The Honble Vs. Shivanand

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Court : Karnataka Dharwad

Decided On : Sep-15-2016

Judge : H.Billappa and K.N.Phaneendra

Appeal No. : CRL.RC 31/2012

Appellant : The Honble

Respondent : Shivanand

Judgement :

1 IN THE HIGH COURT OF KARNATAKA DHARWAD BENCH DATED THIS THE15H DAY OF SEPTEMBER, 2016 PRESENT THE HONBLE MR. JUSTICE H. BILLAPPA AND THE HONBLE MR. JUSTICE K.N. PHANEENDRA CRL.R.C. NO.31/2012 C/W CRL. A. NO.2549/2012 IN CRL.R.C. NO.31/2012 BETWEEN THE STATE OF KARNATAKA THROUGH KHANAPUR P.S., R/B. ARG, REPTD. BY SPP, HONBLE HIGH COURT OF KARNATAKA, DHARWAD. .. PETITIONER (BY SRI V.M. BANAKAR, ADDL. SPP.) AND:

1. SHIVANAND VISHNU GURAV, AGE:24 YEARS, OCC: AGRICULTURE, R/O. DUKKARWADI, TQ:KHANAPUR, DIST: BELGAUM. 2 2. ARJUN @ MALLIKARJUN S/O. GAVADU PATIL, R/O. DUKKARWADI, TQ:KHANAPUR, DIST: BELGAUM.

3. SANJAY SOMANING PATIL, AGE:

46. YEARS, OCC: AGRICULTURE, R/O. DUKKARWADI, TQ:KHANAPUR, DIST: BELGAUM.

4. KAMALAWWA W/O. NINGAPPA PAWASKAR, AGE:

40. YEARS, OCC: AGRICULTURE, R/O. DUKKARWADI, TQ:KHANAPUR, DIST: BELGAUM. ACCUSED. (BY SRI A.G. MULAWADMATH, ADV.) THIS CRIMINAL REFERRED CASE IS FILED U/S.366 OF CR.PC, FOR CONFIRMATION OF DEATH SENTENCE NO.1 SHIVANAND VISHNU GURAV. BY THE PRL. SESSIONS JUDGE, BELGAUM VIDE

JUDGMENT
OF CONVICTION DATED0911.1.2012 IN S.C.66/2007. AWARDED TO ACCUSED IN CRL.A. NO.2549/2012 BETWEEN ********** 1. SHIVANAND VISHNU GURAV, AGE:24 YEARS, OCC: AGRICULTURE, R/O. DUKKARWADI, TQ:KHANAPUR, DIST: BELGAUM.

2. KAMALAWWA W/O. NINGAPPA PAWASKAR, AGE:

40. YEARS, OCC: AGRICULTURE, R/O. DUKKARWADI, TQ:KHANAPUR, DIST: BELGAUM. APPELLANTS3(BY SRI A.G. MULAWADMATH, ADV.) AND: THE STATE OF KARNATAKA THROUGH KHANAPUR P.S., REPTD. BY SPP, R/B. ARG, HONBLE HIGH COURT OF KARNATAKA, DHARWAD. .. RESPONDENT (BY SRI V.M. BANAKAR, ADDL. SPP.) THIS CRIMINAL APPEAL IS FILED U/S.374(2) OF CR.PC. FOR SETTING ASIDE THE

JUDGMENT
OF CONVICTION AND

ORDER
OF SENTENCE PASSED BY THE PRL. SESSIONS JUDGE, BELGAUM IN SC NO.66/2007, DATED91.2012 AND THEREBY IMPOSING THE CAPITAL PUNISHMENT OF DEATH TO APPELLANT NO.1/ACCUSED NO.1 U/S.302 OF IPC AND FURTHER CONVICTING APPELLANT NO.2 I.E., ACCUSED NO.4 SENTENCING HER TO UNDERGO IMPRISONMENT FOR LIFE AND FURTHER

ORDER

ED FOR RIGOROUS IMPRISONMENT OF6MONTHS FOR COMMITTING OFFENCE U/S.341 OF IPC BE SET ASIDE AND APPELLANTS/ACCUSED NO.1 & 4 BE ACQUITTED. ********* THE CRL. REFERRED CASE AND CRIMINAL APPEAL HAVING BEEN HEARD AND RESERVED FOR

ORDER
AND

JUDGMENT
ON208.2016 BEFORE THE DIVISION BENCH CONSISTING OF HONBLE HBJ AND KNPJ, COMING ON FOR PRONOUNCEMENT OF4

ORDER
PHANEENDRA, J.

DELIVERED THE FOLLOWING:

JUDGMENT
, AND THIS DAY K.N.

JUDGMENT
The Principal District & Sessions Judge, Belgaum, vide judgment dated 9th January 2012 in Sessions Case No.66/2007 has convicted the accused No.1-Shivanand Vishnu Gurav and accused No.4-Kamalawwa for the offence under Section 302 read with Section 114 of Indian Penal Code and sentenced accused No.1 imposing capital punishment of death, however, sentenced accused No.4-Kamalawwa to undergo imprisonment for life and imposed six months further imprisonment for the offence punishable under Section 341 of IPC.

2. For confirmation of the sentence of death imposed on accused No.1, the learned Sessions Judge has submitted the records to this Court as required under Section 366 of Criminal Procedure Code on the basis of which Crl.R.C. No.31/2012 has been registered 5 before this Court.

3. Aggrieved by the conviction and sentence, accused No.1 and 4 have also preferred an appeal before this Court in Crl. A. No.2549/2012.

4. Both the matters arise out of the same judgment of conviction and sentence, as such they are taken together for disposal.

5. It is just and necessary to bear in mind the brief factual matrix that emerge from the records. The case of the prosecution is that, the accused persons 1 to 4 before the trial Court and witnesses P.Ws.1 to 3 as well as four deceased persons are relatives to each other. P.W.1-Pondappa is the brother of the deceased Basawwa. Deceased Goudappa is the husband of deceased Gourawwa. The another lady, who died in the incident, Gourawwa is the brothers wife of P.W.1 i.e. 6 wife of deceased Goudappa. Basawwa is the wife of P.W.3-Ramaning. All the accused persons are related to this P.W.3-Ramaning. Accused No.1-Shivanand Vishnu Gurav is the sisters son of P.W.3 i.e., the son of one Smt. Sushilamma. Accused No.2-Arjun is the another brother of P.W.3. Accused No.3-Sanjay Somaning Patil is the brother-in-law of accused No.1 and accused No.4-Kamalawwa is the sister of P.W.3 and accused No.2.

6. It is the case of the prosecution that deceased Basawwa was given in marriage to P.W.3 and there was dispute between P.W.3 and the accused persons with reference to some family properties. It is also the case of the prosecution that P.W.3-Ramaning and accused No.2 had divided their joint family properties i.e. 15 acres each and they were cultivating their shares separately. Accused No.2-Arjun was not married. Accused No.4- Kamalavva lost her husband Ningappa and she had 7 been staying in the house of accused No.2 and assisting accused No.2 in agricultural operations. Accused No.4-Kamalavva and other accused persons had an eye over the land which was given to P.W.3-Ramaning as they were issueless. But, subsequently to their frustration, Basawwa (deceased) wife of P.W.3-Ramaning gave birth to a male child by name Suresh. As said Basawwa gave birth to a male child, accused No.4-Kamalavva became hostile towards P.W.3-Ramaning and Basawwa. The said Kamalawwa and other accused wanted to usurp the property of Ramaning and Basawwa on the ground that they were issueless, but, when they got a issue later a rift started. Accused No.4 and other sisters of Ramaning started demanding their share in the property. However, the same was refused by Ramaning. In this regard, accused No.1 to 3 have been supporting accused No.4. It is also the case of the prosecution that few days prior

to the incident, accused No.1 and 3 had removed 60 truck 8 loads of sand from the land belonging to Ramaning and Basawwa in Sy.No.35/2 of Dukkarwadi village during the absence of said Basawwa. There was a police complaint in this regard and as such accused No.1 and 3 along with other accused were furious against Ramaning and Basawwa and were seeking opportunity to wreck vengeance against them.

