R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 27th DAY OF FEBRUARY, 2015

PRESENT

THE HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDAR

AND

THE HON'BLE MR. JUSTICE P.S. DINESH KUMAR

Criminal Appeal No.379/2011

BETWEEN:

1. Annayappa @ Krishnappa
   S/o Dhoomappa
   Aged about 58 years
   Kumbaranahalli
   Janata Colony, Anekal Taluk
   Bangalore

2. Babu
   S/o Annayappa
   Aged about 28 years
   Kumbaranahalli
   Janata Colony, Anekal Taluk
   Bangalore

..Appellants

(By Sri Hashmath Pasha, Adv.,)

AND :

State of Karnataka
By Anekal Police
Rep by S.P.P.
High Court of Karnataka
Bangalore

..Respondent

(By Sri B.T. Venkatesh, Addl. SPP.,)

This Criminal Appeal is filed under Section 374(2) of Cr.P.C praying to set aside the Judgment & Order dated 15/17.02.2011 passed by the Principal District and Sessions Judge, Bangalore Rural district, Bangalore in S.C.No.297/2008 convicting the appellants/accused for the offence punishable under Section 302 r/w 34 of Indian Penal Code.

This Criminal Appeal having been heard and reserved for judgment, coming up for pronouncement of Judgment this day, **MOHAN M. SHANTANAGOUDAR .J.,** delivered the following.

J U D G M E N T

This appeal is filed by the convicted Accused Nos.1 and 2 questioning the Judgment & Order of conviction and sentence dated 15/17.2.2011 passed by the Prl. District & Sessions Judge, Bangalore Rural district, Bangalore in S.C. No.297/2008.

The appellants herein alongwith Accused Nos.4 and 5 were tried for the offence punishable under Section 302 r/w Section 34 of IPC. By the impugned Judgment, Accused Nos.4 and 5 are acquitted, whereas the appellants herein (Accused Nos.1 and 2) are convicted for the offence under Section 302 r/w 34 of IPC.

It is relevant to note that Accused No.3 was a juvenile and hence the proceedings are pending against him in the Juvenile Court.

2. Case of the prosecution in brief is that five persons including the appellants herein formed themselves into an unlawful assembly armed with deadly weapons like clubs and stones at about 00.30 hours i.e., on the night intervening between 7.7.2008 and 8.7.2008, with the common object of murdering Muniraju; they came near the place where the deceased Muniraju was proceeding towards

his house; Accused No.3 threw chilly powder on the face of Muniraju; Accused No.2 assaulted on the head of Muniraju with club, consequent upon which Muniraju fell down; Accused No.1 lifted a stone and threw on the head of Muniraju and Accused No.2 lifted another stone and threw on Muniraju, consequent upon which Muniraju sustained severe bleeding injuries on his head and died on the spot; the dead body was lying in a pool of blood; Accused Nos.4 and 5 who were present during the relevant time abetted other accused to commit murder of Muniraju.

3. In order to prove its case, the prosecution in all examined 26 witnesses and got marked 24 Exhibits and 17 Material Objects. On behalf of the defence, no witness is examined. As aforementioned, the case against Accused No.3 was split up and was sent to juvenile Court inasmuch as Accused No.3 was a juvenile during the relevant point of time. The trial Court acquitted Accused Nos.4 and 5 and

convicted Accused Nos.1 and 2 for the offence punishable under Section 302 r/w 34 of IPC.

4. Sri Hashmath Pasha, learned advocate appearing on behalf of the appellants taking us through the entire material on record submits that the 3rd charge framed by the Court below is defective and the said charge has caused serious prejudice to the accused; as Accused No.1 did not know as to the exact charge against him, he could not defend his case before the Court below properly and therefore the conviction recorded by the Court below against him is improper and incorrect; the statement of PW.2 who is the eye-witness to the incident was recorded on 9.7.2008 i.e., after two days of the incident in question, though he was allegedly present on 7.7.2008 near the scene of offence; the presence of PW.2 is not spoken to by anybody except PW.1; the presence of PW.3 (another eye-witness) is not spoken to by PW.2 and so also presence of PW.2 is not

spoken to by PW.3; the statement of PW.3 is also recorded after two days of the incident; the evidence of the doctor (PW.7) who conducted the post-mortem examination reveals that the incident has not occurred at the time as sought to be made out by the prosecution; the post-mortem report as well as the doctor's evidence reveal that the deceased had taken his last meal about 5 to 6 hours prior to his death; since the evidence of the eye-witnesses reveals that the incident had taken place within an hour or two after having dinner and as the same is contrary to the medical evidence, the versions of the eye witnesses cannot be believed; the Station House Officer of the Police Station has deposed that PW.1 gave the written complaint, whereas PW.1 (complainant) has deposed that he gave complaint orally, which came to be reduced to writing by a Police Constable in the Police Station; the first information (Ex.P1) is not really the first information inasmuch as the Inspector of Police had informed the Head Constable - PW.25 about

the incident on 8.7.2008 at 2 a.m. itself over the phone and the Sub-Inspector of Police as well as the Inspector of Police were on the spot at 2.30 a.m.; whereas the first information came to be lodged by PW.1 before the Police Station at 3 a.m.; since the Police were at the spot much prior to lodging of the complaint, Ex.P1 cannot be treated as the first information report, but it can at the most be treated as the statement recorded by the Police during the course of investigation and consequently is hit by the provisions of Section 162 of Cr.PC; the time of incident as projected by the prosecution is not true; the presence of PWs.2 and 3 at the scene of offence is doubtful; PW.2 is an interested witness whereas PW.3 is a change witness; the origin and genesis of the case is suppressed by the prosecution. On these among other grounds, he prays for acquittal of the accused.

