R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF JUNE, 2023

PRESENT

THE HON'BLE MR JUSTICE K.SOMASHEKAR

AND

THE HON'BLE MR JUSTICE RAJESH RAI K

CRIMINAL APPEAL NO. 879 OF 2016

C/W

CRIMINAL APPEAL NO. 2118 OF 2016

IN CRL.A.NO.879 OF 2016

BETWEEN:

1 . MR. K.R. PUSHPESH @ PUPPI ,

2 . P.V. VINAYA @ VINI,

3 . K.R. RADHISH,

....APPELLANTS

(BY SRI. MURTHY D.NAIK, SENIOR ADVOCATE FOR
SRI. GOUTAM S. BHARADWAJ, ADVOCATE FOR A1;
SRI. ARUNA SHYAM.M, SENIOR ADVOCATE FOR
SRI. SUYOG HERELE .E AND SRI. NISHANTH S.K,
ADVOCATE FOR A2;
SRI. DINESH KUMAR.K.RAO, ADVOCATE FOR A3)

AND:

STATE OF KARNATAKA,
BY CIRCLE INSPECTOR OF POLICE,
VIRAJPET, KODAGU- 571 218.

....RESPONDENT

(BY SRI. VIJAYAKUMAR MAJAGE, ADDL.SPP)

THIS CRL.A. IS FILED U/S.374(2) OF CR.P.C PRAYING TO SET ASIDE THE IMPUGNED JUDGMENT AND SENTENCE DATED 30.03.2016 PASSED BY THE II ADDL. DIST. AND S.J., KODAGU-MADIKERI (SITTING AT VIRAJPET) IN S.C.NO.50/2014 - CONVICTING THE APPELLANT/ACCUSED NO.1 TO 3 FOR THE OFFENCE P/U/S 302,109,120(B) AND 341 R/W 34 OF IPC.

IN CRL.A.NO.2118 OF 2016

BETWEEN:

STATE OF KARNATAKA,
BY CIRCLE INSPECTOR OF

POLICE,
VIRAJPET CIRCLE,
REPRESENTED BY STATE
PUBLIC PROSECUTOR, HIGH
COURT BUILDING
BENGALURU- 01.

....APPELLANT

(BY SRI. VIJAYAKUMAR MAJAGE, ADDL.SPP)

AND:

1. K.R. PUSHPESH @ PUPPI ,

2. P.V. VINAYA @ VINI,

3. K.R. RADHISH,

….RESPONDENTS

(BY SRI. MURTHY D.NAIK, SENIOR ADVOCATE FOR
SRI. GOUTAM S. BHARADWAJ, ADVOCATE FOR R1;
SRI. ARUNA SHYAM.M, SENIOR ADVOCATE FOR
SRI. SUYOG HERELE .E AND NISHANTH S.K, ADVOCATES FOR R2;
SRI. DINESH KUMAR.K.RAO, ADVOCATE FOR R3)

THIS CRL.A. IS FILED U/S.378(1) AND (3) OF CR.P.C PRAYING TO GRANT LEAVE TO APPEAL AGAINST JUDGMENT AND ORDER DATED 30.03.2016 PASSED BY THE II ADDL. DIST. AND S.J., KODAGU-MADIKERI (SITTING AT VIRAJPET) IN S.C.NO.50/2014 - ACQUITTING THE RESPONDENTS/ACCUSED FOR THE CHARGED OFFENCES U/S 5 OF THE ARMS ACT, WHICH IS P/U/S27(1) OF ARMS ACT, 1959 R/W SEC. 34 OF IPC.

THESE APPEALS HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 05.06.2023, COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **RAJESH RAI.K, J** DELIVERED THE FOLLOWING:

JUDGMENT

These two appeals arising out of the common judgment passed in SC No.50/2014 dated 30.03.2016 by the I Additional District and Sessions Judge and concurrent charge of II Additional District and Sessions Judge, Kodagu, Madikeri (sitting at Virajpet).

2. Criminal Appeal 879/2016 by the convicted accused Nos.1 to 3 is directed against the judgment of conviction and order of sentence passed in SC No.50/2014 dated 30.03.2016 by the I Additional District and Sessions Judge, wherein accused Nos.1 to 3 sentenced to undergo simple imprisonment for life and to pay a fine of Rs.10,000/- each for the offence punishable under Section 302 read with Section 34 IPC. Further, they sentenced to undergo simple imprisonment for a period of five years and to pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for a period of six months for the offence punishable under Section 109 read with Section 34 IPC. Further, sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.5,000/- in default to undergo simple imprisonment for a period of six months for the offence punishable under Section 120B read with Section 34 IPC and also sentenced to undergo simple imprisonment for a period of one month and to pay fine of Rs.500/- in default, to undergo imprisonment for one month for the offence punishable under Section 34 of IPC.

3. Whereas Crl.A.No.2118/2016 is preferred by the State under Section 378(1) and (3) of Cr.P.C. to set aside the judgment and order dated 30.03.2016 passed by the I Additional District and Sessions Judge, in SC No.50/2014, insofar as it relates to acquitting the accused for the charges under Section 5 of the Arms Act which is punishable under Section 27(1) of the Arms Act, 1959 read with Section 34 of IPC and thereby, to convict and sentence the accused for the offence punishable under Section 5 of Arms Act, which is punishable under Section 27(1) of the Arms Act read with Section 34 of IPC.

4. The brief facts of the prosecution case in these appeals are as under:

On 17.04.2014, at about 3.55 p.m. within the limits of Virajpet Town Police Station, in Navanagara, Perumbadi of Arji Village, due to ill-will between the deceased in this case, one Nousheer and accused No.1 i.e. appellant No.1-Pushpesh, accused Nos.1 to 3 with a common intention of committing the murder of the deceased went in Kharishma Motor vehicle bearing Regn.No.KA 45/R-5333 and while the deceased Nousheer was

going to his house, accused Nos.1 and 2 restrained him near the house of CW.6-Raman and assaulted the deceased on his head, face, neck, shoulder and both hands with sickle causing grievous injuries to him and thereby, committed his murder. Accused No.3 facilitated accused Nos.1 and 2 to commit the murder of the deceased-Nousheer by giving information to accused Nos.1 and 2 about the movements of the deceased. Hence, PW.23, one of the relatives of the deceased lodged the complaint before the respondent-Nagara Police Station, Virajpet, Madiker, as per Ex.P.43, against accused Nos.1, 2 and one Sampath and Ramesh. The same has been registered in Crime No.52/2014 dated 17.04.2014 by the said Police against accused Nos.1, 2 and one Sampath and Vinay for the offences punishable under Sections 302, 114, 120B read with Section 34 of IPC as per Ex.P.42 by PW.28, the then PSI of Nagara Police, Virajpet. Thereafter, submitted the FIR to the jurisdictional Magistrate. Subsequently, the said Police during the course of investigation, recorded the statements of the PWs.22 and 23, the relatives of the deceased and visited the scene of occurrence, drew up spot mahazar, apprehend the accused and after collecting necessary

document and other evidence, laid the charge sheet against these appellants i.e. accused Nos.1 to 3 for the offence punishable under Sections 109, 120B, 341, 302, read with 34 of IPC.

