the injured Bhimanagowoda Desai is said to have made an oral dying declaration before PW-2, PW-3 and Bhimaraya to the effect that he was assaulted by A-1, A-2 and A-3. All of them arrived with the injured Bhimanagowoda Desai at G.G. Hospital, Gulbarga at about 8.30 am where Dr. Prabhavathi, Asst. Surgeon [PW-6] examined him and there he died at 8.45 am. In the meantime, H.K. Revanna [PW-27] who was working as Police Sub-Inspector, Station Bazar police station, received a telephonic call at 8.30 am to the effect that in the court premises one person was assaulted. Thereupon he proceeded to the place of occurrence and from there he reached the hospital at 9.30 am where he received medico legal case intimation [Exhibit P-12] from the doctor [PW-6] at 10.00 am and learnt that PW-1 had already left for the police station for lodging a case. As such PW-27 returned to the police station at 11.25 am whereafter PW-1 arrived there at 11.30 am whose statement was recorded by PW-27 on the basis of which First Information Report [FIR for short] was drawn up in which A-1 to A-8 and A-10 to A-13 were named besides five to six other persons.

5. The police after registering the case took up investigation and on completion thereof submitted chargesheet on receipt whereof learned Magistrate took cognizance and committed the aforesaid sixteen accused persons to the Court of Sessions to face the trial.

6. Defence of the accused persons was that they were innocent, had no complicity with the crime, no occurrence as alleged had taken place, the deceased-Bhimanagowoda Desai might have received injuries in some other manner of occurrence and they have been implicated in the case in hand to feed fat the old grudge.

7. During trial the prosecution adduced oral and documentary evidence and upon conclusion of the same all the accused persons

were acquitted of the charge but on appeal being preferred eleven accused persons have been convicted whereas acquittal of four accused persons has been maintained and appeal in relation to one accused abated in view of his death as stated above. Against the order of conviction the eleven accused persons preferred appeal before this Court whereas the State filed appeal by Special Leave against the confirmation of acquittal as stated above.

8. In these appeals we are required to consider cases of fourteen accused persons only, viz., ten convicted persons and four acquitted ones. So far as four acquitted accused persons, viz., A-8, A-10, A-11 and A-12 are concerned, they were charged for conspiracy and the Trial Court as well as the High Court has concurrently recorded findings to the effect that prosecution failed to prove the charge of conspiracy after taking into consideration the evidence adduced on behalf of the prosecution. We have been taken through the evidence of the prosecution witnesses to prove this charge and in our opinion the High Court was quite justified in upholding the order of acquittal, the view taken by the Trial Court and confirmed by the High Court, being reasonable one, cannot be said to be perverse in any manner and, consequently, no interference by this Court is called for.

9. We now proceed to consider the cases of the ten convicted accused persons. The High Court as well as the Trial Court has come to the conclusion that the prosecution failed to prove the case of conspiracy beyond reasonable doubt as stated above. Both the courts further concluded that prosecution failed to prove its case beyond reasonable doubt that the deceased made an oral dying declaration before PW-2, PW-3 and Bhimaraya, A-1 was arrested, only after four hours of the occurrence, from near the place of occurrence and jambiya was recovered from his possession.

10. Shri Sushil Kumar, learned Senior Counsel appearing on behalf of the appellants in support of the appeal, submitted that as the prosecution failed to prove the charge of conspiracy, which was the genesis of occurrence, the prosecution case should be discarded on this ground alone. In our view the submission has been made only to be rejected. Firstly, conspiracy cannot be said to be the genesis of occurrence and secondly, in the facts of the present case, the offences of conspiracy and murder cannot be said to have been committed in one transaction. A day previous to the date of occurrence, i.e., on 21.4.1989, the accused persons were said to have hatched up conspiracy, one in the afternoon at the house of A-11 by all the sixteen accused persons and another in the evening by twelve accused persons out of sixteen at the house of Nangouda at Shantinagar in Gulbarga town and the occurrence had taken place not in continuation of the conspiracy on the same day but on the following day. In the present case, according to the findings recorded by the two courts, the prosecution has failed to prove the charge of conspiracy beyond reasonable doubt. From this it cannot be inferred that the case of prosecution that the accused persons conspired to kill the deceased was found to be false. Proof beyond reasonable doubt is entirely different from finding a charge to be false. Even if conspiracy is assumed to be genesis of the occurrence which, on the facts of the present case, cannot be said to be so, it is well-settled that if the genesis fails the same would not by itself necessarily create doubt regarding veracity of the prosecution case on the manner of actual assault and evidence of witnesses in this regard. Thus, we do not find any substance in this submission.