Per contra, Sri Venkatesh, learned Addl. SPP argued in support of the judgment of the Court below contending that

the evidence of PWs.2 and 3 is more than sufficient to bring home guilt against the accused; the evidence of PWs.2 and 3 cannot be doubted; merely because the eye witnesses knew the deceased, their versions cannot be doubted or that they cannot be dubbed as interested witnesses. He further submits that the entire material on record is properly appreciated by the Court below while coming to the conclusion and therefore no interference is called for.

5. PW.1 is the younger brother of the deceased; he received the call from PW.2 at 1.30 a.m. on 8.7.2008 over phone about the incident of assault by Accused Nos.1 to 3; he went and saw the dead body of the deceased; immediately, he rushed to the Police Station and lodged the complaint as per Ex.P1 before the Station House Officer – PW.25. Based on Ex.P1 – complaint, Crime No.188/2008 came to be registered by PW.25 and the FIR was sent to the jurisdictional Magistrate as per Ex.P16. PW.1 is also a

witness for scene of offence *panchanama* Ex.P2. He is also a witness for *panchanama* – Ex.P3 under which the clothes of Accused Nos.1 and 2 were seized from their house. Mos.12 and 13 are the apparels of Accused No.1 and Mos.14 and 15 are the apparels of Accused No.2.

PW.2 is an eye witness to the incident. He was accompanying the deceased during the relevant point of time while deceased was proceeding to his house after having dinner in Amaravathi hotel. He informed about the incident to PW.1 in detail and in turn PW.1 came to the spot as mentioned supra and lodged the complaint.

PW.3 is another eye witness. He is from Adur village. He has deposed that while he was passing through the road near the place of incident, he heard *galata* and stopped his vehicle for a while and saw the incident of murder of the deceased Muniraju by Accused Nos.1 to 3.

PW.4 has deposed that he went alongwith the deceased, Kaverappa, Suresh (PW.2) and Srinivas (PW.10) for erecting cut-outs of Gottigere Manjunath in the evening of 7.7.2008; such work continued up to 11.30 p.m. on 7.7.2008; all of them had dinner at Amaravathi hotel; thereafter he (PW.4) left the deceased at the main gate of their village and then he proceeded in the car alongwith Kaverappa. Subsequently, he came to know about the death of the deceased.

PW.5 is the witness for scene of offence mahazar Ex.P2 under which Mos.1 to 7 were seized; they are the stones, clubs and slippers.

PW.6 is the elder brother of the deceased. He came to the spot after hearing the *galata*.

PW.7 is the doctor who conducted the post-mortem examination over the dead body of the deceased; Ex.P11 is the post-mortem report. Ex.P12 is his opinion about the

weapon. He has opined that the death is due to shock as a result of the head injury sustained by the deceased. He has also deposed that the deceased has sustained as many as ten injuries.

PW.8 is the witness for inquest *panchanama* – Ex.P13.

PW.9 is the friend of the deceased. He came to the spot and saw the dead body subsequent to the incident.

PW.10 is one more eye witness to the incident. However he has turned hostile to the case of the prosecution though supported the case to certain extent on other aspects.

PW.11 is the Assistant Director of Forensic Science Laboratory. His report is at Ex.P15. He has conducted the test relating to sample mud and blood stained mud – Articles 8 and 9 and has given the report.

PW.12 is the Police Constable who delivered the first information report to the jurisdictional Magistrate at 3.45 a.m. on 8.7.2008.

PW.13 is the Assistant Executive Engineer of BESCOM. He has given the report as per Ex.P17 showing that there was a power supply in the area on 8.7.2008 from 00.00 hours to 6 a.m.

PW.14 is the Head Constable. She arrested Accused No.4 – Shanthamma on 8.7.2008 at 2.30 p.m.

PW.15 is the Police Constable who arrested Accused No.5 on 8.7.2008.

PW.16 is the Police Constable. He participated in the course of investigation.

PW.17 is the Assistant Engineer of BESCOM. He has also deposed about the electricity supply during the relevant point of time.

PW.18 is the Assistant Engineer who drew the sketch of scene of offence as per Ex.P19.

PW.19 is a resident of Janatha colony in Kumbaranahalli and he has turned hostile to the case of the prosecution.

PWs.20, 21 and 22 are the Police Constables who participated in the investigation at different times.

PW.23 is the Inspector of Police He filed the charge sheet after completion of investigation.

PW.24 is the Scientific Officer of the Forensic Science Laboratory, Bangalore. She has given her report as per Ex.P22 after examining Mos.1 to 17.