5. On committal of the case to the Court of Sessions, the appellants/accused pleaded not guilty for the charges leveled against them and claimed to be tried. In order to bring home the guilt of the accused, for the charges leveled against them, the prosecution examined in total 32 witnesses as PWs.1 to 32 and relied 72 documents as per Exs.P.1 to P.72 so also, 13 material objects i.e. MOs.1 to 13.

6. Apart from denying all the incriminating circumstances appearing against the accused in the evidence of prosecution witnesses, the accused though not examined any of the witness on their favour, relied on four documents marked as Exs.D.1 to D.4. The defence of the accused is one of total denial and that of false implication.

7. After hearing the learned counsel appearing on both sides and on assessment of oral as well as documentary

evidence, the learned Sessions Judge, by the judgment under appeal held that the evidence on record established beyond reasonable doubt that the accused committed the murder of the deceased Nousheer. In that view of the matter, the learned Sessions Judge convicted the accused for the aforesaid offences. Aggrieved by the said judgment of conviction and order of sentence, the accused preferred Crl.A.879/2016 before this Court to set aside the impugned judgment and order of sentence. However, the State preferred Crl.A.No.2118/2016 to convict the accused for the charged offence under Section 5 of the Arms Act, which is punishable under Section 27(1) of the Arms Act, 1959 read with Section 34 of IPC. Though the learned Sessions Judge framed the additional charge for the offence punishable under Sections 5 and 27(1) of the Arms Act, has not passed any order on the said charge.

8. We have heard the learned Senior counsel Sri Murthy D Naik for accused No.1/appellant No.1, the learned Senior counsel Sri Arun Shyam for accused No.2/appellant No.2, learned counsel Sri Dinesh K Rao for accused No.3/appellant No.3 in

Crl.A.No.879/2016 and Sri. Vijay Kumar Majage, learned Additional SPP for the State in Crl.A.No.879/2016 and perused the records secured from the Trial Court.

9. The learned Senior Counsel Sri Murthy D Naik for the appellant No.1 vehemently contended that the judgment under appeal suffers from perversity and illegality inasmuch as the learned Sessions Judge has failed to appreciate the evidence on record. He would further contend that the Trial Court failed to consider inconsistency and discrepancy in the evidence rendered by the witnesses before the Trial Court. The Trial Court passed a cryptic judgment without considering/assigning judicious reasons and appreciating the evidence on record which caused great miscarriage of justice to the accused/appellants. He would further contend that the Trial Court totally relied on the evidence of PW.22 and PW.24, who are the alleged eyewitness to the incident without scrutinizing/appreciating their evidence, though the same does not inspire confidence of the Court as the same is highly inconsistent. According to learned Senior Counsel, those eyewitnesses PW.22 and PW.24 are relatives of the deceased

and they failed to inform the incident to the concerned police either orally or by lodging a written complaint instead, they informed the said incident to PW.23 one Hamsa and in turn, he lodged Ex.P.43 complaint before the Police. However, the scribe of the said complaint is PW.30 one K.V Sunil who is none other than the Advocate of PW.23. The said aspect of the matter creates doubt in the version of PW.22 and PW.24.

10. The Learned Senior Counsel would further contend that by perusal of the cross-examination of PW.22 & PW.24, who are the alleged eyewitnesses to the incident, they categorically admitted that there is a distance of 2 to 3 furlong between spot of the incident and their house. More over, there is no visibility of the said spot from their house due to the ups and downs of the road and also due to the coverage of the view by the saplings of coffee plantation existing in the fens of their house. Hence, there is no possibility of they witnessing the alleged incident. He would further contend that those witnesses neither made any attempt to prevent the accused while committing the incident nor made any hue and cry. They also failed to inform

the same to the Police. Further, the said witnesses failed to identify the weapons said to have been used for the commission of the crime ie. MOS.11 and 12. Hence, according to the learned Senior Counsel the evidence of PW.22 & PW.24 requires greater scrutiny and much evidentiary value cannot be attached without any independent corroboration.

11. The learned Senior counsel also contend that though PW.23 i.e. the first informant said to be an eyewitness to the incident, according to the complaint, he totally turned hostile to that effect and he deposed only in respect of lodging the complaint. Further, the learned Senior Counsel also contended that the prosecution totally failed to prove the motive for the alleged incident since none of the witnesses deposed on that aspect including the eye-witnesses and the complainant. Though the accused not disputed the homicidal death of the deceased, the prosecution falsely implicated these accused in the crime and accordingly, failed to prove the charges leveled against them. According to the learned Senior Counsel, among the other witnesses examined by the prosecution, PWs.9 to 16 have totally

turned hostile to the prosecution and remaining witnesses i.e. Mahazar witness are also not fully supported the prosecution case. Hence, the learned Senior Counsel prays to allow the appeal.

12. The learned senior counsel relied on the following decisions of the Hon'ble Apex Court to substantiate his arguments:

i) AIR 1957 SC 614 (VADIVELU THEVAR AND ANOTHER vs. STATE OF MADRAS);
ii) 2022 SCC ONLINE SC 991 (KHEMA ALIAS KHEM CHANDRA ETC., vs. STATE OF UTTAR PRADESH);

13. The learned Senior counsel Sri Arun Shyam with his vehemence contend that there is a delay in transmitting the FIR to the jurisdictional Magistrate from the Police, i.e. though the FIR dispatched from the Police Station on 17.04.2014 at about 6.00 p.m., the same has reached before the jurisdictional magistrate on 18.04.2014 at about 13 hours. Hence, there is an inordinate delay of six hours in transmitting the FIR and the investigating officer totally failed to explain the said delay. As such, there is a doubt creates in the prosecution case. He would

further contend that the recovery of MOS.11 and 12, i.e., two sickles at the instance of accused Nos.1 and 2 as per Ex.P.9 not proved as per law since the recovery mahazar witness PW.6 and 21 in their cross-examination categorically admitted that they do not know the contents of Ex.P.9. Further, the said witnesses admitted that they affixed their signature in the Police station to the said mahazar. They further stated in their cross-examination that before they reaching the spot from where the sickles said to have been recovered, the Police were there already. Further the place of recovery of MOS.11 and 12 is an open area, i.e., water stream with access to the public. Hence, evidentiary value cannot be attached to the said recovery of MOS.11 and 12. The learned Senior counsel would further contend that apart from the said legal infirmities, the said recovery is a joint recovery at the instance of both accused Nos.1 and 2 as such, the same cannot be relied for the purpose of connecting the accused in the alleged crime. By reiterating the arguments advanced by learned Senior counsel for accused No.1, the learned Senior counsel Sri. Shyam submits that the trial Judge failed to consider the material inconsistency and discrepancy in the evidence of