7. In the above background it appears that the alleged incident happened and four ghastly murders had taken place. It is the further case of the prosecution that on 15.11.2006, while the deceased Basawwa and her husband Ramaning, complainant Pondappa (P.W.1), Pondappas wife Irawwa (deceased) and Pondappas brother Goudappa and Goudappas wife Gourawwa (deceased) and their son Irappa had been to their land i.e. land of P.W.3-Ramaning and they were all engaged in cutting paddy crop and also heaping the same on the thrashing floor of the said land. All the accused, who 9 were hiding in the bushes taking advantage of the situation, went near Basawwa and other persons and told them to stop cutting and heaping paddy. When Basawwa did not heed to the said demand made by the accused, accused No.1-Shivanand Vishnu Gurav, who was armed with an axe, attacked Basawwa and Goudappa and assaulted on their neck with the axe and as a result, both Basawwa and Goudappa fell on the ground and died on the spot. Accused No.2-Arjun assaulted Gouravva with an axe on her neck and she died due the injuries, on the spot. Thereafter, on seeing the incident Irawwa and others started running away from the spot, accused No.4-Kamalavva wrongfully restrained Irawwa and accused No.1 and 2 chased Irawwa, wife of P.W.1, and accused No.1 assaulted her with a chopper and caused severe injuries and she also died due to the injuries on the spot. Accused No.3 abetted commission of the offence being there at the spot and encouraging all the other persons to do away 10 with the lives of the said persons.

8. On receiving the telephonic information, P.W.30-Yallappa, PSI, rushed to Dukkarwadi village and found four dead bodies lying surrounding the thrashing floor of the land. Thereafter, P.W.3 was found on the land along with P.W.1. The PSI brought P.W.1- Pondappa to the police station and recorded his statement as per Ex.P.1 which is the primary document which set the criminal law into motion.

Thereafter, the said P.W.30 registered a case in Crime No.255/2006 for the offences under Sections, 302, 114 and 341 read with Section 34 of IPC against all the accused and despatched the FIR to the jurisdictional Magistrate. Subsequently, the investigation was taken over by P.W.29-Ganapati, who was working as Circle Inspector of Police, Khanapur Circle, during the relevant point of time. He concluded the investigation and ultimately laid 11 the charge sheet against the accused for the aforesaid offences. The accused persons were arrested, particularly, accused No.1 and 2 were arrested on 18.11.2006, accused No.3 was arrested on 16.11.2006 and accused No.4 surrendered before the Court on 21.11.2006. They were not granted with bail and they had been in custody during the course of the trial.

9. Learned Sessions Judge after securing the presence of accused persons, framed charges against the accused for the offences punishable under Sections 302, 341, 114 read with Section 34 of Indian Penal Code. As the accused persons pleaded not guilty, they were tried. It is also evident from the records, that subsequently accused Nos.3 and 4 were released on bail on 24.07.2007. It is also evident that, accused No.2- Arjun died during the course of trial on 29.09.2009 and accused No.3 also died on 03.05.2011. Therefore, proceedings stood abated as against accused No.2 and 12 3. The remaining accused Nos.1 and 4 were tried by the learned Sessions Judge, as noticed supra.

10. The prosecution in order to bring home the guilt of the accused, examined 31 witnesses as P.Ws.1 to 31 and got marked Exs.P.1 to 58, and on behalf of defence, during the cross-examination of witnesses, Exs.D.1 to D.5 were also got marked. Material objects M.Os.1 to 40 were marked. After completion of the evidence on the prosecution side, accused were also examined under Section 313 of the Criminal Procedure Code. As the accused persons did not chose to lead any defence evidence on their side, the learned Sessions Judge, after hearing the arguments and considering all the oral and documentary evidence on record, rendered the judgment of conviction which is questioned before this Court.

11. The learned Addl. State Public Prosecutor strenuously contended that four ghastly murders were 13 committed which caused serious impact on the society,

therefore, the learned sessions Judge has rightly convicted the accused No.1 and sentenced him to death which requires to be confirmed by this Court in order to send a stern and appropriate message to the society. Therefore, he contended that the judgment and order of conviction and sentence passed against accused Nos.1 and 4 does not call for any interference at the hands of this Court. His arguments on each point would be considered at relevant stage.

12. The learned counsel appearing for appellants/accused nos.1 and 4 in Crl.A. No.2549/2012 took us through the entire materials on record and submitted the arguments in detail. He mainly concentrated on the grounds with regard to the homicidal death, time of death of the deceased persons and the time of the incident. He also contended that P.Ws.1 to 3 are close relatives of the deceased and their 14 evidence has to be very carefully scrutinised by this Court. He also contends the lapses on the part of the Investigating Officer who has not ventured upon to examine all the necessary and relevant witnesses. He also took us through the evidence of P.Ws.1 to 3 as to how these persons evidence is not creditworthy. We would like to refer the same while discussing the evidence on record. It is also contended that most of the material witnesses have turned hostile with regard to the extra-judicial confession and recovery of incriminating articles at the instance of the accused including the mahazar witnesses and also the witnesses who were examined to establish the motive. He further contended that there are discrepancies and contradictions in the evidence of prosecution witnesses including the Investigating Officer, which makes the prosecution case unbelievable. He further contends that registration of the first information report and sending the same to the jurisdictional magistrate are also 15 doubtful. It is also argued that the evidence of the prosecution with regard to existence of weapons with them like sickles is suppressed and no effort was made by any of the witnesses to prevent the accused persons from doing the offence or to save the deceased persons from the hands of the accused persons. Therefore, he contended that a re-evaluation of the entire materials on record would show that prosecution has not proved the case beyond reasonable doubt. Hence, he pleaded for acquittal of the accused.

13. Lastly, learned counsel for accused Nos.1 and 4 contends that the trial Court has not properly considered the evidence on record, the circumstances of the case, previous antecedents of the accused persons before sentencing accused No.1 to death. Therefore, trial Court not giving any finding as to whether case falls under the category of rarest of rare case. Without assigning sufficient reason trial Judge has wrongly 16 sentenced accused No.1 to death. He submitted that he should not be mistaken that he is arguing for alternative punishment to accused No.1, and this plea is without prejudice to his arguments that the accused are entitled for acquittal altogether. He also submitted that the sentence imposed by the trial Court is also not proper under the facts and circumstances of the case. Therefore, he pleads before this Court for acquittal of all the accused persons.

14. Before adverting to discuss the main witnesses in this case, particularly, eyewitnesses version and other circumstances pleaded by the prosecution, it is just and necessary to refer, in brief, to the evidence adduced by the prosecution through the witnesses.