PW.25 is the Station House Officer of the Police Station during the relevant point of time. He received the complaint as per Ex.P1 from PW.1 and registered the first information

(complaint) in Crime No.188/2008 and submitted the first information report to the concerned jurisdictional Magistrate.

PW.26 is the Investigating Officer who conducted part of the investigation.

6. The case of the prosecution mainly rests on the evidence of eye witnesses PWs.2,3,10 and 19. Out of them, PW.19 has turned hostile completely to the case of the prosecution and PW.10 has turned hostile to a major extent. However PWs.2 and 3 have supported the case of the prosecution fully.

7. As aforementioned, it is the case of the prosecution that PW.2, PW.10, deceased, PW.4 and one Mr. Kaverappa were involved in erecting the cut-outs of their political leader Gottigere Manjunath at various places; they erected the cut-outs from 8.30 p.m. to 11.30 p.m. on 7.7.2008; the birthday of Gottigere Manjunath was on 8.7.2008 and the

deceased, PWs.2,4 & 10 and others wanted to celebrate his birthday; after finishing the work of erecting the cut-outs of Gottigere Manjunath at 11.30 p.m. on 7.7.2008, all of them had dinner at Amaravathi hotel near APC circle; the deceased consumed alcoholic drinks also; all of them came up to the main gate of the village in the car; PW.4 and Kaverappa dropped PW-2, PW.10 and the deceased near Janatha colony of the village and proceeded further in the car; the house of the deceased is situated in a garden land abutting Janatha Colony; PWs.2,10 and the deceased started going towards their houses; when they came near the house of the deceased, all the five accused suddenly came to the spot with club and chilly powder; Accused Nos.4 and 5 instigated other accused to do away the life of the deceased; Accused No.3 threw chilly powder on the face of Muniraju; Accused No.2 assaulted on the head of the deceased with club; the deceased fell down; Accused No.1 took a big stone and threw it on the head of the deceased;

Accused No.2 took another stone and threw it on the head of the deceased; immediately after the incident, PW.2 informed PW1 (brother of the deceased) over phone and in turn PW.1 rushed to the spot and saw the dead body which was lying in the pool of blood and thereafter complaint came to be lodged; the incident has taken place at about 00.30 hours on 8.7.2008; PW.1 came to the spot at about 1.00 to 1.30 hours on 8.7.2008 and lodged the complaint at 3.00 a.m. in Anekal Police Station, which came to be registered in Crime No.188/2008. The first information report reached the Magistrate at 3.45 a.m. on 8.7.2008. From the above, it is clear that the complaint came to be lodged without any delay. It has also reached the jurisdictional Magistrate within 45 minutes after registration of the complaint. Therefore this is not the case wherein it can be argued that there was scope for improving or for concocting the case of the prosecution.

8. The first information (complaint) lodged by PW.1 is at Ex.P1. PW.1 in his complaint/Ex.P1 repeated the entire episode as heard by him from PW.2. Even the minute details of the incident are given by PW.1 at the time of lodging the first information. He has given the names of the persons who were accompanying the deceased during the relevant point of time. He has narrated the overt acts of Accused Nos.1 to 3 as well as Accused Nos.4 and 5. He has also specifically deposed about the role played by PW.19 – Gopal who is the neighbour of the deceased. In short, we find that the complaint reveals every minute detail of the incident.

9. The complainant is examined as PW.1. He has reiterated in the evidence before the Court below that he received the information from PW.2 about the incident over phone and soon rushed to the spot and saw the dead body; immediately thereafter he went to the Police Station and

lodged the complaint. Though PW.1 is not the eye witness to the incident, his evidence is relevant in view of the fact that the complaint lodged by him contains every minute aspect of the incident in question. Since the complaint came to the lodged with every detail of the incident, it cannot be said that the case of the prosecution is manipulated, particularly when the first information is lodged within 2 to 2 ½ hours after the incident.

10. The case of the prosecution is supported by the ocular testimony of PWs.2 and 3.

PW.2 has deposed that himself, PW.10, Kaverappa and PW.4 erected the cut-outs of Mr.Gottigere Manjunath on 7.7.2008; after completion of such work at 11 p.m. on 7.7.2008, they went to the hotel near APC circle and had dinner; they were there in the hotel up to 12.30 midnight intervening between 7.7.2008 and 8.7.2008 and thereafter they returned to the village in the car of deceased Muniraju;

PWs.2, 10 and the deceased alighted from the car to go towards their houses; PW.4 and Kaverappa with the permission of the deceased took his car and proceeded further by telling that they would be coming in the morning; PW.2, PW.10 and the deceased while proceeding towards the house of the deceased, met Gopal (PW.19) who had just come from Krishnagiri; after talking with PW.19, the deceased, PW.2 and PW.10 proceeded further and immediately thereafter the incident had occurred; all the accused came in a group; Accused No.3 threw chilly powder on the deceased; Accused No.2 assaulted the deceased with the club on the backside of his head; on account of the blow on the head, the deceased fell down facing the ground; Accused NO.1 threw a big stone on the head of the deceased; Accused No.2 took another stone which was lying there and threw on the head of the deceased; Accused Nos.4 and 5 instigated the other accused to commit the murder of the deceased; though he (PW.2) and PW.10 went

to the rescue of the deceased, they were threatened with dire consequences; Gopal (PW.19) went towards the house of the deceased Muniraju to inform the inmates of the house of Muniraju about the incident; however PW.2 informed about the incident to PW.1, who in turn came to the spot within 5-10 minutes; PW.1 once again talked with PWs.2 and 10 and went to the Police Station and lodged the complaint. It is also deposed by PW.2 that there was sufficient electrical light to see the incident and that everything was clearly visible since the mercury bulb was on. He has also deposed about the motive for commission of the offence.

