CASE NO.:
Appeal (crl.) 1146 of 2003

PETITIONER:
PEERAPPA & ORS.

RESPONDENT:
STATE OF KARNATAKA

DATE OF JUDGMENT: 09/08/2005

BENCH:
P. VENKATARAMA REDDI & D.M. DHARMADHIKARI

JUDGMENT:
JUDGMENT

P. VENKATARAMA REDDI, J.

The three appellants herein are accused Nos. A2, A3 & A4 in Sessions Case No. 30 of 1989 on the file of I Addl Sessions Judge, Gulbarga. They, along with nine others, were charged with the offences under Sections 147, 148 & 302 read with 149 IPC. The accused No.7 died during the pendency of the Sessions case. The other 11 accused including the appellants herein were acquitted by the trial Court. The State of Karnataka filed the appeal in the High Court questioning the acquittal. During the pendency of the appeal, the accused No.1 died. Hence the appeal had abated against him. The High Court, on reappreciation of evidence, held that the trial Court acquitted the accused Nos. 1 to 4 "on flimsy grounds by rejecting the evidence of PWs 4 & 5 and other circumstantial evidence". The High Court observed that no second view was possible as far as the guilt of the accused Nos. 1 to 4 was concerned. The High Court felt that the trial Judge gave undue importance to minor aspects in rejecting the testimony of PWs 4 & 5. Accordingly, the High Court allowed the appeal to the extent of convicting the accused Nos. 2 to 4 (appellants herein). As A1 died, he was not convicted, though A1's complicity was held proved. The three appellants were convicted under Section 302 IPC read with Section 149 IPC and sentenced to life imprisonment. As regards the other accused persons, the High Court was of the view that A5 to A12 reached the spot only after the other four accused attacked the deceased Mahadevappa and that these persons did not share the common object with the accused Nos. 1 to 4 and the attack did not continue after they came to the scene. Hence accused Nos. 5 to 12 were acquitted on benefit of doubt.

Aggrieved by the reversal of acquittal by the High Court, the present appeal is filed by the accused Nos. 2 to 4.

At the outset, we may point out that there is a palpable error in the judgment of the High Court concerning the provision under which the appellants were convicted. As unlawful assembly consists of five or more persons and the accused other than A1 to A4 having been acquitted on the ground that they did not share the common object, the conviction under Section 302 with the aid of Section 149 IPC is clearly unsustainable. On the finding of the High Court, the number of persons of the unlawful assembly is less than five. If at all they can be convicted under Section 302 read with Section 34 IPC or Section 302 simplicitor. Another patent error in the High Court's judgment is the reason given by the High Court for acquitting A5 to A12. The High Court wrongly assumed that A5 to A12 reached the spot after the assault by A1 to A4 and that none of them were with the other four accused initially. But the very evidence of the eyewitnesses on which the High Court placed reliance is otherwise. They attributed varied roles to the accused Nos. 5 to 12 at various stages of the incident. Thus, the ground of acquittal of the other eight accused was an irrelevant ground, though, in the view

we take, the ultimate conclusion is correct.
Now we shall consider whether the High Court was justified in reversing the verdict of acquittal recorded by the trial Court. Briefly, the prosecution case is this:
On 3.9.1988, at about 9 a.m. when the deceased Mahadevappa, who went to the house of PW8 at Kuknoor village the previous day, was going back to his native village Kumman Sirasgi, PW4\027a carpenter by profession, was also going to Kumman Sirasgi along with the deceased. When they came to the cart road near the land of Chand Patel (A11) within the limits of Kumman Sirasgi, the accused A6, A9 & A10 stopped Mahadevappa and thereafter A1 & A3 attacked him with axe and A2 & A4 assaulted him with dagger and A5, A8 & A12 instigated the other accused to kill Mahadevappa. A6 tied the two legs of the deceased with 'dhoti'. The accused fell down on the spot and succumbed to the injuries. The postmortem revealed that there were injuries to the vital parts of the body such as stomach, abdomen, intestine, liver and lungs apart from the fracture of ribs. There were 11 external injuries. He died on the spot. PW4 who was behind the deceased and PW5, a person having lands in the vicinity, are supposed to be the eyewitnesses to the crime.
PW3, the younger brother of the deceased, having got the information about the incident from PWs 4 & 5, went to Yadrami police station by walk and lodged the report to the Sub-Inspector of Police (PW12) at 4.15 p.m. In turn, he recorded the statement of PW3 and it is marked as Ext.P5. The FIR was registered on the basis of that statement.
According to PW3, PW4 gave him the names of six persons who assaulted Mahadevappa. They are A1, A2, A3, A7, A9 & A10. PW5, who came to the spot where the dead body lay, allegedly gave the names of A4 to A6, A8, A11 & 12. Thus, according to the version in the FIR and the evidence of PW3, PW4 gave six names and PW5 gave equal number of names. The FIR seems to have reached the Magistrate the next day morning at about 9 a.m. The Sub-Inspector of Police, who registered the FIR proceeded to the spot of the incident at about 8 p.m. and stayed there upto 11 p.m. till the arrival of the Circle Inspector of Police (PW13), but he did not meet the family members nor did he make any efforts to call the witnesses or record their statements. The inquest was conducted by the Circle Inspector of Police\027PW13, the next day morning. The statements of PWs 4 & 5 were recorded sometime in the evening of 4.9.1988. PW13 then arrested the accused and claimed to have recovered the weapons used on the basis of the information furnished by them in the presence of panchas. The postmortem was done on the spot by the Medical Officer, Jawargi who was examined as PW11. PW13 then took other steps such as sending the bloodstained mud and clothes found on the dead body for chemical examination. The chemical examiner's report is Ext.P19. After completion of investigation, PW13 filed the charge sheet in the Court.
The prosecution case mainly rests on the evidence of PWs 4 & 5. The alleged recovery of weapons at the instance of the accused appellants is also being relied upon as corroborative evidence. As regards the motive of the crime, it is fairly clear from the evidence on record that the accused and the members of the prosecution party were inimically disposed towards each other in view of the land dispute and the panchayat elections. Many of the accused are interrelated. It is also seen from the evidence of the Police Officer\027PW12 that the deceased Mahadevappa had criminal record and he is an accused in a case of murder of A3's mother. His name was entered in the rowdy sheet of the police station.
The trial Court disbelieved the evidence of PW4 for the following reasons:
1. The version of PW4 that he was going to Kumman Sirasgi on 3.9.1988 in order to fix a wooden horse to the doors of Kuderagonda family is unbelievable. The purpose of his visit to Kumman Sirasgi was not disclosed to the I.O. He could not even give the name of the person who placed