15. P.Ws.1 to 3 are the eyewitnesses to the incident; they are close relatives of the deceased and they all supported the case of the prosecution. P.W.4- Raju is a witness to Exs.P.9 to P.12 which are the 17 seizure mahazar of clothes of deceased Goudappa, deceased Basawwa, deceased Gouravva and deceased Irawwa; he turned hostile to the prosecution, however, he has admitted his signatures on the mahazars. P.W.5- Mohan is the photographer who took the photographs and is a witness to Exs.P.2 to P.8 and P.13 to P.16 and he supported the case of the prosecution to some extent. P.W.6-Tukaram is the eyewitness to the incident, but he did not support the case of the prosecution, he was examined to elicit about the previous enmity between the accused and the deceased; his statement is marked at Ex.P.17. P.W.7-Vithal also is an eyewitness; he also turned hostile and his statement is marked at Ex.P.18. P.W.8-Mahadev is the person examined before the Court who acted as a panch to settle the dispute between the accused and deceased persons, but he turned hostile to the case of prosecution and his statement is marked at Ex.P.19. P.W.9-Dhondiba is the person examined to establish 18 that on 16.11.2006 accused No.1 came to him and confessed with regard to commission of murders; he also turned hostile and

his statement is marked at Ex.P.20. P.W.10-Rayappa is examined to prove the motive for the accused persons to commit murder with reference to lifting of the sand from the land of deceased Basawwa; he has also turned hostile and his statement is at Ex.P.21. P.W.11-Nana is the person who was examined to prove that he was also present at the time of the incident and seen the incident, but he also turned hostile and his statement is marked at Ex.P.22, P.W.12- Sanjay is a coolie worker; he was examined to prove the previous dispute between the parties and panchayat held to console them and also for the purpose that he had seen accused No.1 and 4 on the date of the incident holding blood-stained axe in his hand immediately after the accident, but he also turned hostile and his statement is marked at Ex.P.23. P.W.13-Shankar is examined by the prosecution in order to prove that 19 panchayat was held to console both the parties to settle their dispute; he also not supported the case of the prosecution and his statement is marked at Ex.P.24. P.W.14-Parvati is the witness to the inquest proceedings held on the dead bodies of Gourawwa, Irawwa, Basawwa and Goudappa as per Exs.P.25, 26, 27 and 29; she also supported the case and identified his left thumb impression on these documents. P.W.15- Yallappa is the panch witness to Ex.P.28, which is the spot mahazar; he also supported the case of the prosecution and identified his signature on the document as Ex.P.29(a). P.W.15-Yallappa is also a witness to Exs.P.30 which is the seizure panchnama in respect of shirt (M.O.39) and axe (M.O.1) produced by accused No.1 and Ex.P.31-the seizure panchnama in respect of axe (M.O.2) produced by accused No.2; he is also a witness to Ex.P.28, the spot mahazar; he has partially supported the case of the prosecution. He is also a witness to Ex.P.33 under which M.O.3-Arna was 20 recovered, but this witness turned hostile to recovery process; however, he has supported the case of the prosecution sofar as inquest proceedings are concerned. P.W.16-Nirupadi is examined before the Court to prove the inquest proceedings held on the dead bodies of Gourawwa, Irawwa and Basawwa, which are marked at Exs.P.25 to 27. There is no much dispute sofar as this aspect is concerned. P.W.17-Dr.Ashok, P.W.18- Dr.Narayan and P.W.19-Dr.Pragati are the doctors who conducted the post-mortem examination on the dead bodies which are involved in this case, and in particular, P.W.17 conducted post-mortem examination on the dead bodies of Goudappa and also Gourawwa as per

Exs.P.34 and 35, P.W.18 conducted post-mortem examination on the dead body of Irawwa and issued the certificate as per Ex.P.36, and P.W.19 conducted post-mortem on the dead body of Basawwa as per Ex.P.37. On various grounds, doctors evidence has been relied upon by the learned counsel for the accused. We would 21 like to refer the said argument at the relevant point of time. P.W.20-Appanna, who was the Police constable during the relevant point of time, took the dead body of Goudappa from the spot to the hospital for post-mortem examination, along with a report as per Ex.P.38. P.W.21-Vithoba is the person, who examined to establish the previous motive showing that the deceased Basawwa had lodged a complaint, which was registered in LPT No.73/2006, against the accused in connection with lifting of sand from the land bearing Sy.No.35/2 measuring 18 guntas. He has stated that he registered the case as per Ex.P.39 and issued an endorsement as per Ex.P.40 and gave the report as per Ex.P.41. P.W.22- Mahesh, who was working as a police constable, shifted the dead body of Basawwa to the hospital for the post- mortem examination and he gave the report as per Ex.P.42, and he identified the clothes on the dead body as per M.Os.4 to 8 (clothes of Basawwa). P.W.23- Sahadev is the police constable who carried the first 22 information report to the jurisdictional magistrate. He also gave report as per Ex.P.43. P.W.24-Hanamanth, who was working as a police constable during that time, carried 18 sealed articles to the RFSl, Belgaum and brought back the articles after examination with his report as per Ex.P.44. P.W.25-Amrut, who was working as Head Constable at Khanapur, shifted the dead body of Gourawwa to the hospital for post-mortem examination; he identified the clothes of deceased Gourawwa which are marked as M.Os.9 to 14 and he gave the report as per Ex.P.45. P.W.26-Yamanappa, who was also working as a Head Constable during relevant point of time, shifted the dead body of Irawwa to the hospital; he identified the clothes on the dead body as per M.Os.15 to 18 and Mangala sutra as M.O.19; he gave the report as per Ex.P.46. P.W.27-Shivappa, who was working as a Junior Engineer, PWD department, at the instance of the police, visited the spot and prepared the sketch of scene of offence as per Ex.P.47. P.W.28- 23 Basappa, who was an agriculturist of Devalatti village, acted as panchas to Exs.P.25 and P.26 which are the inquest panchanama drawn on Gourawwa and Irawwa and also on the dead body of Basawwa as per Ex.P.27; he

identified two photographs at Exs.P.2 and P.3. P.W.29 is the prime witness who was working as CPI, Khanapur during the relevant point of time, visited the spot and right from the day-1, he investigated the matter and submitted the charge-sheet. P.W.30- Yallappa, who was working as PSI, Khanapur, during that time, on the basis of an unanimous call, went to the spot, saw P.W.1 at the spot and brought him to the police station and the said person gave oral complaint and the same was reduced into writing and he registered the case in Crime No.255/2006 and prepared the FIR. The said complaint is marked at Ex.P.1 and thereafter, he also assisted the investigating officer. He is also examined to establish the registration of LPT No.73/2006 with reference to lifting of sand by the 24 accused and the said complaint alleged to have been given by deceased Basawwa. He also refers to Exs.P.51 and 52 which are the complaints with reference to Crime No.250/2006 and Crime No.251/2006 which were registered on the basis of complaint under Section 107 of Cr.P.C., against both accused persons and their opposite parties. P.W.31-Somanna, an agriculturist was examined for the purpose of recovery of incriminating articles at the instance of the accused persons and also as a witness to Exs.P.30 to 33. The said witness turned hostile to the prosecution case.

16. On the basis of the evidence adduced by the prosecution, in the above said manner, the Trial Court, after appreciating the evidence, has recorded the judgment of conviction and sentenced the accused as noted supra.

17. As depicted, while narrating the facts of this particular case, four ghastly murders have taken place 25 at the hands of the accused persons. The prosecution, in order to establish the case against the accused persons, has relied upon various circumstances including the version of the eyewitnesses. The eyewitnesses are, in fact, are the close relatives of the deceased persons, as we have already narrated. The prosecution, in order to bring home the guilt of the accused, has relied upon the following important aspects: Homicidal death. i) ii) Motive. iii) Extra-judicial confession of accused No.1. iv) Conduct of the accused persons immediately v) after the incident. Recovery of incriminating articles at the instance of accused and its connection with the accused. vi) Eyewitnesses version vii) Regarding sentence 18. On the other hand, the defence also tried to find fault

with the prosecution by relying upon the lapses in the investigation and also the various circumstances which makes the prosecution case disbelievable which we are going to discuss in detail 26 hereinafter.