Though PW.2 is subjected to searching cross-examination, nothing worth is elicited by the defence so as to discard his evidence. In the cross-examination, it is elicited by the defence that PW.2 is none other than the close relative of Accused No.1. PW.2 is also resident of Janatha colony. He admits that Accused No.1 is his

maternal uncle, which means Accused No.1 is brother of PW.2's mother. It is suggested by defence to PW.2 that there was quarrel between his mother and Accused NO.1 with regard to division of properties, but such suggestions are all turned down by PW.2. PW.2 has further deposed that his mother and Accused No.1 own 2 acres of land jointly and the same is not divided. He has reiterated in the cross-examination as to how the incident had taken place and as to how Accused Nos.1 and 2 brutally committed the murder of the deceased. He has further deposed that after talking with PW.19 – Gopal, they went further for about 4- 5 steps and at that point of time, the incident had taken place. He has further deposed that the deceased died instantaneously after Accused Nos.1 and 2 smashed the head of the deceased with stones. Looking to the answers given by PW.2 in his cross-examination, it is clear that he is a self employed man and not dependent on others; he has been

earning by hiring a taxi; he also owns a van and uses the same for transporting milk to the dairy.

11. We do not find any ground to disbelieve the version of PW.2 inasmuch as his version is natural and reliable. His presence cannot be doubted inasmuch as he is the friend of the deceased and had gone for erecting the cut-outs of their leader Gottigere Manjunath on the relevant day along with deceased and others.

12. The case of the prosecution is further supported by the evidence of PW.3. The evidence of PW.3 is on par with the evidence of PW.2. PW.3 has deposed that he knew all the accused as well as the deceased; he was having a *kabab* shop at Adur; on every Monday, he used to close his shop (weekly holiday) and proceed to Bangalore for purchasing items for preparing *Kabab*; 7.7.2008 was also a Monday and therefore he had closed his *kabab* shop and

gone to Bangalore for purchasing *kabab* items; at 7.00 p.m. he left Bangalore to come to his native place; at 9.30 p.m. he reached Jigani; he spent some time at Jigani with his relative and thereafter he started going towards his native place Adur on Jigani-Anekal road; while he was so proceeding, he heard some *galata* near Kumbaranahalli Janatha colony; on seeing *galata,* he parked the vehicle and saw the incident; the quarrel was in progress; Accused No.3 threw something on the deceased; Accused No.2 gave a blow with a club to deceased and the club broke into pieces; Accused No.4 and Accused No.5 were standing aside; Accused No.1 pelted stone on the head of the deceased and then Accused Nos.2 and 3 also pelted stone on the head of the deceased; he saw the incident standing at a distance of about 30 feet; he is from a neighbouring village; on account of fear, he drove away his vehicle from the spot to his home and once again returned back to the place next day at about 5 or 5.30 a.m. He has also deposed about the motive for

commission of the offence after learning about the same from others. Even in the cross-examination, he has reiterated about the incident in question and overt acts of each of the accused. He has asserted that he knew the deceased because the deceased used to come to his shop and purchase the eatables; however he was not his close friend. He has further asserted that while going to Adur from Bangalore, he will have to pass through Kumbaranahalli which is near the scene of offence. He also admits in the cross-examination that he could not lodge the complaint immediately after seeing the incident because of fear and after reaching home, his wife did not permit him to go outside the house till the morning of 8.7.2008.

13. Sri Hashmath Pasha, learned advocate for the appellants strenuously argued that the evidence of PWs.2 and 3 cannot be believed inasmuch as PW.2 is an interested witness and PW.3 is a chance witness.

Merely because PW.2 is the friend of the deceased, he cannot be treated as an interested witness. His presence with the deceased was natural on the scene of offence. In the cross-examination of PW.2, his evidence was not shaken. The house of PW.2 is nearby the house of the deceased. PW.2 is none other than the nephew of Accused No.1. If really the incident has not taken place as narrated by PW.2, there was no reason for him to depose against his own maternal uncle, particularly when there is no malice against him. On the contrary, PW.2 has boldly deposed before the Court about the incident in question though he is the nephew of Accused No.1. As a matter of fact, PW.2 is more interested in the family of Accused No.1 inasmuch as Accused No.1 is his maternal uncle. Whereas the deceased is not related to him. As aforementioned, PW.2 has also deposed that there is no dispute on the property issue between his mother and Accused No.1 inasmuch as the only property measuring about 2 acres has still remained joint.

In view of the same, he cannot be treated as an interested witness.