PWs.22 and 24 and also the evidence of the Investigating Officer-PW.29. He would further submit that by perusal of the entire evidence on record and the charge sheet papers, the motive for the alleged incident is not forthcoming. Though the case rests on evidence of eye-witnesses, motive does not play vital role. But in the same time, there must a reason / intention / motive for the commission of crime. But the prosecution totally failed to prove the same. He would further submit that the scribe of the complaint is a practicing advocate who is well acquainted with PW.23 and also with the eye-witnesses. As such, there is a possibility of false implication of the accused cannot be ruled out. According to him, the seizure mahazar witness, i.e., seizure of M.Os.11 and 12 under Ex.P9-mahazar, though supported the case of the prosecution, in the chief-examination, but in the same time, in their cross-examination, they categorically admitted that they affixed their signature in the police station. Further, PW.23, the complainant is projected as an eye-witness to the incident, but he totally turned hostile to that effect. The alleged eye-witnesses i.e. PW.22 and PW.24 were also failed to identify MO.11 and MO.12, i.e., the weapons

said to have been used for the commission of the crime. According to the learned Senior counsel, there are much contradictions in the evidence of PW.22 & PW.24 in respect of the alleged incident is concerned. The topography of the place of incident as admitted by PW.23 and PW.24 clarifies that there is no possibility of they witnessing the incident. Hence for that reason only, they failed to lodge the complaint before the Police or to inform the same to any other third parties, being the relatives of the deceased. Hence, the learned Senior counsel would contend that much evidentiary value cannot be attached to their evidence. Accordingly, learned Senior counsel prays to allow the appeal.

14. The learned Senior counsel relied on the following decisions of the Hon'ble Apex Court to substantiate his arguments:

1) Pulen Phukan and Others v. State of Assam, (2023) SCC OnLine SC350
2) Chunthuram v. State of Chhattisgarh, (2020) 10 SCC 733

3) Nand Lal and Others v. State of Chhattisgarh, (2023) SCC OnLine SC262
4) State of Rajasthan v. Teja Singh and Others, (2001) 3 SCC 147
5) Rangaswamaiah and Ors v. The State of Karnataka – Criminal Appeal No.526/2014
6) Nagaraja P.M v. The State of Karnataka – Criminal Appeal.No. 348/2015
7) Pradeep Kumar v. State of Chhattisgarh, (2023) LiveLaw (SC) 239
8) Md. Jabbar Ali and Others v. State of Assam, (2022) SCC OnLine SC 1440
9) Ramanand alias Nandlal Bharti v. State of Uttar Pradesh, (2022) SCC OnLine SC 1396

15. Sri. Dinesh K Rao, learned counsel for appellant No.3 vehemently contend that either in the complaint or in the F.I.R, the name of accused No.3 is not forthcoming and initially, the complaint lodged against accused Nos.1, 2 and against one Sampath and one Ramesh by the complainant-PW.23. However, the F.I.R registered against accused Nos.1, 2 and one Sampath and one Vinay. Subsequently, during the course of filing the charge sheet, by dropping the name of the said Sampath, Vijay and Ramesh, accused No.3, i.e. appellant No.3 was implicated in

the crime without any basis or material. According to the learned counsel, by perusal of the entire charge sheet materials and also evidence of the witnesses, absolutely, there is no materials/evidence/overt-act forthcoming against accused No.3. The learned Trial Judge convicted accused No.3 only based on assumption and presumptions for the reason that he is the brother of accused No.1. Hence, according to the learned counsel, the learned Sessions Judge viewed the matter in a different angle, which caused miscarriage of justice to accused No.3. In the evidence of PW.8 and PW.23, it is stated that the accused No.3 was near the petty shop of PW.8 till 2.30 p.m on the date of incident. However, the incident caused in the evening hours. Admittedly, there was an election on that day. Hence, mere presence of accused No.3 in the spot, in the noon hours, no way connects him in the alleged crime. The learned counsel submits that by perusal of the entire Judgment of the Trial Court, the Trial Judge totally failed to appreciate the non availability of evidence against accused No.3. Accordingly, he prays to allow the appeal.

16. On the other hand, Sri.Vijayakumar Majage, learned Addl. SPP, sought to justify the Judgment under appeal and contended that the Judgment and order of sentence does not suffer from any perversity or illegality since the learned Sessions judge on proper appreciation of oral and documentary evidence has recorded findings, which are sound and reasonable regard being had to the evidence on record. Therefore, it does not call for interference by this Court. He further contends that though there is a little delay in transmitting the F.I.R from the Police Station to the jurisdictional Magistrate, the same does not go into the root of the prosecution case when there is ample evidence available on record to prove the guilt of the accused. The learned Add. SPP would vehemently contend that the first information was lodged immediately after the incident and to that effect, PW.23 clearly deposed before the Court. As such, there is no reason to disbelieve the version of PW.23-the complainant. He would further contend that the case rests on the evidence of eye-witnesses i.e., PW.22 and PW.24 and those two witnesses categorically deposed about the commission of the murder of the deceased by the accused and they are natural

witnesses since their house situated 50 feet away from the spot of incident. The said aspect was very much forthcoming in their evidence and also in the evidence of P.W.6. The evidence of PW.22 and PW.24 are consistent with each other since there is no much contradiction in their version. The non-lodging of the complaint by PW.22 will not be fatal to the prosecution case since the said witness informed the incident to PW.23 to lodge the complaint. Moreover, there is no reason to depose falsely against the accused by PW.22 and PW.24. He would further contend that, during the course of cross-examination of PW.22 and PW.24 the counsel for the accused elicited the manner in which the incident taken place and also about the assault made by the accused persons to the deceased. In such circumstance, the defence counsel himself filled the lacuna, if any in the evidence of eye-witnesses, in the cross-examination. He would further submit that as far as recovery of MO.11 and MO.12, the weapons said to have been used for the commission of the crime clearly proved by the evidence of PW.6 and PW.21 under Ex.P9-the mahazar. PW.6 and PW.21 categorically deposed in respect of the recovery of MO.11 and MO.12 based on the voluntary