19. Now, let us consider the above said aspects in detail one-by-one.

20. Homicidal death It is a sine qua non that the prosecution has to prove the homicidal death of four persons in this particular case. There is absolutely no dispute with regard to the death of four persons by name Basawwa, Goudappa, Gourawwa and Irawwa. The learned counsel for the appellant Sri Muluwadmath has not seriously disputed about the homicidal death of the deceased persons. However, as a matter of fact, this Court has to look into the materials on record as to whether the prosecution has proved the homicidal death of these persons. 27 20.1 The evidence of P.Ws.1 to 3, who are the eyewitnesses, have categorically stated in their evidence with regard to the injuries sustained by the deceased persons on various parts of their body, inquest proceedings that was conducted on the dead bodies and with regard to shifting of the dead bodies to the hospital and conducting of the post-mortem examination. Invariably, P.Ws.1 to 3 have categorically stated about the injuries sustained by the deceased persons which are fatal in nature. Apart from the version of P.Ws.1 to 3, the prosecution has also examined P.W.14-Parvati, P.W.16-Nirupad and P.W.28-Basappa, who were present at the time of inquest proceedings held on the dead bodies of Gourawwa, Basawwa and Irawwa as per Exs.P.25 to 27. They also identified the dead bodies and the injuries on the dead bodies. P.W.15-Yallappa is the witness to the inquest held on the dead body of Goudappa as per Ex.P.29. He also supported the prosecution case that he was present at the time of 28 inquest. He identified the dead body of Goudappa and the injuries on the dead body. P.W.20-Appanna, P.W.22-Mahesh, P.W.25-Amrut and P.W.26-Yamanappa are the police constables who have shifted the dead bodies to the hospital immediately after the inquest. The investigating officer P.W.30-Yallappa has also spoken about conducting of the inquest panchanama on the dead bodies of the deceased persons. In support of the above said evidence, the prosecution also examined P.W.17-Dr.Ashok who has conducted post-mortem on the dead bodies of Goudappa and Gourawwa as per Exs.P.34 and 35; P.W.18-Dr.Narayan who has conducted post-mortem on the

dead body of Irawwa as per Exs.P.36; and P.W.19-Dr.Pragati who has conducted post-mortem on the dead body of Basawwa as per Ex.P.37. The doctors have categorically stated in support of the post-mortem examination report and deposed that, all the dead bodies had received chopped wounds on different parts of the body particularly to the 29 neck portion; they further deposed that the deaths were caused due to shock and hemorrhage secondary to trauma to the brain and rupture of large vessels over the neck. They have narrated that, in particular, Goudappa had sustained severe injuries to the head and neck; Gourawwa sustained two chopped wounds on the neck; Irawwa sustained two chopped wounds over the mandible, spinal region and also on the neck; and Basawwa sustained a chopped wound over the left neck. On the basis of the above said opinion of the doctors and the evidence available on record, it clearly discloses that the untimely death of the four persons occurred not due to any other reason except for the reason of injuries sustained by them. Therefore, there is no hesitation to hold that the prosecution has proved that all the deceased persons have died a homicidal death. 30 21. Extra-judicial confession of accused No.1 The extra-judicial confession itself is a very weak piece of evidence unless it is shown to the Court that the said extra-judicial confession is so strong which leads to no other doubt and court can safely rely upon such extra-judicial confession. Though the prosecution has relied upon the said circumstance, but while arguing the case, the learned Additional State Public Prosecutor has not pressed into service the particular circumstance as the prosecution has not been able to establish the circumstance with all rigor. Accused No.1 is alleged to have made extra-judicial confession before P.W.9 after the incident. However, this P.W.9 has turned totally hostile to the prosecution case. P.W.9 has denied that accused person approached him and requested him to help him by confessing that they have committed four murders and that this witness had suggested them to surrender before the police. But, this witness has not supported the prosecution case to any 31 extent. However, it was suggested to him that, on 16.11.2006, accused Nos.1 and 2 had been to him and told that they have committed the murder of four persons (deceased persons herein) and asked him to save them. But, the said suggestion has been denied. No other evidence is available sofar as this particular circumstance is concerned. Hence, we have no hesitation to hold that the

prosecution has not proved this particular circumstance.

22. Conduct of the accused persons immediately after the incident: It is the case of the prosecution that immediately after the accident, the accused persons i.e., accused Nos.1 to 3 holding deadly weapons i.e. to say, the axes stained with blood, were proceeding away from the lands of the deceased persons and this was seen by P.W.7, P.W.11 and P.W.12. The prosecution wants to establish the conduct the accused persons immediately 32 after the incident by examining these witnesses. However, we have no hesitation to hold that the prosecution has also not able to establish this particular circumstance as these witnesses have also not supported the case of the prosecution and their evidence is not creditworthy for acceptance. 22.1 P.W.7, who is said to be the resident of the same village, during the course of cross-examination, has stated that on the date of the incident at about 11.30 a.m. when these witnesses were harvesting in their lands, they saw accused No.1 carrying the blood- stained axe and accused No.4 was also accompanied him and that both of them were proceeding in a hurried manner. Thereafter, these witnesses came to know that the said accused persons were proceeding in that manner after committing murder of four persons due to previous ill-will. P.Ws.11 and 12 have also stated in the same fashion. They have not even supported the case of 33 the prosecution to any extent during the course of cross-examination. They have completely denied the said suggestion and their statements have been marked before the Court as per Exs.P.18, P.22 and P.23.

23. Recovery of incriminating articles and its connection to the accused: The case of the prosecution is that the Investigating Officer-P.W.29 recovered the incriminating articles at the instance of the accused persons, particularly accused No.1 and 2 as narrated by him at paragraphs 10 to 14. According to P.W.29, accused Nos.1 and 2 were arrested in connection with this case at a place called Khade Bazaar, Belgaum on 17.11.2006 and recorded their voluntary statements. Accused No.1 & 2 have given their voluntary statements as per Ex.P.49 and Ex.P.50. It is stated by the investigating officer that the accused No.1 has disclosed in his voluntary statement that he had concealed the axe and 34 also a shirt worn by him. The investigating officer secured panch witnesses and went along with accused No.1. In fact, before proceeding to recover the articles, they

also seized the pant of accused No.1 and shirt of accused No.2 which was worn by them under mahazar- Ex.P.32 which are marked before the Court as per M.Os.38 and 39. The accused No.1 first led the police near a mango tree in Dukkarwadi village situated towards the eastern side in a paddy field, which was near the place of the incident and near a stream (halla), he put his hand in a bush and took out a axe in the presence of the panch witnesses. The said axe was seized under the panchanama Ex.P.30. The axe is marked before the Court as M.O.1. It is the further case that accused No.1 led them farther to a distance of 25 feet from that place to the eastern side and took out a shirt from a bush and produced the same which was stained with blood. The said shirt was also seized as per M.O.40. Both the articles were packed on the spot and 35 sealed. Both the articles were seized under Ex.P.30. At that time, photographs were also taken which are produced as Exs.P.13 and 14. 23.1 It is the case of the prosecution as per the evidence of P.W.29 that thereafter accused No.2 led them to eastern side in the same land up to Rangi Halla and then he took deviation towards 75 feet to the western side where there were bushes and from the said bushes he took out an axe and produced before the Investigating Officer and thereafter, the said axe was seized under a mahazar Ex.P.31 in the presence of panch witnesses. Photograph was also taken at that time as per Ex.P.16. Thereafter, accused No.1 took the police and the panch witnesses to the house of accused No.2 and in the 2nd room of the said house he took out a file (arana). The said arana was also seized by the police under a Mahazar Ex.P.33 in the presence of panchas. The said arana is marked as M.O.3. 36 23.2 In order to prove this particular aspect, the prosecution has examined P.W.15 and P.W.31 in this regard. But, P.W.15 and P.W.31 have not fully supported the case of the prosecution. The investigating officer has also spoken to about the recovery of these articles as narrated above. 23.3 Before adverting to the cross-examination portion of the investigating officer, it is just and necessary to bear in mind the evidence of these two important witnesses i.e., -P.W.15 and P.W.31. P.W.15 in his cross-examination by learned Addl. Special Public Prosecutor as well as in the examination-in-chief has admitted his signatures on Exs.P.30 to 31. He has also stated that he has seen two axes before the court which were produced by accused No.1 and 2, but he cannot remember whether the very same axes were produced by accused Nos.1 and 2