So also PW.3 cannot be dubbed as a chance witness. According to the defence, the presence of PW.3 could not have been found near the scene of offence at the odd hours. Such doubt of the defence is clarified by PW.3 himself by deposing that he had been to Bangalore for purchasing items for his *kabab* shop in usual manner; since 7.7.2008 was Monday and as the *kabab* shop would be closed on every Monday in order to facilitate himself to get the items from Bangalore for preparing *kabab*, he was free on that day and had been to Bangalore for purchasing the items. After purchasing the items from Bangalore, he was going towards his house situated at Adur village. He has also clarified that he will have pass through Kumbaranahalli village i.e., near seene of offence while proceeding towards his house from Bangalore. He withstood in his cross-examination by reiterating that he had been to Bangalore for purchasing

items for his *kabab* shop and only after hearing *galata* in the Janatha colony, he stopped his vehicle and saw the incident and thereafter went to his house. He has confessed before the Court that he could not come out of the house till morning because his wife prohibited him from going out of the house because of fear. He also admits that the situation at that point of time did not warrant him to come out and intervene in the matter. In other words, PW.3 did not want to interfere in the quarrel between the accused and the deceased inasmuch as he did not want to risk his life.

14. The defence further argued that the statements of PWs.2 and 3 are recorded after two days of the incident in question and therefore their versions are after thought.

Such submission cannot be accepted. The incident had taken place at about 00.30 hour to 1.00 hour on 8.7.2008. On seeing the brutal and merciless attack on the deceased, both the eye witnesses PW.2 and 3 were very

much feared and they did not even try to save the life of the deceased because of such fear. PW.10 who was another eye witness also did not come to the rescue of the deceased. They were mute spectators. Incident has taken place, may be within one or two minutes. On going through the admission of PW.3 that the situation at that point of time and on that day did not warrant him to interfere and lodge the complaint immediately, itself would clearly reveal that the murder had taken place because of political reasons and the situation in the area was tense. In this view of the matter, we are of the opinion that the innocent persons who are financially weak and helpless, generally would not venture to come out of the houses immediately to lodge the complaint. Merely because the statements of PWs.2 and 3 are not recorded early, their versions cannot be suspected. Moreover the argument of the defence that the statements of these two witnesses are recorded after two days is not correct. In fact their statements are recorded after one day

of the incident. As aforementioned, the incident had taken place at about 1 a.m. on 8.7.2008 and the statements are recorded on 9.7.2008 i.e., on the next day of the incident. It is no doubt true that PW.2 has admitted that the Police talked with him immediately after the incident. It may be the lapse on the part of the investigating officer in not recording the statement of this witness immediately. The fact remains that the statements of PW.2 and PW.3 are recorded on the next day of the incident.

The belated recording of the statements of the eye witnesses would not *ipso facto* affect the case of the prosecution in view of the fact that the version as stated by PW.2 was entirely found in the complaint Ex.P1 lodged by PW.1 within two or two and half hours of the incident. Complaint is lodged by PW.1 as told by PW.2. This means PW.2 has narrated about the incident in detail immediately after the incident to PW.1, who in turn lodged the complaint without any delay, containing all the details as narrated by

PW.2. The complaint very much discloses the presence of PW.2 alongwith the deceased at the time of commission of the offence. It is specifically stated in the complaint that the complainant got information from PW.2 over phone about the incident and all the details as deposed by PW.2 before the Court are found entirely in the complaint – Ex.P1 which is lodged within two and half hours of the incident. There was no scope for the Police to improve the case of the prosecution inasmuch as the First Information Report has reached the Magistrate within 45 minutes after registration of the crime. Therefore the belated recording of the statement of PW.2 by the Police during the course of investigation would not affect the merit of case of the prosecution at all. It is well settled that in case of defective investigation, the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands

of the Investigating Officer if the investigation is defective. If primacy is given to designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcing agency but also in the admisitration of justice [see judgments in the case of PARAS YADAV AND OTHERS .vs. STATE OF BIHAR {1999(2) SCC 126} and in the case of RAM BIHARI YADAV .vs. STATE OF BIHAR AND OTHERS {1998(4) SCC 517}].

We are conscious of the fact that the delayed examination of witnesses by the investigating agency in certain cases may create a doubt in the mind of a Court for accepting the testimony of the witnesses. However if the explanation offered by the prosecution for such delay in recording the statements of the vital witnesses is reasonable and acceptable, the Court may condone such lapse on the part of the Investigating Officer.

We are of the opinion that the question as to whether the delay in recording the statements of the eye witnesses during the course of investigation affects the merits of the matter or not, depends upon the facts and circumstances of each case. If the witnesses stand the test of cross-examination and if the prosecution is able to explain the delay in recording the statements satisfactorily, there is no reason as to why the benefit should go to the accused for the delayed recording of the statements. The Apex Court in the case of AMBIKA PRASAD .vs. STATE (DELHI ADMINISTRATION) – 2000 SCC (criminal) 522 relying upon the dictum laid down by the Apex Court in the case of KRISHNA PAL (DR.) .vs. STATE OF U.P. – 1996 SCC (CRIMINAL) 249 held that the delay in recording the statements of the eye witnesses shortly after the incident would not be a ground to discard the convincing and reliable evidence adduced in the case. While concluding so, the Apex Court has found that the investigating agency has

explained the delay in recording the statements of the eye witnesses.