11. Learned senior counsel next submitted that evidence of the three alleged eyewitnesses, viz., PW-1, PW-2 and PW-3 should be scrutinized with greater care and caution in view of the fact that the prosecution failed to prove the charge of conspiracy and its case that the deceased made an oral dying declaration before PW-2, PW-3 and Bhimaraya, A-1 was arrested after four hours from near the place of occurrence and recovery of jambiya from his possession. He very strenuously submitted that none of the three witnesses was eyewitness, they reached the hospital after PW-27 had left the

hospital for the police station, PW-2, PW-3 and Bhimaraya did not carry the deceased in auto-rickshaw to the hospital and the recovery of their blood-stained clothes has not been proved.

12. According to the evidence of PW-27, he reached the hospital at 9.30 am and remained there at least till 10.00 am, during which time he took medico legal case intimation [Exhibit P-12] and found twenty two to twenty five persons standing in front of the hospital who told him that Bhimanagowoda Desai had died. PW-27 further stated that the dead body had been shifted to the mortuary and as relatives of the deceased and the villagers told him that nobody was present there he didn't go to the mortuary. He further stated that the relatives of the deceased, who were present in the hospital, told him that one of the relatives of the deceased had left for the police station for lodging the FIR, but they themselves did not give any information to this witness about the incident. On the basis of the aforesaid statement of PW-27 it cannot be inferred that PW-1, PW-2 and PW-3 arrived at the hospital after this witness left the hospital. Syed Abdul Waheed [PW-16], who is a court staff, stated that injured was taken in an auto-rickshaw to the hospital. Gurulingappa [PW-14], who was driver of the auto-rickshaw, stated that two persons took the injured to the hospital in his auto-rickshaw. The doctor [PW-6] stated that the injured was brought to the hospital at 8.30 am by PW-2 and this fact has been noted down in the entry made in the register duly maintained in the hospital which has been marked as Exhibit P-10. PW-3 stated in his evidence that his and PW-2's clothes were stained with blood. He further stated that he and PW-2 lifted the injured and when they were taking him to the hospital in the auto-rickshaw blood was oozing out from the injuries and drops of blood fell on his shirt. Basaraja Ningin, Police Inspector, the Investigating Officer [PW-28] stated that he seized five shirts, one each from the persons of PW-2, PW-3, Bhimaraya, who was chargesheet witness no. 11, A-1 and the deceased and sent the same to the Chemical Examiner for analysis. The Chemical Examiner has submitted a report [Exhibit P-48] which shows that he found blood upon five shirts which were marked a-2, c-1, e-2, f-2 and g-1. According to the report of Serologist [Exhibit P-49] on the last four shirts human blood was found but on the first one, i.e., a-2 it was not possible to opine whether it was human or animal blood as the same was disintegrated and the blood group found on c-1, e-2, f-2 and g-1 was A but there is no evidence to show that the blood group of deceased was A. It has been submitted that there is no evidence to show that out of the five shirts which one belonged to PW-2 and PW-3. One thing is clear that out of the five shirts on four shirts human blood was found, therefore, at least over one of the shirts belonging to PW-2 and PW-3 human blood was found whereas on the other shirt also though blood was found but whether the same was human or animal blood could not be detected because of the disintegration. Thus, taking cumulative effect of the report of Chemical Examiner [Exhibit P-48], that of the Serologist [Exhibit P-49] and the evidence of PW-2, PW-3, PW-6, PW-14, PW-16 and PW-28 it cannot but be said that the injured was carried to the hospital by PW-2, PW-3 and chargesheet witness no. 11-Bhimaraya and while carrying the injured in the auto-rickshaw the clothes of PW-2 and PW-3 were stained with blood, which negatives the submission of the learned counsel for the appellants that PW-2 and PW-3 had not witnessed the occurrence. Likewise, the aforesaid facts and the evidence of PW-27 that he was told by some of the relatives of the deceased that one person had already gone to the police station to lodge the FIR also show that there is no substance in the submission of the learned counsel for the appellants that none of PW-1, PW-2 and PW-3 had witnessed the occurrence and they arrived the hospital after PW-27 left the hospital.