on that particular date or not. In the course of cross-examination by Special Public 37 Prosecutor, it is also admitted that on that particular date, when the recoveries were made, he was invited by the Circle Inspector of Police, Khanapur, to his office at about 1.00 p.m. He has stated that no recovery was made in his presence. However, he admitted that accused Nos.1 and 2 were also present and they stated that they wanted to produce some property and this witness was requested by the police to act as panch witness and accordingly, he agreed to become a panch witness. He has further stated that he has seen the axe before the Court which is marked at M.O.1 and it may be the same axe produced by accused No.1. Likewise, he has also admitted that M.O.2, another axe which was produced by accused No.2. In the course of cross- examination, at paragraphs 6 & 7, he also admitted that accused No.1 had taken the police and panch witness to the house of the accused No.2 and he also stated that accused No.1 produced a arana-M.O.3 from the house of accused No.2. He has also admitted that Exs.P.13 to 38 16 are the photographs which were taken at the time of production of the weapons by accused Nos.1 and 2. 23.4 Looking to the above said evidence, it is clear that though this witness turned hostile and has not fully supported the production of shirt by accused Nos.1 and 2, on perusal of the entire evidence, he virtually supported the case of the prosecution by stating about the recovery of the weapons from accused Nos.1 and 2. 23.5 P.W.31-Somanna identified his signature on the mahazar but stated that he does not know about the production of any axe as well as the shirt by accused No.1 and 2. Even in the cross-examination, he has not supported to any extent except admitting his signature on Ex.P.31. Though this witness has also turned hostile, but nevertheless, this Court has to visualise the entire evidence considering the cross- examination of the investigating officer in this regard. 39 23.6 P.W.29-Ganapati, Investigating Officer is the person who recovered these articles. His evidence has been subjected to cross-examination at paragraphs 37 to 42. In this regard, at paragraphs 37 and 38, he has stated about arrest of accused nos.1 and 2 and recording of their voluntary statements. Though there is some discrepancy about the accused knowing about Kannada language, but he has talked with them in Marathi language, but their statements were recorded in Kannada and it is further stated that at paragraphs 39 how the accused persons have taken the police to different spots and produced

the articles recovered from them. At paragraph 42, it is reiterated by the witness that accused no.1 was wearing a pant and shirt on that day and accused No.2 was wearing a shirt and half pant and therefore, he recovered these properties. It is suggested and denied by this witness that, the accused have not produced any material objects. It is also 40 suggested that it is not the material objects seized from the accused persons and produced before the Court. Therefore, virtually it denotes that something has been seized from the accused, but it is suggested that those articles were not produced by the police before the Court. Except these suggestions nothing has been elicited from P.W.29 as to why he has to falsely implicate the accused and also produce, any articles which were not at all seized from the accused. Therefore, looking from the entire materials on records, in our opinion, the prosecution has also established the recovery of a shirt, an axe and an arana from accused No.1 and one axe and one pant at the instance of accused No.2 as noted above. 23.7 In order to connect these materials, the prosecution has relied upon the evidence of P.W.4 and P.W.29, the investigating officers with regard to recovery of clothes on the dead body of the deceased persons 41 under Exs.P.9 to 12. Ex.P.9 refers to seizure of clothes of deceased Goudappa; Ex.P.10 refers to seizure of clothes of deceased Basawwa; Ex.P.11 refers to seizure of clothes of deceased Gourawwa; and Ex.P.11 refers to seizure of clothes of deceased Irawwa. As noted above, P.Ws.20, 22, 25 and 26 shifted the dead bodies to the hospital and as well as P.Ws.14, 15, 16 & 38 who are witnesses to the inquest panchanama have deposed before the Court about the injuries on the dead bodies and as well as the blood stained clothes on the dead bodies. P.W.4-Raju turned hostile to the prosecution case. However, he identified his signature as per Ex.Ps.9(a) to 12(a). As could be seen from the overall evidence of prosecution, there is no much dispute sofar as the seizure of these articles and blood-stained clothes on the dead bodies. This witness, in the course of cross-examination, has stated that his signatures were taken in the police station. P.W.29, at paragraphs 6 to 8 has categorically deposed before the Court that he has 42 seized these articles, clothes on the deceased under a mahazar. He has further deposed that P.C.No.1893 produced the clothes of deceased Goudappa in the police station and he has seized as per Ex.P.9 and which was marked as M.Os.30 to 35, which are, a cap, a shirt, a banian, a half-pant, an underwear and a

waist-thread. Likewise, he also seized M.Os.4 to 8 which are the clothes of deceased Basawwa produced by P.C.No.2343. M.O.4 is a blouse, M.O.5 - a saree, M.O.6 - a petticoat, M.O.7 - a nose stud and M.O.8 - a mangala sutra. Like wise, H.C.No.1508 - P.W.25 has produced the clothes of Gourawwa and they were seized as per M.Os.9 to 14 which are a saree, a petticoat, nose stud, a mangala sutra and two bangles. Likewise, H.C.No.1829 produced the clothes and articles of deceased Irawwa marked at M.Os.15 to 19 which are a blood-stained blouse, a saree, a petticoat, ear stud and one mangala sutra. He has also stated that while conducting the spot panchanama marked at Ex.P.28, in 43 the presence of panch witnesses, he recovered white plastic chappals which were marked as M.O.20 and collected grass mixed with mud stained with blood at M.O.21 and ordinary mud at M.O.22 and also M.Os.23 to 28 are the blood stains and ordinary mud collected at different places where the dead bodies are found. Sofar as this particular statement made before the Court, the investigating Officer has not been subjected to cross- examination. Except the general denial, no specific suggestions have been made sofar as any discrepancy with regard to the seizure of these articles. Therefore, we are of the opinion that the prosecution has also established the recovery of these articles on the dead body of the deceased persons as noted above. 23.8 The prosecution in order to connect these materials to the crime, has sent these materials to the FSL. P.W.24-Hanamant, who was working as a police constable, carried these articles to RFSL, Belgaum, and 44 he took the articles in a sealed manner and came back with the articles along with his report as per Ex.P.44. The evidence of this witness also has not been subjected to cross-examination. The prosecution has produced RFSL before the Court Ex.P.57, which discloses that all the articles which were stained with blood particularly item Nos.1 to 4 are the mud mixed with grass and item Nos.5 to 13 which are the clothes of the deceased persons were sent to the FSL along with articles which were seized from the custody of the accused i.e., item Nos.14 to 18, which are one pant, one shirt, one kodli, one shirt and another kodli. They were all subject to examination. As could be seen from the FSL report, all these articles were stained with blood as noted in the result of analysis. The serological report shows that item Nos. 5 to 15 and 17 were also stained with human blood and item Nos.16 and 18 which are axes sent for FSL examination and the stains were found to be not

sufficient for serological examination. It is also stated 45 that the above said item Nos. 5, 6, 8 to 15 and 17 were stained with A group blood. This clearly indicates that shirt and pant and another shirt recovered from the custody of the accused are marked at item Nos.14, 15 and 17 were also stained with A group blood which matches with blood group of deceased persons which has not been properly explained by the accused persons. Though the stains were insufficient for the analysis found on two axes marked at item Nos.16 and 18, but the report shows that there were blood stains on those two axes.

24. The learned counsel for the accused in this regard relied upon a ruling of the Honble Apex Court reported in 2016(2) KCCR1175between The State of Karnataka by Nyamathi Police Station, Nyamathi Vs. Sri Kantharaj, wherein this Court has held that - Under Section 27 of the Evidence Act, recovery of weapon, contradiction in evidence of witnesses - same cannot be considered as 46 either minor or inconsequential inconsistencies but are glaring enough to go to the root of the prosecution case. 25. Though the learned counsel has submitted that the witnesses have not supported the recovery, but we have already noted above that the evidence of the prosecution witnesses which clearly indicate that there is no dispute with regard to recovery of axes particularly in the evidence of P.W.15 which corroborates the evidence of the investigating officer. Therefore, we are of the opinion that the prosecution has established this particular aspect with regard to recovery and the accused have not explained anything with regard to the blood stains found on their clothes matching with the blood stains on the clothes of the deceased.