Having regard to the aforementioned legal position and under the facts and circumstances of this case, we find that the evidence of PW.2 cannot be doubted only on the ground of non-recording of his statement immediately after the incident.

So also the version of PW.3 cannot be doubted merely on the ground of belated recording of his statement. He has clearly admitted in the cross-examination that he was not permitted by his wife to go out of his house till the morning of 8.7.2008 and thereafter he came out of the house. Even otherwise, he is an independent witness. He is not related to either the accused or the deceased. He knows both the accused as well as the deceased since he is from a neighbouring village and that the said persons were purchasing eatables from his shop.

We find that the evidence of PWs.2 and 3 is consistent, cogent and reliable. They have fully supported the case of the prosecution. Their evidence is consistent with the case of the prosecution and their version has remained blemishless. Nothing worth is elicited by the defence in their cross-examination so as to discard their versions.

15. Though PW.10, another eye witness has turned hostile to major extent, he has supported the case of the prosecution to certain extent. According to the case of the prosecution, PW.10 has also accompanied PW.2 and the deceased on that day after dinner to go to his house. PW.10 has categorically deposed that by 12.30 midnight intervening between 7.7.2008 and 8.7.2008, himself, deceased and PW.2 came to the village and got down from the car. Thereafter according to PW.10, he went towards his house. However he has deposed about *galata* between the

accused and the deceased. The rest of the incident as deposed by PW.2 and PW.3 is not supported by this witness.

From the evidence of PW.10, it is clear that he has also accompanied the deceased and PW.2 upto the spot in question and that *galata* took place. The version of PW.10 atleast confirms the presence of PW.2 on the spot. PW.10 has also deposed about the motive for commission of the offence. He further admits that quarrels used to take place between the accused and the deceased on number of occasions; since the deceased had taken out the Ambedkar photo fixed in the Janatha colony, the accused had grouse against the deceased and in that regard, panchayath was held in the village and the matter was settled.

16. Apart from the ocular testimony of the aforementioned witnesses, the evidence relating to motive for commission of the offence is also amply available on record.

The aspect of motive is deposed by PWs.1,2 and 3. According to them, there used to be frequent quarrels between the accused on one side and the deceased on the other. Deceased and his group were supporting their leader Gottigere Manjunath who had contested for assembly elections, whereas the accused were supporting rival political party candidate. Number of complaints and counter complaints were lodged between them. The deceased had removed the Ambedkar photo which was fixed by the accused in the Janatha colony and in that regard also, the accused had grouse against the deceased. In that regard, panchayath was also convened and the matter was settled in the village.

17. It is no doubt true that the Police came to the spot prior to registering the crime based on Ex.P1. Technically speaking, the defence is justified in arguing that Ex.P1 cannot be treated as first information report and at the

most, it can be treated as the statement recorded during the course of investigation under Section 161 of Code of Criminal Procedure. But that itself will not harm the case of the prosecution. Since the deceased was a political leader in the area, the news must have been spread immediately and must have reached the Police Station and hence the Police must have come to the spot and thereafter the investigation is taken up.

18. Sri Hashmath Pasha, learned advocate for the appellant submits that it is not clear as to whether the complaint lodged by PW.1 was oral or a written complaint (pre-prepared complaint).

It is no doubt true that Ex.P1 discloses that pre-prepared complaint came to be lodged by PW.1 which came to be registered. However it is clarified by PW.1 that he went to the Police Station and gave the oral information/complaint which came to be reduced to writing

by the Police Constable who was present in the Police Station and such complaint which was reduced to writing by the Police Constable was presented by PW.1 before the Station House Officer.

PW.25 – SHO has admitted in the cross-examination that Ex.P1 was written in the Police Station itself and one Mr. Channaveerappa, Police Constable wrote the complaint. It is further admitted by PW.25 that the complainant – Nagaraj (PW.1) was not in a position to write the complaint (obviously because his brother was brutally murdered). PW.25 instructed the complainant to take the help of Police Constable – Channaveerappa for writing the complaint. Accordingly, the complaint came to be written in the Police Station by Police Constable - Channaveerappa and the same was presented before the Station House Officer for registration.

19. It is also contended by the defence that the charges framed against the accused are not specific and

consequently great prejudice is caused to the accused in setting forth the defence.

Such submission also cannot be accepted. For better understanding of the issue, it is just and necessary to note the charges as framed by the trial Court, which read thus:

> That you Accused 1 to 5, on account of previous illwill between you and C.W -1's brother Muniraju, on 07.07.2008 between 12.30 a.m. and 01.00 a.m. at Kumbaranahalli Janatha colony, on the road in front of Muniyappa's house, when Muniraju was moving, you all the accused formed into an unlawful assembly with the common object of murdering the said Muniraju and thereby committed an offence punishable under Section 143 of IPC and within my cognizance.
>
> That you accused on the aforesaid date, time and place, being the members of unlawful assembly, committed rioting armed with deadly weapons like clubs and stones and thereby committed an offence punishable under Sections 147, 148 IPC and within my congnizance

That you accused on the aforesaid date, time and place, being the members of unlawful assembly with the common object, A-3 threw chilly powder on the face of Muniraju, Muniraju fell down, you A-2 and A-3 threw stones and committed his murder and thereby committed an offence punishable under Section 302 r/w 149 IPC and within my cognizance.