13. Another ground of attack to the evidence of PW-1, PW-2 and PW-3 is that no reliance should be placed upon these witnesses as PW-1 and PW-2 are close relations of the deceased and PW-3 is his

bodyguard inasmuch as, undisputedly, there was animosity between the deceased and the accused persons, especially when these witnesses cannot be said to be stamp witnesses as none of them has received any injury. In our view, merely because witnesses are related or interested or not injured their evidence cannot be discarded if the same is otherwise found to be credible, especially when they have supported the prosecution case in material particulars. All the three eyewitnesses PW-1, PW-2 and PW-3 are natural witnesses. PW-3 was undisputedly bodyguard of the deceased and PW-1 and PW-3 came with the deceased to the house of PW-2 which was in Gulbarga the previous night for appearance of the deceased in Sessions trial, pending against him, in the morning court at Gulbarga and in the morning all of them went to the court where the present occurrence had taken place in the broad day light. So far as PW-2 is concerned, further submission has been made that his evidence should be discarded also on the ground that he made the statement before the doctor [PW-6] to the effect that A-4 was also the assailant, as would appear from Exhibit P-10, an entry made in the register duly maintained in the hospital, which shows that he had not seen the occurrence. The learned counsel for the appellants is right in submitting that A-4 was not an assailant but only a person present at the time of the conspiracy being hatched as per the prosecution itself, but has been named along with the accused persons who were said to have assaulted the deceased. The submission of the counsel is that therefore his testimony as a whole has to be discarded and the statement of this witness cannot be accepted in the circumstances of the case. PW-2 is a close relation of the deceased. In fact, the deceased stayed with him the previous night and they came to the court premises. The incident had happened unexpectedly all of a sudden. Immediately thereafter he along with two others carried the deceased in an auto-rickshaw to the hospital and reported the incident to the doctor. One can understand in the circumstances that the witness was in complete shock and, therefore, a discrepancy made by him in including the name of A-4 along with the other accused persons to be assailants is a mistake which could be committed by any person in the circumstances narrated above. For this mistake, the statement of PW-2 cannot be discarded which is corroborated in material particulars by the statements of other eye-witnesses and the documents produced by the prosecution. Further, it has been submitted that this witness was an advocate, as such he ought to have realized the implication of delay in lodging the FIR. We find from the evidence of this witness that he being close relation of the deceased was under shock, as such he couldn't take any steps for lodging the FIR before the same was lodged by PW-1. Thus, we find no reason whatsoever to discard the sworn testimony of PW-1, PW-2 and PW-3.

14. We now proceed to deal with the cases of the ten convicted persons individually, out of whom, Appasab [A-9], Chandappa [A-15] and Rajasekhar [A-16] were not named in the FIR, although they were also known to the informant [PW-1], for which no explanation whatsoever has been furnished by the prosecution. This being the position, on this ground alone, these three accused persons are entitled to be given benefit of doubt.

15. Turning to the cases of Mahboobsab [A-5], Buddesab [A-6], Khasimsa [A-7] and Sharnappa [A-13], according to the FIR, A-5 was merely a member of the mob not having any arms in his hands, he neither ran towards the deceased nor caught hold of him nor is said to have assaulted him. Even in his subsequent statement made before the police, the informant [PW-1], had nowhere stated that A-5 caught hold of the deceased but, in court in the year 1994 after about five years he disclosed, for the first time, that this accused caught hold of the deceased. PW-2 also did not name this accused in his statement made before PW-6 on the basis of which entry was made in the hospital register [Exhibit P-10]. Moreover, in his

statement made before the police PW-2 had not stated that this accused caught hold of the deceased but in court he stated for the first time after five years that this accused caught hold of the deceased. PW-3 also did not state in his statement made before the police that this accused caught hold of the deceased but made statement in the Sessions Court after five years for the first time that this accused caught hold of the deceased. In view of these facts, we feel that it would not be safe to uphold the conviction of A-5.

16. Next accused in this category is Buddesab [A-6]. In the FIR it has been simply stated that this accused along with others ran towards the deceased with jambiya but specifically it has nowhere been mentioned that he caught hold of him. Even in his subsequent statement made before the police PW-1 has nowhere stated that this accused caught hold of the deceased. It was for the first time in court after five years he stated that this accused caught hold of the deceased. PW-2, another eyewitness, in his statement made before PW-6, which was the earliest version of the occurrence, had not named this accused, much less disclosing therein that he caught hold of the deceased. PW-2 has nowhere stated in his statement made before the police that A-6 caught hold of the deceased. This witness, like PW-1, for the first time stated in court after five years that A-6 caught hold of the deceased. On the question of complicity of this accused the last witness is PW-3 who also in his statement made before the police has nowhere stated that this accused caught hold of the deceased but he has made such a statement for the first time in court after five years. This being the position, we are of the view that it is not possible to uphold the conviction of A-6.