26. Motive: Of course, motive in a given case play some role if it is established to the satisfaction of the Court by the prosecution in order to ascertain the real intention of 47 the accused persons in doing their wrongful acts. Even if the motive is not established to prove the guilt of the accused, if some evidence is placed before the Court and the existence of relevant fact, placed before the Court is sufficient with other facts to show that there was ill-will, enemity or animosity between the parties that can also be used as a corroborative piece of evidence with other materials. It should also be borne in mind that mere non-proof of motive will not in any way enure to the benefit of the accused persons and the court can

draw an inference on the basis of the other strong materials on record including the eyewitnesses version with reference to the guilt of the accused. Further, if the prosecution is unable to prove its case by other materials on record, mere proof of motive itself is not sufficient to convict the accused persons on the sole ground that they had animosity against the deceased persons. Motive is a double-edged weapon which may cut both sides. Bearing in mind the above said principles, now we would like to consider the motive 48 factor. 26.1 The case of the prosecution as could be seen right from the beginning as found in Ex.P.1 is that the deceased Basawwa was given in marriage to Ramaning (P.W.3). the said Ramaning has a brother by name Arjun (accused No.2) and four sisters by name, Kamalawwa (accused No.4), Shashikala, Sushila (mother of accused No.1) and Shivali. Out of them Arjun was not married. Arjun and Ramaning had 30 acres of land and they had divided the said land into 15 acres each and were enjoying their respective shares. The deceased Basawwa and Ramaning had no issues. Therefore, the other brother and sisters of said Ramaning were expecting the lands belonging to Ramaning after their death. But, subsequently, Basawwa gave birth to a male child which irritated other members of the family and, in fact, the other 49 sister of Ramaning and Arjun started demanding their shares in the property. But, Ramaning had not given any shares to his sisters. In this background it is alleged that all the accused persons were joined hands together and they were grinding axe against Basawwa and her husband Ramaning. They were also preventing Basawwa and Ramaning from going to their land for cultivating and harvesting and removing the paddy crop. 26.2 Yet another motive which was projected by the prosecution is that the accused No.1 and accused No.3 had also committed theft of sand in the land of Basawwa and in this regard there was rift between two parties and in this context, the parties had also filed criminal complaints against each other and in this regard there was a strong motive for the accused to do away with the life of Basawwa and other deceased persons. 50 26.3 In order to prove the above said motive, the prosecution has relied upon the evidence of P.W.8- Mahadev, P.W.10-Rayappa, P.W.12-Sanjay, P.W.13- Shankar, P.W.21-Vitoba and P.Ws.1 and 3 and several documents which we are going to discuss at a later stage. 26.4 P.W.1, in his evidence, at paragraphs 2 and 3, has stated about the previous ill-will and hatred-ness between Basawwa and her husband on one

side and the accused on the other. He has also stated about accused Nos.1 and 3 removing sand from the land of Basawwa and, in this connection, there was a complaint lodged before the police and the police have warned accused No.1 in this regard. It is also reiterated that accused No.1 was demanding a share of his mother in the property with Ramaning. In this context, it is said that, because of the above motive, the incident happened on that particular day. Sofar as this particular aspect is 51 concerned, there is no much cross-examination sofar as this witness is concerned. At paragraph 19 of his evidence, an attempt was made to elucidate with regard to the dispute. It is elicited in the course of cross-examination that there are two portions in the land of P.W.3-Ramaning and that he has also got another land. It is also elicited that the said Ramaning and his brother Arjun have partitioned the property, but sisters were not given a share in the property. Except this, nothing has been suggested to this witness sofar as the statement made by him before the court with regard to previous ill-will and rivalry with regard to the accused persons asking Ramaning a share in the property and also excavating sand from the land of Basawwa there was a quarrel between the parties. 26.5 P.W.3 Ramaning has also stated at paragraph 5 that earlier to the incident, accused No.1 was removing sand from the land without his consent. 52 In that connection, the deceased Basawwa, the wife of this witness, had opposed accused No.1 from removing sand and she had also given a police complaint. Though he was also cross-examined extensively, but in spite of that sofar as this previous ill-will and motive factor is concerned, he was not subjected to cross-examination. 26.6 Further, the prosecution also examined so many other witnesses, but they have not fully supported the case of the prosecution in this regard. P.W.8- Mahadev, P.W.10-Rayappa, P.W.12-Sanjay and P.W.13- Shankar, who were examined before the Court to show that there was some land dispute and also a dispute with regard to the accused Nos. 1 and 2 excavating sand from the land of Basawwa and these witnesses have held panchayat and warned accused persons in this regard. But, these witnesses have totally turned hostile to the prosecution. 53 26.7 Apart from the above, the prosecution has also relied upon the evidence of P.W.21 and P.W.30 in this regard. P.W.30, in his evidence, has stated that on 05.10.2006 i.e., about 1 months prior tot he incident, he received a complaint by post sent by deceased Basawwa which was registered in

LPT No.73/2006. On the basis of the said complaint, he deputed Police Head Constable for conducting an enquiry. He registered the said complaint as per Ex.P.39 which bears the left hand thumb impression of the deceased Basawwa. It also bears the signatures of the Police Officers who received the Complaint. This document contains the allegations against accused Nos.1 and 3 who have committed theft of more than 60 truck loads of sand from the land of the deceased Basawwa. It is stated by this witness that after conducting inquiry, he has issued an endorsement to Basawwa which is at Ex.P.40. Ex.P.40 states that the parties to the proceedings have been called before the police station on 05.10.2006 and all the persons were 54 warned and closed the said case and it is also stated that because the said dispute is of civil in nature, they can approach the court for remedies. Nevertheless, this document shows that the opposite party was called and warned in this regard. Thereafter, on 12.11.2006 much prior to the incident, H.C.B No.444 has given a report that the accused persons though warned by the police were not in the habit of hearing anybody in the village and they are very cruel in nature and also stated that parties are not cordial to each other and they might fight against each other at any point of time. This particular document is dated 12.11.2006. In this regard, P.W.21-Vithoba H.C.B. No.444 has also supported the say of the investigating officer. He has also stated that he registered a case on the basis of the complaint lodged by Basawwa by registered post and he, in fact, enquired into the matter and submitted his report as per Ex.P.40. In the course of his cross- examination, though some attempt has been made to 55 show that he has not at all received any complaint as per LPT No.73/2006 on 05.10.2006, but in the course of cross-examination also he reiterated that he on the basis of the said complaint intimated the parties that since the matter was of civil in nature, they can go to Court and, in turn, reported the same on 12.11.2006. Sofar as the investigating officer is concerned, there is no much cross-examination on this aspect is concerned. 26.8 The learned counsel for the accused very strenuously contended before the Court that if at all the said factum is true, there is no material placed with regard to the receipt of the complaint by means of RPAD and no postal cover has been produced. If at all, it was sent through post, why the said cover has not been maintained. Further, he added that the complaint was lodged on 05.10.2006 itself, the entire action has been taken as per Exs.P.39 to