statement of accused Nos.1 and 2 respectively. He would further contend that the recovery of the blood-stained clothes also proved beyond reasonable doubt by the prosecution and those material objects sent to FSL and the said FSL officer examined as PW.26 i.e. Dr.Chaya Kumari and the said witness categorically stated that the blood-group found in the said material object belongs to human blood and that of 'O' blood group and issued report to that effect as per Ex.P48. Moreover, the doctor who conducted the autopsy over the dead body, i.e., PW.25, issued post mortem report as Ex.P46 and also after perusal of MO.11 and MO.12, gave a opinion that the injuries found and examined in the P.M Report by him could be caused by those weapons, i.e., MO.11 and MO.12. Accordingly, issued report as per Ex.P47. The learned Addl. SPP further contend that PW.6 is a witness who had seen accused Nos.1 and 2 escaping from the spot immediately after the commission of the incident by holding MO.11 and MO.12. He also identified their dress which is seized under Ex.P8 and also MO.11 and MO.12. As such, by perusal of the evidence of PW.22 and PW.24 coupled with the evidence of PW.6, the prosecution proved its case

beyond reasonable doubt. According to him, since the case rests on eye-witnesses evidence, motive does not play any vital role. As such, the learned Addl. SPP prays to dismiss the appeal filed by the accused and prays to allow the appeal filed by the state and to convict the accused for the offence punishable under the provisions of Arms Act since MO.11 & MO.12 comes within the purview of Section 2(1)(c) of Arms Act which reads as under:

> *" (c) "arms" means articles of any description designed or adapted as weapons for offences, or defence, and includes firearms, sharpedged and other deadly weapons, and parts of, and machinery for manufacturing arms, but des not include articles designed solely for manufacturing arms, but des not include articles designed solely for domestic or agricultural uses such as a lathi or an ordinary walking stick and weapons incapable of being used otherwise than as toys or of being converted into serviceable weapons;"*

17. Hence, according to the Addl. SPP, though the commission of the crime and recovery has been proved and there is a specific charge for the offence punishable under

Section 5 r/w section 27(1) of Arms Act 1959 r/w section 34 of IPC, the learned Sessions Judge failed to convict the accused for the said offence. As such the learned Addl. SPP prays to dismiss the appeal filed by the accused and prays to allow the appeal filed by the State.

18. In the facts and circumstances of the case and in the light of the submissions made on both the sides, the points that would arise for our consideration are:

> i) *Whether the Judgment under the appeal suffers from any perversity or illegality warranting interference by this Court?*
> *ii) Whether the learned Sessions Judge is justified in convicting the appellants/accused Nos.1 to 3 for the offence punishable under Sections 109, 120-B, 341, 302 read with Section 34 of IPC?*
> *iii) Whether the learned Sessions Judge erred by not convicting the accused for the offence punishable under sections 5 r/w Section 27(1) of Arms Act 1959 r/w Section 34 of IPC ?*

19. We have bestowed our anxious consideration to the submissions made by the learned Senior counsels appearing on appellants and learned Addl. SPP for State and carefully perused

the records secured from the Trial Court and also the reasonings adopted by the learned Sessions Judge.

20. This Court being the Appellate Court, in order to re-appreciate the entire material on record, it is relevant to consider the entire prosecution witnesses and the documents relied upon.

i) PW.1-K.Suleman, who is the father of the deceased Nousheer in this case has stated that the accused and deceased were friends and on 17.04.2014, when he was at his house, he heard the screaming sound near his house and PW.3 and PW.4 informed him that accused Nos.1 and 2 were assaulting his son. Hence, he immediately rushed to the spot. At that time, his son lying on the pool of blood. However, before he reaching there, the accused escaped from the spot. He denied the other contents of his statement. Hence, prosecution treated him as a hostile witness. Though the learned Prosecutor cross-examined the said witness, he denied his statement in respect of the actual commission of the incident.

ii) PW.2-Nousheena who is the younger sister of the deceased stated that she knows the accused from childhood and on 17.04.2014, when she was at her house, daughter of CW.4 informed her that there was a quarrel between accused Nos.1 and 2 and deceased. Immediately, she rushed to the spot, at that time, she saw her brother was assaulted. However, the accused Nos.1 and 2 already escaped from the spot and she was informed by the public that accused Nos.1 and 2 committed the murder of her brother. In the cross-examination, she stated that daughter of C.W.4 informed her that accused Nos.1 and 2 assaulted her brother.

iii) PW.3-Abbas is a witness for spot mahazar-Ex.P5. He identified his signature on Ex.P5 as per Ex.P5(a) and deposed to that effect, by identifying the wounds found in the dead body. However, in the cross-examination, he admitted that he does not know the contents of Ex.P5.

iv) PW.4 is witness for inquest panchanama as per Ex.P6. This witness also identified his signature on Ex.P6 as per Ex.P6(a) and deposed that the said mahazar was drawn at

Govenrment Hosptial, Virajpet. However, in the cross-examination, he admitted that he does not know the contents of Ex.P6.

v) PW.5-Asgar is a witness for recovery mahazar of the clothes and other belongings of the deceased as per Ex.P7. This witness also supported the case of the prosecution and identified his signature on Ex.P7 as per Ex.P7(a).

vi) PW.6-Nasir is a witness who had seen the accused at the spot immediately after the commission of the incident along with MOS.11 and 12 and also a witness for Ex.P8, i.e., seizure of jerkins which were worn by the accused at the time of commission of crime and seized in the police station. He is also a witness for recovery mahazar-Ex.P9 wherein MOs.11 and 12 recovered at the instance of accused Nos.1 and 2 from a gutter near the property of one Pinto. This witness also identified MO.13, i.e. the photograph of the bike. In his cross-examination, he has stated that himself and Nousheer are close friends and also admitted that he does not know the contents of Ex.P8. Further, he also admitted that MO.11 and MO.12 were

not seized and sealed in front of him and accused Nos.1 and 2 were already there in the garden of Pinto before he reaching there. He further admitted that he does not know the contents of the said mahazar since the Police had not read over the same to him.

vii) P.W.7-Hussainar is also a witness for Ex.P7-mahazar, i.e., recovery of the dress and other materials belongs to the deceased as per Ex.P3 to P8. However, in the cross-examination, it is stated that he had not read the contents of mahazar.

viii) P.W.8-Abdul Rahaman is a hearsay witness running a petty shop at the vicinity of the alleged spot of incident. However, in the cross-examination, he admitted that he had not seen the accused persons on the date of incident and also had not given any statement before the Police.

ix) PW.9-P.N.Vijesh is a circumstantial witness running a mobile shop in the vicinity of the spot of incident. However, this witness turned hostile to the prosecution case.

x) PW.10-P.R.Vijay, father of accused No.2, PW.11-mother of accused No.2, PW.12-sister of accused No.2, PW.13-sister of accused No.2, PW.14-mother of accused Nos.1 and 3, PW.15-brother of accused Nos.1 and 3. However, all these witnesses have turned hostile to the case of the prosecution. PW.16 is also a circumstantial witness, who turned hostile.

xi) PW.17-Deepa.B, Panchayath Development Officer of Bettoli village Panchayath who issued the domicile certificate of accused No.1.