17. We now proceed to consider the case of Khasimsa [A-7]. According to the FIR this accused along with others ran towards the deceased with jambiya but specifically it has nowhere been mentioned that he caught hold of him. PW-1 in his subsequent statement made before the police has nowhere stated that this accused caught hold of the deceased. This witness has made statement for the first time in court after five years that this accused caught hold of the deceased. PW-2, another eyewitness in his statement made before PW-6 has not named this accused, much less disclosing therein that he caught hold of the deceased. PW-2 has nowhere stated in his statement made before the police that A-7 caught hold of the deceased. This witness like PW-1 for the first time has stated in court after five years that A-7 caught hold of the deceased. The last witness is PW-3 who also in his statement made before the police has nowhere stated that this accused caught hold of the deceased but has made such a statement for the first time in court after five years. This being the position, we are of the view that the evidence adduced against this accused is not credible.

18. Last accused in this category is Sharnappa (A-13]. So far as the FIR is concerned it has been simply stated that this accused along with others ran towards the deceased with jambiya but specifically it has nowhere been mentioned that he caught hold of him. PW-1 in his subsequent statement made before the police has nowhere stated that this accused caught hold of the deceased. This witness has made statement for the first time in court after five years that this accused caught hold of the deceased. PW-2, another eyewitness in his statement made before PW-6 has not named this accused, much less disclosing therein that he caught hold of the deceased. PW-2 has nowhere stated in his statement made before the police that A-13 caught hold of the deceased. This witness like PW-1 for the first time stated in court after five years that A-13 caught hold of the deceased. PW-3 stated that this accused caught hold of the deceased. In view of the fact that in the earliest version of the occurrence disclosed by PW-2 before PW-6, the name of this accused was not disclosed much less stating that he caught hold of the deceased, in the FIR and in the subsequent statement of PW-1 made before the police there is no allegation that this accused caught hold of the deceased, we feel it would not be safe to place reliance upon

the uncorroborated testimony of PW-3 that this accused caught hold of the deceased. This being the position, in our view it would not be safe to uphold the conviction of A-13.

19. For the following reasons we are of the view that the prosecution has failed to prove its case beyond reasonable doubt so far as A-5, A-6, A-7 and A-13 are concerned.

20. Next category of accused is that of the assailants, viz., Mallanna [A-1], Lalesa [A-2] and Bhimangouda [A-3]. So far as these accused persons are concerned, according to the FIR, all of them were assailants of the deceased. Even in the first version of the occurrence, which was disclosed before lodging the FIR by PW-2 before PW-6, as would appear from the entry made in the register duly maintained in the hospital [Exhibit P-10], all the three accused persons were named as assailants of the deceased. In the FIR, in the subsequent statement of the informant-PW-1 made before the police, in the statements of PW-2 and PW-3 made before the police and in the statements of PW-1, PW-2 and PW-3 made in court they have consistently stated that A-1, A-2 and A-3 assaulted the deceased with jabmias and their evidence is corroborated by the medical evidence as according to the post mortem examination conducted by Dr. A.N. Kulkarni [PW-7], injuries by jambiya were found on the person of the deceased and the same were sufficient to cause death in the ordinary course of nature. In view of the foregoing discussions we are of the view that the High Court was quite justified in convicting Mallanna [A-1], Lalesa [A-2] and Bhimangouda [A-3] and no interference by this Court is called for.

21. In the result Criminal Appeal No. 298 of 2000 is allowed in part and the appeal filed by Mallanna [appellant no. 1], Lalesa [appellant no. 2] and Bhimangouda [appellant no. 3] is dismissed. The appeal filed by Bapugouda [appellant no. 9] is disposed of the same having abated in view of his death and appeal of Mahaboobsab [appellant no. 4], Buddesab [appellant no. 5], Kashimsa [appellant no. 6], Appasab [appellant no. 7], Sharanappa [appellant no. 8], Chandappa [appellant no. 10] and Rajashekara [appellant no. 11] are allowed, their conviction and sentence are set aside and they are acquitted of the charge. Bail bonds of appellant nos. 1-3, who are on bail, are cancelled and they are directed to be taken into custody forthwith to serve out the remaining period of sentence for which the matter must be reported to this Court within a period of one month from the date of receipt/production of the copy of this judgment. So far as appellant nos. 4-8, 10 and 11, who are on bail, are concerned, they are discharged from the liability of bail bonds. Bapugowda [appellant no. 9], who was also on bail and whose appeal abated, stands discharged from bail bonds.

22. Criminal Appeal No. 1159 of 2006 is dismissed.