41 on the same day i.e., on 05.10.2006. That shows the hurried action of the police. 56 Therefore, he contends that the case with regard to the excavation of sand is a concocted story invented subsequently for the purpose of laying a false claim against the accused and to create a motive which was actually not there. Normally, if any complaint is filed where it does not require the registration of a criminal case, but it requires an advise of warning or a direction to the parties, there is no fun in expecting the police to register a case and conduct a detailed investigation. The police can take swift action in this regard and conduct a formal enquiry. 26.9 In the cross-examination of P.W.30, at paragraph 7, it is suggested that there are disputes between the complainant parties and respondent parties in connection with the landed property. It is also suggested that the deceased Basawwa has opposed the accused persons from harvesting paddy crop. It is also reiterated by this witness that the head constable had 57 conducted an inquiry and thereafter he issued an endorsement to the parties. It is also clearly established that all was not well between the complainants family and the family of the accused. 26.10. Further, added to the above, the learned counsel also contended that to show the motive, police have also created a story by producing FIRs in Crime Nos.250/2006 and 251/2006 registered under Section 107 of the Criminal Procedure Code which are marked at Exs.P.51 and 52. It appears that these proceedings were initiated not only against the complainant party but also against the accused. On the basis of the report given by the Head Constable as per Ex.P.41, which we have already considered, which was given on 12.11.2006, shows that police had warned the parties not to quarrel with regard to excavation of sand on 05.10.2006. This P.W.21 has stated that there is likelihood of breach of peace in the said village. 58 Therefore, appropriate action may be taken. On the basis of the said information Exs.P.51 and 52 were registered under Section 107 of Cr.P.C. The learned counsel tried to contradict this aspect on the basis of the irregularity in the first information report. But, Exs.P.51 and 52 though they were registered in the night hours on the previous day of the incident i.e., on 14.11.2006, the said documents show that the said quarrel between the parties was intimated to the police on 12.11.2006 itself as per Ex.P.41. 26.11 The above said facts and circumstances though not sufficient to draw a conclusive inference as to how exactly the quarrel had taken place between the parties and the strong

motive vexed with the accused persons. But in our opinion it is sufficient to show that all was not well between the parties and they were having grouse against each other in respect of the dispute with regard to landed property as well as the 59 alleged sand excavation. The court cannot expect a meticulous and minute details with regard to the quarrel between the parties. It would suffice that if the prosecution is able to show the existence of some rivalry between the parties that may be sufficient for the court to draw an inference with regard to the existence of some motive considering all the other facts and circumstances in a given case. Therefore, we are of the opinion that the prosecution has been successful in placing the above said materials to show that there was some hatred-ness and ill-will between the two groups. Though there are certain discrepancies as contended by the learned counsel with regard to the registration of the proceedings under Section 107 of Cr.P.C. on the previous day night and there is some discrepancy with regard to the serial numbers in FIR, nevertheless that itself is not sufficient to come to the conclusion that there was no ill-will or hatred-ness between the parties. In this regard, we are of the opinion that the 60 prosecution is successful in bringing out some material to show the differences between the parties. Hence, the motive factor is also successfully established by the prosecution.

27. EYEWITNESSES VERSION: The major strength of the prosecution case is the version of the eyewitnesses. The prosecution mainly relied upon the evidence of the eyewitnesses. It is the fundamental basic principles of criminal jurisprudence that quantity of evidence is not the criteria in a criminal case but the quality. Even the court can rely upon a sole eyewitness to render the judgment of conviction, if such evidence is so strong, credible and reliable by the Court. However, the Court has to scrutinize the evidence of the eyewitnesses in a very meticulous manner, scanning the evidence in order to ascertain whether in spite of small abrasions, contradictions and omission, the evidence of the eyewitnesses can be relied 61 upon. The learned counsel for the appellants very strenuously contended that in this particular case, the motive is very feeble and the eyewitnesses are very close related witnesses of the deceased particularly though the other eyewitnesses were present at the spot, the investigating officer has not ventured upon to record the statement of those witnesses. In such circumstances, the Court has to scan through the evidence with a spectacle fitted with magnifying lenses. In this

background, now we would like to consider the evidence of the eyewitnesses. 27.1 Before adverting to deal with the eyewitnesses version, the learned counsel also brought to our notice that the evidence of P.W.3, who is styled as eyewitness has been totally discarded by the trial Court on the ground that he is not a witnesses, whose evidence can be relied upon because of the inconsistencies and the behaviour of the witness before 62 the Court. The learned counsel contended that though the said witness has given some arrogant answers to the questions put to him, but nevertheless, if his evidence is relied, it is virtually in favour of the accused persons. Therefore, such evidence also can be taken into consideration by the Court. Therefore, it is just and necessary to consider whether the evidence of P.W.3. altogether has to be discarded. 27.2 P.W.3-Ramaning, who lost his wife in the incident i.e., Basawwa, though has deposed before the Court on 24.07.2008 at the initial stages explaining the relationship between the parties, the Court has observed after recording the evidence of P.W.3, That, this witness started telling something in some language which was not followed by anybody and he is not answering either in Kannada or Marathi. He is behaving in a rude manner. Therefore, he has to be referred to a psychiatrist for examination at 63 District Hospital, Belgaum and to report and further order was deferred. 27.3 But, subsequently on 10.11.2008, further examination of the said witness has been done, but there is no material as such referred to by the Sessions Judge as to what happened to the medical examination of this witness by the psychiatrist. Even the learned Trial Judge has not even recorded in the order sheet as to whether the said witness was referred to psychiatrist for examination or not. The fact remains that subsequently on 10.11.2008, the witness has been examined in detail, he has given his evidence and he was treated as hostile by the prosecution to some extent and in the course of cross-examination, to some extent, he has supported the prosecution and to some extent he has implicated A1 and excluded accused Nos.2 to 4. 27.4. In legal parlance, it is true that a witness has to testify his evidence and his evidence can be 64 accepted for appreciation, if he is not suffering from any incapacity as contemplated under Section 118 of the Indian Evidence Act. Section 118 imposes responsibility on the court to ascertain as to whether the witness is competent witness to testify and that such persons is not prevented from explaining the question put to him or from giving rational answers

to those questions, by tender age, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Though the learned trial Judge has committed a serious error in not certifying that the witness is a competent witness to be testified, this Court has to look into the overall evidence of this witness to consider whether he is a person suffering from any mental illness or physical illness or due to extreme age, he could not able to give any rational answers after understanding the questions put to him. Though the trial court has not made any efforts to do this exercise when the evidence of that witness has already been recorded, it becomes the responsibility 65 of this Court in order to make use or discard the evidence of such witness to ascertain whether the evidence of such witness is admissible as contemplated under Section 118 of the India Evidence Act. 27.5. As we have already observed that the learned counsel has no objection to rely upon the evidence of this witness, as he contended that if his evidence is relied upon, it would favour the accused to some extent but that is not the criteria to accept or discard the evidence of a witness. The evidence has to be looked into to ascertain whether the questions put to the witness have been properly understood and answers have been given in a rational manner. As could be seen from the evidence of this witness, he has very consciously answered to almost all the questions, though while answering to some questions, he has taken some time. But no answer given by this witness can be categorised as irrelevant answers. That shows 66 that the witness has understood all the questions put to him and very consciously and rationally answered the questions specifically implicating accused no.1 and excluding accused nos.2 to 4. Therefore, the evidence of this witness cannot be altogether discarded when it does not fall under any category as per Section 118 of the Indian Evidence Act in order to totally discard his evidence. Therefore, we prefer to consider the evidence of this witness also.

28. It is argued before us by the learned counsel for the appellants Sri Muluwadmath that the evidence of P.Ws.1 to 3 has to be very carefully scrutinized because if their evidence given in the course of cross- examination is considered, they are found to be undependable and unreliable. When such being the case, reliance cannot be placed on the evidence of such witnesses. In this regard he relied upon a decision reported in 2016 ACR382between Ram Laxman vs. State