the order and paid the price of Rs.3500/-. Admittedly PW4 did not fix the wooden horse at the house mentioned above even till the date of giving evidence and no reason has been given for not fixing the wooden horse till date.

2. The witness stated that the police called him to the spot at the time of conducting panchnama on the dead body of Mahadevappa and he had signed the inquest 'mahazar'; but the inquest report does not bear his signature (his statement was recorded under Section 161 Cr.P.C. only in the evening of 4th September, 1988).

3. PW4 did not inform the complainant PW3 about the presence of A3, A4, A6, A8, A11 & A12 but in his deposition PW4 made improvements stating that A4, A5, A8, A11 & A12 were also present at the spot and that A6, A9 & A10 pelted stones at him. If he had really seen the incident, he would not have omitted to mention the names of A4, A5, A6, A8, A11 & A12 before PW3.

4. The presence of PW5 is also doubtful. According to him, he had gone to his land in order to see whether weeds shall be removed from the land on which a groundnut crop was sown 40 days earlier. According to the spot panchnama (Ext.P32), there was no crop on the land of PW5 but only grass was found. PW1, the panch witness also confirmed this fact. Moreover, it is improbable to believe that for the first time after 40 days, he went to his land to see the groundnut crop raised.

5. His evidence in regard to the assault of the deceased is not consistent with the evidence of PW4 as to the part played by each of the accused. PW5 did not attribute any overt act to A1 except stating that he was standing with others near the deceased.

It may be noted that PW5 did not state before the Investigating Officer that PW4 had seen the incident.

The High Court, after referring to the evidence of PWs 4 & 5 observed that the evidence of these two witnesses corroborates the presence of each other. The High Court also referred to the evidence of PW8, who stated that PW4 was going with the deceased to Kumman Sirasgi. According to the High Court, there were only minor discrepancies in the evidence. There was nothing unnatural in PW5 going to his land and witnessing the incident. The High Court further observed that the trial Court was not justified in rejecting the evidence of PW4 on the ground that the wooden horse was not fixed even later on. The High Court pointed out that PWs 4 & 5 have no axe to grind against the accused.

We are of the view that the High Court has not come to the grips of the reasoning given by the trial Court and did not critically examine the evidence of PWs 4 & 5 before reversing the acquittal. As regards the presence of PW5, the spot panchnama of his land coupled with the evidence of panch witness PW1 reveal that there was no crop at all in the land and therefore his version that he had gone to the land to check on the removal of weeds, was not believed by the trial Court. The reason given by the trial Court was a relevant reason and goes a long way in doubting the presence of PW5. The main reason assigned by the trial Court was not discussed at all. As regards the presence of PW4 again the reasons given by the trial Court are relevant reasons. The fact that he could not even given the name of the person who paid the advance towards price and the he did not fix the wooden horse even after the incident, has been legitimately taken into account by the trial Court. May be a different view is possible. But the view taken by the trial Court cannot be said to be irrelevant. Apart from that, PW4's evidence as to the watching the incident by standing under nearby neem tree and minutely observing the details of attack, is highly improbable. His version is that when he was answering the calls of nature near the land of Chand Patel (A11), A6, A9 & A10 pelted stones