xii) Pw.18-Sampath Kumar is an Auto Driver at the vicinity turned hostile to the prosecution case.

xiii) PW.19-M.M.Kushalappa, the then Police Constable of Virajpet Rural Police who has transmitted the F.I.R to Magistrate.

xiv) PW.20-Kishore.B.T, who is also the then Police constable of Virajpet Police formal witness carrier of the FSL items.

xv) PW.21-Younus @ Uned is a circumstantial witness, a daily wage worker in the vicinity to the place of incident,

deposed that immediately after the incident, he visited the spot and came to know that accused Nos.1 and 2 have committed the murder of deceased. This witness also deposed in respect of the recovery of MO.9 and MO.10 under Ex.P8 and Ex.P9 and identified his signature on Ex.P8 as per Ex.P8(a) and Ex.P9(a). However, in the cross-examination, he stated that he does not know the contents of Ex.P8 and Ex.P9 and he did not know the names of the Police officer who visited the spot and the exact place from where MO.9 to MO.12 are recovered.

xvi) PW.22-M.E.Yousuf who is an eye-witness to the incident deposed in his evidence that, on 17.04.2014, at about 3.45 p.m., himself and his wife PW.25 were sitting in a washing stone behind the courtyard of their house. At that time, they saw the accused presons chasing the deceased Nousheer and accused Nos.1 and 2 were assaulting him with the sickles. He cried for help. At that time, public gathered and accused Nos.1 and 2 escaped in a motor vehicle. However, this witness failed to identify MO.11 and MO.12, i.e., the material objects used for the commission of crime. In the cross-examination, he admitted

that his house and the house of the deceased is situated in a distance of about 2 to 3 furlongs and he does not know to read and write Kannada and there are several houses situated in and around the place of incident. According to him, when he reached the spot of incident, C.W.6-Raman was also there.

xvii) PW.23-Hamsa is the neighbour of the deceased who lodged the complaint as per Ex.P43 immediately after the incident. According to him, he did not witnessed the incident. However, lodged the complaint before the Police. Hence, the prosecution treated this witness as hostile witness. This witness also turned hostile in respect of Ex.P5-seizure mahazar and Ex.P6-spot mahazar.

xviii) PW.24-Ramula who is none other than the wife of PW.22 and she reiterated the version of PW.22 and stated that herself and her husband PW.22 have seen the commission of the incident by accused Nos.1 and 2 by assaulting the deceased Nousheer. However, in the cross-examination, this witness admitted that there are coffee saplings around their house in the fence and the said coffee saplings covered the visibility of the

road. She stated that she had not seen Raman at the place of incident. This witness also failed to identify MO.11 and MO.12.

xix) PW.25-Dr.C.Srinivasa Murthy, the then doctor of Government Hospital, Virajpet, who conducted autopsy over the dead body and examined the injuries found on the dead body of the deceased and gave his opinion as per Ex.P46 that the "death is due to hemorrhagic and neurogenic shock secondary to homicide using sharp edged weapons." The doctor has also gave an opinion in respect of the weapons, i.e. MO.11 and Mo.12 said to have been used for the commission of the crime that the injuries found on the dead body could be caused from the weapons like MO.11 and MO.12 which he examined. Accordingly, issued report to that effect as per Ex.P47.

xx) P.W.26-Dr.Chayakumari, the FSL officer, who examined MO.1 to MO.5, MO.8 to MO.12 and issued the report as per Ex.P48. She deposed that the blood group found on the articles are belongs to 'O' blood group.

xxi) PW.27-K.K.Jais is a hearsay witness residing near the spot of the incident. However, this witness turned hostile to

the prosecution case and denied his statement recorded as per Ex.P50.

xxii) PW.28-Suresh Bopanna, the then Police Sub-Inspector of Virajpet town police, who received the complaint from PW.23 as per Ex.P43 and registered the F.I.R against the accused and others as per Ex.P42. He also visited the spot and shifted the dead body from the spot of incident to Government Hospital, Virajpet. He is also witness for Ex.P5, i.e., the spot mahazar in which MO.1 and MO.2 were seized. This witness also prepared the rough sketch of the place of incident as per Ex.P54. However, in the cross-examination, he admitted that PW.23-complainant is not residing within the vicinity of the spot of incident. Further, he also admitted that either in the complaint or in the F.I.R, there is no mention in so far as the weapon used for commission of the crime.

xxiii) PW.29-K.R.Prasad is the then Circle Inspector of Police of Virajpet circle, who conducted the investigation of the case, i.e., drawing of the spot mahazar, inquest mahazar, arrest of the accused, recording of voluntary statement of accused

Nos.1 and 2 as per **Ex.P59** and P60 and thereby, recovery of MO.11 and MO.12 and other recoveries. He also recorded the statement of other witnesses in the case and by obtaining the post mortem report and other scientific report, laid the charge sheet against the accused for the offences charged. During the course of cross-examination, he admitted that except the house of one Raman, there were no houses situated near the spot of incident as per the rough sketch, i.e., Ex.P54. He also admitted that he received the information in respect of the incident at about 6 to 6.45 p.m. in the evening. He also admitted that he did not recover any wooden rods in the case. He also admitted that he had not drawn any mahazar at Kushalnagara where the motor bike was seized in the case. He also admitted that the doctor did not give any firm opinion that the injuries found in the dead body could be caused by MO.11 and MO.12.

xxiv) PW.30-K.V.Sunil, who is a practicing advocate at Virajpet Court and known to PW.23, the complainant, wrote the complaint-Ex.P43. In the cross-examination, he admitted that he is the Secretary of communist party of Kodagu District and

conducted Zilla Panchayath election from the Communist party. He also admitted that he was advocate for PW.23-Hamsa.

xxv) P.W.31-T.H.Ramesh, the then Police Constable of Virajpete police station, handed over the dead body to the father of the deceased and received the requisition to that effect. He also carried the cloths of deceased to the office of the Circle Inspector/I.O.

xxvi) PW.32-Chikkaswamy, the then PSI of Kushalnagara police station deposed that based on the wireless message of Virajpete Police, he arrested Accused Nos.1 and 2 at Kushalnagara and taken them to Kushallnagara Police Station. From there, handed over them to Virajpet Police Station on 17.04.2014.