That you accused on the aforesaid date, time and place, being the members of unlawful assembly with the common object, you A-4 and A-5 were present and abetted the other accused to commit the murder of Muniraju and thereby committed an offence punishable under Section 114 r/w 149 of IPC and within my cognizance.

20. According to the defence, the 3rd charge does not cover the Accused No.1 at all inasmuch as no specific charge is framed against him for the offence under Section 302 of IPC.

Such submission cannot be accepted. Though in the 3rd charge, Accused No.1 is not specifically mentioned, undoubtedly it specifies that Accused no.1 is also charged with the offence under Section 302 with the aid of Section 149 of IPC. Added to it, it appears while drafting the charge, the trial Court has erroneously mentioned as "A-2 and A-3 threw stones" instead of "A-1 and A-2 threw stones". It seems it is a sheer typographical mistake, which cannot be made much of by the accused, more particularly when no prejudice is shown to have been caused to the accused.

As aforementioned, it is the definite case of the prosecution that Accused No.3 threw chilly powder on the deceased; Accused No.2 assaulted on the head of the deceased with the club; the deceased fell down due to assault by club; Accused No.1 lifted the stone and threw on the head of the deceased; Accused No.2 took another stone and threw on the head of the deceased and the death was

instantaneous. The first information report as well as the chargesheet clearly reveal this aspect of the matter. Keeping this in background, the charges will have to be framed and the entire material has to be viewed. It is by now well settled that if the ingredients of the section charged with are obvious and implicit, conviction under such head can be sustained irrespective of the fact whether the said section has been mentioned or not in the charge. Omission or defect in framing of charge in such cases would not disable the criminal court from convicting the accused for the offence which is found to have been proved on the evidence on record.

It is by now well settled that the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself. The order of conviction granted by the Court for a substantive offence without a specific charge can be set aside only if prejudice is made out by the accused. We are conscious of

the legal position that the omission to frame a charge is a grave defect. In some cases, the omission to frame a charge is so serious that it would vitiate a trial or render it illegal. If the material on record is sufficient to warrant conviction for a particular offence without express specification and where the facts proved by the prosecution constitute a distinct offence, but closely relevant to the same set of facts connected with one charged, the provisions of Sections 464 & 465 of Cr.PC would apply. It is needless to observe that the said provisions would apply to the cases of inadvertence in framing charge. If the defect in framing of charge is so serious that it cannot be covered under Section 464 of Cr.PC, the order of conviction can be set aside. However, as aforementioned, the order of conviction cannot be said to be invalid merely on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges; the order of conviction can be said to be invalid only if the Court comes to the conclusion that

such non-framing of charge, irregularity or omission or misjoinder of charges has also resulted in a failure of justice. If the accused is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and if the accused is given full and fair chance to defend himself against such allegations, it can be safely said that no prejudice is caused to the accused.

21. The Constitution Bench of the Apex Court in the case of WILLIE (WILLIAM) SLANEY .vs. STATE OF MADHYA PRADESH (AIR 1956 SC 116) while deciding the effect of defective framing of charges, has concluded thus:

> "Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled-up one involving the direct liability and the constructive liability without

specifying who are directly liable and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence without a charge can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.

This judgment should not be understood by the subordinate courts as sanctioning a deliberate disobedience to the mandatory requirements of the Code, or as giving any license to proceed with trials without an appropriate charge. The omission to frame a charge is a grave defect and should be vigilantly guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and

render it illegal, prejudice to the accused being taken for granted.

In the main, the provisions of Section 535 would apply to cases of inadvertence to frame a charge induced by the belief that the matter on record is sufficient to warrant the conviction for a particular offence without express specification, and where the facts proved by the prosecution constitute a separate and distinct offence but closely relevant to and springing out of the same set of facts connected with the one charged."

(Emphasis Supplied)

(Note: Section 535 of old Code is p*ari materia* with Section 464 of New Code i.e., 1973)

22. In the case of SANICHAR SAHNI .vs. STATE OF BIHAR (AIR 2010 SC 3786), the Apex Court has considered the issue relating to the effect of error in framing of charge and has held as under:

"Therefore, … unless the convict is able to establish that defect in framing the charges has

> caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory."
>
> (Emphasis Supplied)

23. In the case of DARBARA SINGH .vs. STATE OF PUNJAB (AIR 2013 SC 840), the Apex Court has concluded that the accused has to satisfy the Court that the defective framing of charge has prejudiced the cause of the accused resulting in failure of justice. It is only in that eventuality, the Court may interfere. The Court elaborated the law as under:

> "The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465 CrPC, which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some

irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

"Failure of Justice" is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be "failure of justice" not only by unjust conviction but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of

course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be overemphasized to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence. "Prejudice" is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under criminal jurisprudence, then the accused can seek benefit under the orders of the court. *(Vide:* ***Rafiq Ahmed*** *@ Rafi* ***v. State of U.P.,*** *AIR 2011 SC 3114;* ***Rattiram v. State of M.P.,*** *AIR 2012 SC 1485; and* ***Bhimanna v. State of Karnataka,*** *AIR 2012 SC 3026)".*

(Emphasis Supplied)

24. In the matter on hand, the accused has not shown as to how prejudice is caused. The case of the prosecution as aforementioned is that Accused No.2 has assaulted the deceased with club at the first instance, consequent upon which deceased fell down; Accused No.1 lifted the stone and threw it on the head of the deceased and thereafter once again Accused No.2 assaulted on the head of the deceased with another stone. Based on such facts and keeping in mind such allegations, the defence has cross-examined the witnesses. Objection was not raised by the defence during the course of trial alleging creation of confusion in the mind of the accused with regard to charge No.3. Even otherwise, since the accused knew very well about the case as made out against them by the prosecution and since the accused have cross-examined the eye witnesses at length on the point of actual involvement of the accused and roles played by the accused, in our considered opinion it is not a case wherein the prejudice is stated to have been caused to the

accused. Hence, the defect or irregularity if any, in framing of 3rd charge does not affect the case.

25. It is also relevant to note that the charge was framed against all the accused for the offence under Section 302 r/w 149 of IPC. Accused Nos.4 and 5 are acquitted. Accused No.3 is being tried before the Juvenile Court. The trial Court, on facts has come to the conclusion that there is adequate evidence on record that Accused Nos.1 and 2 shared common intention to commit the crime in question.

24. In the case of DHARI AND OTHERS .vs. STATE OF UTTAR PRADESH {AIR 2013 SC 308}, the Apex Court after considering the earlier judgments in AMAR SINGH .vs. STATE OF PUNJAB, {AIR 1987 SC 826}; NAGAMALLESWARA [K] .vs. STATE OF A.P. {AIR 1991 SC 1075}; NETHALA POTHURAJU .vs. STATE OF A.P. {AIR 1991 SC 2214}; AND MOHD. ANKOOS .vs. PUBLIC PROSECUTOR {AIR 2010 SC 566}, has reconsidered the issue whether the accused could

be convicted under Section 302 r/w 149 of IPC, in the event that the High Court had convicted three persons among the accused and the number of convicts has thus remained less than 5, which is in fact necessary to form an unlawful assembly as described under Section 149 of IPC. After considering the aforementioned judgments, the Apex Court concluded that in a case where the prosecution fails to prove that number of members of an unlawful assembly are five or more, the Court can simply convict the guilty persons with the aid of Section 34 of IPC, provided that there is adequate evidence on record to show that such accused shared a common intention to commit the crime in question. It is by now well settled that even if the accused has not been charged with the aid of Section 34 of IPC and instead charged with the aid of Section 149 of IPC, he can be convicted with the aid of Section 34 of IPC when evidence shows that common intention was shared by such accused to commit the crime. Even, the conviction of an accused

under Section 302 of IPC simpliciter is permissible if the Court reaches the conclusion on the basis of the material placed before it that injuries caused by the accused were sufficient in the ordinary course of nature to cause death and nature of the injuries was homicidal.

27. In the unreported Division Bench judgment of this Court in the case of NAYAZ PASHA .vs. STATE OF KARNATAKA in Criminal Appeal no.1924/2007 disposed of on 17th October 2012, a similar question relating to defective framing of charges was raised by the counsel for the defence. In the said matter, the prosecution case was that Accused no.1 had assaulted the deceased with the chopper, which was fatal in nature, while Accused no.2 had held the deceased by hand and facilitated the assault. But in the charge framed by the trial Court, the roles had been interchanged and the act of assault was attributed to Accused no.2 while the Accused no.1 was sought to be charged holding the deceased person and facilitated the

assault on him. In the said matter, this Court after discussion of the law on the point, has concluded that no prejudice is caused to the accused inasmuch as the accused were very much aware about the case as made out by the prosecution against them.

In the present matter also, the 3rd charge instead of mentioning "A-1 and A-2 threw stones" has mentioned that "A-2 and A-3 threw stones". However evidence was let in by the prosecution specifying the overt acts of Accused No.1 and 2 of throwing stones on the deceased. Such evidence on record is in consonance with the case of the prosecution, which is known the accused.

28. In the case on hand, not only the Accused nos.1 and 2 have actively participated in the offence by assaulting the deceased as mentioned *supra*, but also have shared the common intention to commit the crime of murder. Therefore the trial Court is justified in convicting Accused nos. 1 and 2 for the offence under Section 302 r/w Section 34 of IPC.

29. Having regard to the totality of facts and circumstances and the aforementioned discussion, we are of the opinion that the trial Court is justified in convicting Accused Nos.1 and 2 for the offence under Section 302 r/w Section 34 of IPC. The prosecution has proved its case beyond reasonable doubt as against Accused Nos. 1 and 2.

In view of the above, the appeal is liable to be dismissed and accordingly, the same stands **dismissed**.

Sd/-
JUDGE

Sd/-
JUDGE

Gss/-