towards him and therefore he ran and stood below the neem tree adjacent to the land of PW5. It is difficult to believe this version. It is clear from the evidence of PW4 that he became apprehensive of his safety and therefore he ran away. If so, will he stand close to the spot of the incident, especially, when so many armed persons were at the scene? If on the other hand, he took shelter at a place located at a respectable distance from the spot of incident, would it be possible for him to give minute details of who attacked with what weapon and at which spot of the body? We do not think that it is reasonably possible. The tendency of a person placed in a position of A4 would have been to run away from that place or if he was bold enough, he could have intervened and tried to dissuade them from attacking the deceased. No such course was followed by PW4, if we go by his version. At best it can be said that PW4, who was behind the deceased saw the accused coming in a group and trying to assault him. Thereafter, he would have fled from the place for his safety. Thereafter, we have no details about the incident in order to hold that the three appellants herein who were amongst the group were actuated by common intention to attack and kill the deceased and accordingly killed him. In the absence of reliable evidence as to the details that happened at the spot, it is not possible to hold the appellants guilty with the aid of Section 34 IPC especially having regard to the fact that rest of the accused, who were also in the group, were acquitted. Moreover, the High Court did not really scrutinize whether the comment of the trial Court regarding material improvements and inconsistencies in the evidence of the alleged eyewitnesses pertaining to the part played by the various accused is justified or not. That comment was merely brushed aside.

Regarding the recovery of weapons on the basis of the alleged disclosure made by the accused, the trial Court commented that no blood was found on the weapons. Moreover, the learned trial Judge observed that the places from which A1 to A4 produced the articles were accessible to public and therefore no reliance can be placed on such recovery. Another reason given by the trial Court was that the I.O. did not record the statement of A1 to A4 in the diary before proceeding to the place, but he made A1 to A4 repeat the same information in the presence of the panch PW6 and therefore the statement made by A1 to A4 cannot be said to be an information to the police which led to the discovery under Section 27 of the Evidence Act. The trial Court placed reliance on a case reported in 1964 Mysore Law Journal 185. Here also we find that the High Court did not deal with the reasons given by the trial Court. The High Court merely referred to the evidence in regard to the recoveries and held that they were proved beyond doubt. Though we feel that some of the reasons given by the trial Court for discarding the recoveries are not correct, we are not convinced that there is satisfactory evidence regarding recovery of weapons. PW6 stated that he did not enter the dilapidated house in which A2 & A4 allegedly pointed out the knife (MO11) and jambia (MO12) respectively which the police seized. In the course of cross examination, he further stated that he was standing outside the house along with another panch and police officer. Moreover, PW6 also stated that neither A2 nor A4 informed him that he had kept the knife in the dilapidated house. The trial Court found that the I.O. did not record the information anywhere. But the prosecution version is that in the presence of panchas, the accused orally revealed at the police station, about the factum of hiding the weapons at that particular place. But, it is belied by the evidence of PW6. So also, in the case of A1 & A3, PW6 stated that they did not inform him in the FIR about the place where they had kept the axes (MOs 9 & 10). He further stated that when A1 & A3 produced axes, he, another panch and the police were sitting on the road in front of the temple. Therefore, the panch witnesses did not actually see the deceased pointing out to the police the hidden weapon. Moreover, there was no proof of any prior information passed on to the police in the presence of panch witnesses as claimed by the I.O. In these circumstances, no reliance can be placed on the evidence as to recovery so as to make it admissible either under Section 27 or Section 8 of the

Evidence Act.
On an anxious consideration of the contentions in the light of the evidence on record and the findings of the trial Court, we are of the view that the High Court ought not to have interfered with the order of acquittal. In this regard, we may recall the observations made by R.C. Lahoti, J (as His Lordship then was), speaking for a three judge Bench in Kashiram Vs. State of M.P. [(2002) 1 SCC 71]. It was observed thus:
"Though the High Court while hearing an appeal against an acquittal has powers as wide and comprehensive as in an appeal against a conviction and while exercising its appellate jurisdiction the High Court can reappraise the evidence, arrive at finding at variance with those recorded by the trial Court in its order of acquittal and arrive at its own findings, yet, the salutary principle which would guide the High Court is\027if two views are reasonably possible, one supporting the acquittal and the other recording a conviction, the High Court would not interfere merely because it feels that sitting as a trial Court its view would have been one of recording a conviction. It follows as a necessary corollary that it is obligatory on the High Court while reversing an order of acquittal to consider and discuss each of the reasons given by the trial Court to acquit the accused and then to dislodge those reasons. Failure to discharge this obligation constitutes a serious infirmity in the judgment of the High Court."

That obligation has not been discharged by the High Court in the instant case. All the reasons given by the trial Court while appreciating the evidence have not been dealt with by the High Court.
We, therefore, allow the appeal, set aside the judgment of the High Court and restore the acquittal by the trial Court. The appellants shall be released forthwith if not required to be detained in any other case.