21. By careful perusal of the evidence of the above witnesses and the documents placed by the prosecution and defence, it could be seen, in order to prove the homicidal death of the deceased, the prosecution mainly relied on Ex.P.6-inquest mahazar and Ex.P46-post mortem report. PW.4 and PW.23 are the witnesses examined by the prosecution in order to prove the

contents of Ex.P6-Inquest Panchanama and both the said witnesses have supported the prosecution case and identified the signature on Inquest lmahazar-Ex.P6 and also deposed about the injuries found on the dead body. Nevertheless, PW.25, i.e., the doctor who conducted the autopsy as per Ex.P46, categorically stated before the Court that on examination of the dead body, he found as many as ten injuries over the dead body and also opined that all those injuries are ante-mortem in nature. Further, he also gave his opinion that the "death is due to hemorrhagic and neurogenic shock secondary to homicide using sharp edged weapon." Hence, by conjoint reading of the evidence of Doctor-PW.25 and contents of Ex.P46 and also the contents of Ex.P6 i.e. inquest mahazar and the evidence of the witnesses to that mahazar, it can be easily concluded that the prosecution proved the homicidal death of deceased-Nousheer in this case. Even otherwise, the learned defence counsels also not seriously disputed that aspect of the matter. Once the homicidal death of the deceased proved the next question that would arise for consideration is "Whether the accused are responsible for the same?" To substantiate the said aspect, the prosecution mainly

relied on the evidence of PW.23, i.e. the complaint PW.22 and PW.24. PW.24 is none other than the wife of PW.22. On careful perusal of the evidence of PW.23, he deposed that PW.22 informed him that accused Nos.1 and 2 committed the murder of deceased. As such, he lodged the complaint before the Police as Ex.P43. Except the said aspect, this witness denied the other contents of Ex.P43-complaint. Hence, the learned Prosecutor treated the said witness as hostile witness to the prosecution case. Even otherwise, in the cross-examination of this witness, he admitted that the complaint was written by his advocate one Sunil and he did not gone through the contents of the complaint. Further, this witness also stated that he did not know the reason behind the commission of the incident. By perusal of the complaint-Ex.P43, the same is lodged against accused Nos.1 and 2 and one Sampath and Ramesh. However, the Police registered the F.I.R against accused Nos.1 and 2, one Sampath and one Vinay. This material discrepancy in the complaint and FIR has not explained by the prosecution either during investigation or before the trial Court. Nevertheless, after investigation, the respondent-Police filed the charge-sheet against accused Nos.1

to 3 and dropped Accused No.4- Sampath Kumar whose name was found in the F.I.R and implicated accused No.3 in the case. Hence, the evidence of PW.23-complainant will not much helpful to the prosecution case since PW.23 turned hostile in respect of the alleged incident is concerned.

22. Coming to the evidence of PW.22 and PW.24, i.e., the eye-witnesses to the incident, PW.22 deposed that on 17.04.2014, himself and his wife were sitting on the backyard of their house on a cloth-washing stone and at that time, they saw accused Nos.1 and 2 chasing the deceased and they assaulted the deceased near the house of one Raman. Thereafter, they escaped from the spot. However, this witness failed to identify the weapons, MO.11 and MO.12 said to have been used for the commission of the crime by accused Nos.1 and 2. By careful perusal of the cross-examination of this witness, he deposed that he has not given any statement to the Police and there are several houses situated near the spot of incident and C.W.6-one Raman also present at the spot of incident, whose house situated very near to the spot of incident. He further stated that

after the incident, he called PW.23 and informed about the incident. However, he admitted in the cross-examination that his house and deceased Nousheer's house are situated in the opposite directions. He also admitted in the cross-examination that he does not know to read and write Kannada and on the date of incident, he was engaged in cutting wooden logs and the alleged place of incident is situated nearly one furlong to his house and that place was covered by hills.

23. PW.24, is another eye-witness to the incident who is none other than the wife of PW.22. The said witness also deposed that on 17.04.2014, i.e., the date of incident, herself and her husband were in their house. At that time, they saw accused Nos.1 and 2 were chasing the deceased and they assaulted him and thereby, committed his murder. However, this witness also faild to identify the material objects, MO.11 and MO.12 said to have been used for the commission of the crime. Moreover, she admitted that there is no visibility of the place of incident from her house since coffee saplings in the fence covered their house and she also stated that her house is

situated 10 feet down to the main road. She also admitted that there are nine houses situated in and around the spot of incident and all the inmates of those houses have witnessed the incident.

24. The learned Senior counsels for the appellants vehemently contend that there is no possibility of P.W.22 and PW.24 witnessing the alleged incident since there are material contradictions in their evidence in respect of the distance from their house to the spot of incident and also their admission in respect of the visibility of the scene of occurrence from their house. On careful perusal of the evidence of this witness, we are of the opinion that there is considerable force in the submission made by the learned Senior counsels for the appellants about the evidence deposed by these witnesses in respect of the incident witness by them, cannot be relied to the fullest extent to prove the guilt of the accused. Moreover in their cross-examination they categorically admitted that their house is situated 10 feet down from the road and also their house is covered with the coffee saplings in the fence. PW.22 stated in his evidence that himself and his wife were sitting in the cloth-washing

stone in the backyard of their house and the incident caused in front of their house. On perusal of Ex.P54, i.e., the rough sketch drawn by the investigation officer clearly depicts that except one house belonging to one Raman, there are no other houses situated on either side of the road. Nevertheless, the I.O-PW.29 categorically admitted in his cross-examination that he did not examine the said Raman whose house is situated adjacent to the spot of incident and there are no houses situated near the spot of incident except the house of said Raman as per Ex.P54. This admission of PW.29-the I.O in the evidence totally contradictory to the version of eye-witnesses P.W.22 and P.W.24 and discarded the evidence of PW.22 & PW.24. Moreover, the conduct of PW.22 and PW.24, the alleged eye-witnesses to the incident, not lodging of the complaint to the Police in spite of they both allegedly witnessing the incident, is quite strange and creates a doubt in their version. According to PW.22, he informed about the alleged incident to PW.23 and in turn, PW.23 approached his advocate PW.30 and prepared the complaint and lodged the same. Admittedly, the complaint discloses the names of two other persons, i.e., one Ramesh and one Sampath.

Moreover, the respondent-Police though registered the F.I.R against accused Nos.1, 2, one Sampath and Vinay, after investigation the Police dropped the names of Sampath and Vinay and implicated accused No.3. Hence, the version of PW.22 and PW.24 coupled with the subsequent event of lodging complaint by PW.23 and registering of F.I.R and filing of charge sheet against accused Nos.1 to 3, creates a clear doubt in the mind of this Court. Even otherwise, P.W.22 and PW.23 categorically admitted that they did not give any statement before the Police and they do not know to read and write Kannada. Moreover, there was an election on the alleged date of incident. According to PW.22 and PW.24, the movements of general public are there in the road on that day. Further, according to PW.24, there are nine houses in and around the spot of incident and all the inmates of those houses have witnessed the incident. But admittedly, none of them were neither sighted as charge-sheet witnesses nor examined before the Court by the prosecution. Interestingly, the Investigation Officer admitted in his cross-examination that the house of one Raman is the only house situated adjacent to the

spot of incident and according to PW.22, the said Raman was very much present at the scene of occurrence, but the said witness was not examined before the Court, for the reason known to the prosecution. In our considered opinion, the non-examination of the said material witness is also fatal to the prosecution case. Hence, without any corroboration, the evidence of PW.22 and PW.24 cannot be based for conviction of the accused since there are material contradictions and omissions forthcoming in their evidence. After careful perusal of their evidence, much evidentiary value cannot be attached to their evidence. According to PW.22, he who informed PW.23 to lodge the complaint, but the contents of the complaint reveals that PW.23 himself is an eye-witness to the incident. However, in the evidence, PW.23 turned hostile to that effect. Hence, in the peculiar circumstance, version of PW.22 and PW.24 cannot be believed as a gospel truth.

25. As far as the other evidence available on record are concerned, though the learned Addl. State Public Prosectuor very much relied on the evidence of PW.6 that he had seen accused

Nos.1 and 2 immediately after the incident while they are escaping from the spot of incident by holding two sickles, PW.6 in the examination-in-chief, deposed that before he reaching the spot, the deceased Nousheer was murdered and the accused were escaping in a motor bike, but in the cross-examination, he categorically admitted that he had not seen the face of the accused and also registration number of the said motor bike. He further deposed that he signed Ex.P8-mahazar, i.e., seizure of motor bike of the accused in the police station and those articles were not seized in his presence. Hence, on careful perusal of the evidence PW.6, the same cannot be relied to prove either recovery or last seen theory. The Hon'ble Apex Court in catena of judgments held that to prove the theory of last seen it is always necessary that the prosecution has to establish place and time of the death which in this case the prosecution failed to prove in the evidence of PW.6.

26. Coming to the next circumstance which the prosecution heavily relied, i.e., the recovery of weapons, i.e., MO.11 and MO.12, said to have been used for the commission of

the crime, seized under Ex.P9-mahazar at the instance of accused Nos.1 and 2 based on their voluntary statement. PW.6 and PW.22 are the witnesses to that effect. By perusal of the evidence of PW.6 and the contents of Ex.P9-mahazar, MO.11 and MO.12 recovered from a stream/drainage near the property of one Pinto situated at Virajpet and Madikeri main road, but PW.6 in his evidence stated that the said recovery has been caused from the road-side of one Pinto's property. More over, in the cross-examination, he categorically admitted that before he reaching the said place, the accused were already there along with the police. He also admitted that the police have not seized and packed MO.11 and MO.12 in his presence. He also admitted that he does not know the contents of Ex.P9. The other witness-PW.22 though supported the case of prosecution in the examination-in-chief, but during the course of cross-examination, he admitted that he does not know the contents of Ex.P9 and MO.11 and MO.12 are not seized and packed in the said place where the Police recovered the same. He further admitted that he does not know whether the owner of that property was present at the time of seizure or not. Hence, by

careful perusal of the evidence of PW.6 and PW.22 coupled with the evidence of I.O-PW.29, it can be duly concluded that the recovery effected at the instance of accused Nos.1 and 2 not within the ambit of Section 27 of the Indian Evidence Act. The Investigation Officer failed to secure the presence of the neighbours within the vicinity of the said place in spite of several houses situated in and around the said place as admitted by PW.29. Hence, the non-compliance of the provisions of Section 100(4) of Cr.P.C., which creates a doubt in the mind of this Court about the recovery of MO.11 and MO.12 under Ex.P9. The Hon'ble Apex Court in the judgment rendered **Pradeep Narayan Modgankar V/s State of Maharashtra** held in Para-6 of the judgment that, Section 100(4) of Cr.P.C requires that before making a search, the Officer or other person to make it, shall call upon two or more independent respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be witness to the search. To attend the witnesses, the search and may issue an order in writing to them or any of them so to do. The Courts generally look for

compliance of the aforesaid provisions, to the extent possible in the facts and circumstance of a given case. Hence in this case in our considered opinion, the prosecution failed to comply the provisions of Section 100(4) of Cr.P.C.

27. It is relevant to note at this juncture that when the evidence of eye-witnesses are not trust-worthy and shaky, in such circumstances, the recovery of material objects play a vital role in evidence, unfortunately, the prosecution even failed to prove such vital circumstance by adducing proper evidence. Hence, in that view of the matter, in our considered opinion, the prosecution also failed to prove the circumstances of recovery of MO.11 and MO.12.

28. Though, the prosecution relied on the evidence of PW.1 and PW.2 who are none other than the father and sister of the deceased in order to prove the motive for the commission of the crime, strangely they both turned hostile to the prosecution case. PW.2, the sister of the deceased also failed to depose the reason behind the commission of such an act by the accused. PW.2 being hearsay witness, stated that somebody informed her

about the death of her brother. Hence, the prosecution also miserably failed to prove the motive for the alleged incident.

29. The learned Addl. SPP vehemently contended that when a case rests on the evidence of direct eye-witness to the incident, the motive does not play a vital role. However in this case, by perusal of the entire evidence and material on record, none of the witness including the family members of the deceased deposed the reason behind commission of the murder of the deceased by the accused. It is the fundamental criminal jurisprudence that for a criminal act, there must be an intention. The Prosecution failed to prove the said circumstance also. Nevertheless when the evidence of eye-witnesses are not trust worthy to believe, then motive place an important role to prove the guilt of the accused.

30. The Prosecution also relied the other circumstance i.e., scientific evidence by examining PW.26-Dr.Chaya Kumari who is the FSL officer. The said witness though deposed that she examined MO.1 to MO.5 and MO.8 to MO.13, i.e., the dress and jerkin of deceased and also MO.11 and MO.12, i.e., two sickles

which are said to have been used for commission of the crime, after serological examination of those articles, she found that the stains found on those articles are of human blood and the same belongs to 'O' group. To that effect, she issued Ex.P8-report. Admittedly, the I.O did not either drew any blood from the body of the deceased or collected blood from the spot and sent the same for FSL to find out the blood group of the deceased. Without examination of the blood-group of the deceased, though the human blood of 'O' group found on the dress and other articles of the deceased, an inference cannot be drawn that the blood group of the deceased also belongs to 'O' group. It was the duty of the prosecution either to collect the blood from the spot or from the body of the deceased to determine the blood group of the deceased, but the prosecution failed to conduct such investigation to determine the same. Our view is fortified by the judgment rendered by the Hon'ble Apex Court in the case of *Rahul vs. State of Delhi Ministry of home Affairs and Anr.* reported in *AIR 2022 SUPREME COURT 5661* wherein, the Apex Court held as under:

"30. It is true that PW-23 Dr.B.K.Mohapatra, Senior Scientific Officer (Biology) of CFSL, New Delhi had stepped into the witness box and his report regarding DNA profiling was exhibited as Es.PW-23/A, however mere exhibiting a document, would not prove its contents. The record shows that all the samples relating to the accused and relating to the deceased were seized by the Investigating Officer on 14.02.2012 and 16.02.2012; and they were sent to CFSL for examination on 27.02.2012. During this period, they remained in the Malkhana of the Police Station. Under the circumstances, the possibility of tampering with the samples collected also could not be ruled out. Neither the Trial Court nor the High Court has examined the underlying basis of the findings in the DNA reports nor have they examined the fact whether the techniques were reliably applied by the expert. In absence of such evidence on record, all the reports with regard to the DNA profiling become highly vulnerable, more particularly when the collection and sealing of the samples sent for examination were also not free from suspicion.

31. In the circumstance, though the prosecution proved the homicidal death of the deceased beyond reasonable doubt,

but by perusal of the evidence of the eye-witnesses and other circumstantial evidence examined by the prosecution, we are of the opinion that the prosecution failed to connect the accused for the homicidal death of deceased. Admittedly, there is a six hours delay in transmitting the F.I.R from the Police Station to the jurisdictional Magistrate. That view of the matter has to be taken into consideration along with the complaint lodged by PW.23 as per Ex.P43 wherein the said complaint lodged against accused Nos.1 and 2 and Sampath and one Ramesh. But strangely the F.I.R registered against accused Nos.1 and 2, the said Sampath and one Vinay. Further, at the time of filing charge sheet, the respondent-Police even dropped the name of said Sampath and implicated accused No.3 in the offence. By perusal of entire materials and evidence on record, there is no such evidence deposed by the witnesses against Accused No.3. Mere presence of the accused No.3 in the scene of offence on the date of incident, itself not sufficient to either implicate him in the crime or to convict him. Though PW.23, the complainant is said to be an eye-witness to the incident, but he turned hostile to that effect. Moreover, the complaint is lodged by PW.30, one

K.V.Sunil, i.e., the practicing advocate at Virajpet Court and the said witness used to defend the complainant's case. Hence, as rightly contended by the learned senior counsels, at the inception of the prosecution case itself, i.e., lodging of complaint and transmitting of F.I.R, creates doubt in the prosecution case. The Hon'ble Apex Court in the case of ***STATE OF RAJASTHAN vs. TEJA SINGH AND OTHERS*** relied by the learned senior counsel, held that, the delay in the F.I.R reaching the Court has to be viewed seriously because requirement of law is that the F.I.R should reach the Magistrate concerned without any undue delay. Moreover, in the case on hand, the prosecution totally failed to explain the said inordinate delay of six hours in transmitting the F.I.R from the Police Station to the jurisdictional Magistrate.

32. As far as the evidence of eye-witnesses-PW.22 and PW.24 are concerned, as discussed supra, there are much contradictions in their evidence. They being well acquainted with the father of the deceased and interested witness, their evidence has to be considered in greater care and caution. The Hon’ble

Apex Court time and again held in catena of judgments that, the vital discrepancies and inconsistencies in the evidence of material witnesses has to be appreciated with greater care. It is a sound and well established rule of law that the Court is concerned with quality and not with quantity of the evidence necessary for proving or disproving a fact. The Court has to weigh carefully the testimony of the witnesses and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony opened to suspicion, then only the evidence has to taken into consider while convicting the accused. In the Case on hand the Trial Court has failed to appreciate the evidence carefully. The Trial Court passed the cryptic judgment without appreciating the evidence and materials available on record. Our view is fortified by the judgment rendered by the Hon'ble Apex Court in ***Vadivelu Thevar vs. State of Madras* (*1957 SCR 981)***.

33. On meticulous examination of evidence on record, it is clear from the evidence of PW.22, PW.23 and PW.24, that there are so many omissions and contradictions in their evidence and

the entire fabric of the prosecution case appears to be ridden with the gaping holes. It is true that due to passage of time, witness do deviate from their Police Statements as their memory fades to some extent and reasonable allowance can be made for such discrepancies. But when such discrepancies makes the foundation of the prosecution case shaky, the Court has to take strict note thereof. On thorough reading of the evidence of the prosecution witnesses, the discrepancies are located the witnesses have discredited themselves. It is well settled principle that there is no embargo on the Appellate Court reviewing the evidence upon which an order of conviction is based.

34. 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 persons and the other to their innocence, the view which is favourable to the accused persons should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice should be prevented. A

miscarriage of justice which may arise from acquittal of the guilty is not less than the conviction of an innocent. Our view is fortified by the dictum of the Hon'ble Supreme Court in the Case ***Lakshman V/s State of Maharashtra*** reported in ***AIR 2002 SC 2973*** and the same is reconsidered by the Hon'ble Apex Court in its latest judgment in the case of *Purushottam Chopra and another vs. State (Govt of NCT, Delhi)* reported in *AIR 2020 SC 476.*

35. The Learned Sessions Judge has ignored number of reasonable doubts which legitimately arose on the evidence lead by the prosecution and its conduct in suppressing the material witness which clearly indicate that the prosecution failed to prove the guilt of the accused beyond all reasonable doubt. The inconsistency of lodging the complaint against 4 persons, subsequently registering the case against 3 persons and finally at the time of filing charge sheet dropping the accused No.3 and implicating the present accused No.3 and the preparing of complaint by an Advocate known to PW.23 and the delay in transmitting the F.I.R to the Jurisdictional Magistrate, creates

doubt in the prosecution case at its inception itself. So also the contradictions in the evidence of eye-witnesses and other recovery mahazar witnesses also creates doubt in the mind of this Court about the veracity of those witnesses. Hence, the benefit of doubt has to be given to the accused persons. In that view of the matter, we are of the considered opinion that the Prosecution failed to prove the charges leveled against the accused beyond reasonable doubt and accordingly, we answer the above points which raised for consideration and proceed to pass the following:

ORDER

i. The Criminal Appeal No.879/2016 filed by the appellants / accused Nos.1 to 3 is hereby allowed. Consequently the Appeal filed by the State in Criminal Appeal No.2118/2016 is dismissed.

ii. The Judgment of conviction and Order of sentence passed in SC.No.50/2014 dated 30.03.2016 by the 2nd Addl. District and Sessions Judge, Kodagu – Madikere (Sitting at Virajpet) is hereby set aside.

iii. Accused Nos.1 to 3 are hereby acquitted of the charges leveled against them for the offence

punishable under Sections 302, 109, 120B, 341 R/w 34 of Indian Penal Code 1860.

iv. The Bail and Surety Bonds executed by accused Nos.1 to 3 are hereby cancelled and if the accused deposited the fine amount, if any, before the Trial Court, the same shall be refunded to them on proper identification.

v. The Registry is hereby directed to communicate this Order to the concerned Jail Authority and the Jail Authorities are hereby directed to release Appellants/accused Nos.1 and 2 forthwith, if they are not required in any other cases.

Sd/-
JUDGE

Sd/-
JUDGE

BNV