of Rajasthan wherein the Court has observed 67 thus, If a witness is found undependable and unreliable, his evidence cannot be split up for to grant benefit to some co-accused while maintaining conviction of another, when in all respects, he stands on same footing and deserves parity. Evidence of only eye witness is highly unreliable and specific injuries attributed by him cannot carry any weight. The learned counsel also relied upon another ruling reported in 2016 ACR332between Shahid Khan Vs. State of Rajasthan, wherein the Hon'ble Apex Court has observed thus - Delay in recording statements casts serious doubt about their being eye-witnesses to occurrence. There is no corroboration of their evidence from any other independent source-Investigating Officer was deliberately marking time with a view to decide about shape to be given to case and eye-witnesses 68 to be introduced. Case against appellants has not been proved beyond reasonable doubt 29. Per contra, the learned Additional SPP has relied upon a ruling reported in (1999)8 SCC624between Koli Lakhmanbhai Chanabhai Vs. State of Gujarat, wherein the Apex Court has observed thus - The evidence of hostile witnesses - prosecution witnesses treated hostile and cross-examination by the prosecution itself. Evidence of even such witnesses to the extent the same supports the prosecution version, held, admissible in trial and if corroborated by other reliable evidence. The Court has to view the entire evidence on record and satisfy itself with regard to the admissibility of the testimony of such witnesses 30. He also relied upon another ruling reported in 1994 SCC (Cri) 555 between Bheru Singh Vs. State of Rajasthan. In the said case, the Supreme Court dealt with contradictions and omissions and observed inter 69 alia that: Minor contradictions or inconsis-tencies are immaterial. Discrepancies, if they are satisfactorily explained by reading the entire case, such discrepancy, omissions or inconsistencies shall be ignored in order to advance substantial justice. 31. Bearing in mind the above said rulings and also the facts and circumstances of the case, this Court has to appreciate the evidence of the eyewitnesses. What emerges from the above said decisions and also rule of prudence in appreciation of evidence in criminal case, is abundantly clear that, when the witnesses to the incident particularly in a murder case is either closely related or otherwise related in the prosecution, their testimony has to pass through the test of close and severe scrutiny before their testimony could be safely acted upon. Even considering the

contradictions and omissions here and there in their evidence, if their 70 evidence is corroborated by other materials and also if those contradictions and omissions are not sufficient to cut the root of the prosecution case itself, such contradictions and omissions can be ignored by the Court. In this context the Court has to analyse the evidence carefully in order to accept the credibility of such witnesses. Therefore, no evidence of any witnesses can be discarded without scrutiny in order to draw an inference either in favour of accused or in favour of the prosecution. The Courts should also determine the nature of the evidence adduced, the quality and quantity of evidence available, the nature of the witnesses and their status in the society, how they are brought up in the society, how they understood the case and how and in what manner they faced cross-examination. All these things play an important role in a criminal case while appreciating their evidence. It is true that appreciation of evidence of the eyewitnesses in criminal cases has a role to play. If many number of 71 eyewitnesses are available, it is quite possible that incident may be explained in different types and in different manner and sometimes though the witness is truthful, but he is liable to be owerawed by the atmosphere of the court and the piercing cross examination made by the counsel. May be under such circumstances due to the pain, grief nervousness, confusion, the witness may mix up facts, regarding sequence of events or fill up evidence from imagination on the spur of the moment. Therefore, the Court has to bear in mind, all these human conduct and based on human reasoning, the court has to appreciate the evidence of such witnesses. Therefore, now we will proceed to discuss the evidence of P.Ws.1 to 3 who are the eyewitnesses to the incident.

32. P.W.1-Pondappa is none other than the husband of the deceased Basawwa. P.W.2-Irappa is the son of deceased Goudappa and Gourawwa. P.W.3- 72 Ramaning is the husband of the deceased Basawwa. Therefore, all these three witnesses are related witnesses to the victims. But, they cannot be called as interested witnesses unless it is shown to the Court in their evidence.

33. The evidence of P.Ws.1 and 2 are almost similar. They have meticulously and vividly stated as to how the incident has happened. P.W.3, who is also styled as an eyewitness, had admitted that he was present at the time of the incident. But,

for the reasons best known to him, P.W.3 has only implicated accused No.1. However he excluded accused Nos.2 to 4 from the incident itself. Therefore, it becomes the responsibility of the Court as to how much of evidence of P.W.3 can be taken into consideration which is corroborated by other materials on record. The evidence which is not corroborated and the evidence which is deliberately stated before the Court in order to save some of the 73 accused, the Court can ignore such evidence. In this background, first we would consider the evidence of these witnesses as to what they have stated in their examination-in-chief.

34. P.Ws.1 and 2 have stated that, on the date of the incident, P.W.1, his wife Basawwa, his elder brother Goudappa, his elder brothers wife Gourawwa, P.W.2-Irappa (son of Goudappa and Gourawwa), his sister Basawwa and her husband P.W.3-Ramaning, all of them had been to their paddy field at 11.00 a.m. situated at Dukkarwadi village, Khanapur Taluk. It is stated by PW-1 that Basawwa was given in marriage to P.W.3-Ramaning. At about 11.00 a.m. (on the day of the incident) they went to the land for harvesting paddy crop. At that time, accused Nos.1 to 4 came to the said land. Out of them, accused Nos.1 and 2 were holding axes. Accused No.1 opposed and asked the sister of this witness i.e. Basawwa not to cut the paddy crop. At that 74 time, accused No.3 instigated accused Nos.1 and 2 to assault Basawwa. Accused No.1 assaulted Basawwa on her neck with the axe. Immediately, she shouted and fell down. At that time, the elder brother of this witness i.e. Goudappa went to rescue Basawwa. Then accused No.1 assaulted Goudappa also with the axe on his neck. Goudappa also fell down with bleeding injuries. Gourawwa, wife of Goudappa, went to rescue her husband and, at that time, accused No.4 came there and caught hold of Gourawwa from behind and instigated the accused to murder Gourawwa also. Then accused No.2 assaulted Gourawwa with an axe on her neck. She also fell down. At that time, this witness, his wife Irawwa and P.W.2-Irappa and brother-in-law of this witness Ramaning being scared of the accused started running from that spot. Accused No.1, in fact, chased the wife of this witness - Irawwa - and assaulted on her left hand also, on her neck and accused No.2 assaulted on her back and cheek due to the impact she also fell 75 down sustaining injuries. Having seen such an incident, all the other persons ran away from the spot and hiding themselves in the bushes. Thereafter, all the accused persons went away from the spot. After sometime, this

witness and others came back and saw all the injured persons, who have sustained bleeding injuries and dead lying at different places near the thrashing floor. Then they started crying. At about 1 to 1.30 p.m., police visited the spot and enquired PW-1 and he narrated the incident and his statement was recorded and explained to him and his left thumb impression was also taken. P.W.1 identified the complaint at Ex.P.1. he also stated that he could identify the axe used by accused Nos.1 and 2 on that day. In fact he identified M.Os.1 and 2 axes, used by accused Nos.1 and 2.

35. In similar fashion, P.W.2 has also deposed that, on that day, totally they were seven persons. As stated, all of them went to the land of Ramaning for 76 harvesting paddy crop. This witness saw all the accused coming towards them, they were hiding in bushes and accused Nos.1 and 2 were holding axes. In the same fashion, he has disclosed as to how the incident happened, but he stated that accused No.1 at that time protested Basawwa and others not to cut the paddy crop. There was verbal altercations between the deceased Basawwa and accused No.1. He also vividly, in the same fashion, stated who assaulted whom, and how the incident happened, which fully corroborates the evidence of P.W.1. He also, in fact, identified the accused persons before the Court and also M.Os.1 and 2 as the axes which were used by the accused.

36. P.W.3-Ramaning, who is also an eyewitness to the incident, has admitted the relationship between the deceased persons, with P.Ws.1 and 2 and also the deceased persons with him on that day. In his examination-in-chief, P.W.3 has admitted that deceased 77 Goudappa and his wife Gourawwa, complainant-Pondappa and his wife Irawwa and Basawwa (wife of P.W.3) and Irappa (P.W.2) were assisting him in cultivation of his land. He deposed that, on the date of the incident, they were all present in the land harvesting paddy crop. At that time, accused No.1 also came to the land. P.W.3 specifically excluded other three accused stating that they were not present at that time. He deposed that accused No.1, after entering the land, he did not talk anything and he started assaulting with the help of an axe, particularly, the wife of this witness Smt.Basawwa and then Goudappa, Gourawwa and Irawwa and caused grievous injuries to them; Gourawwa fell down and accused No.1 assaulted on her body with an axe; Irawwa

was running away and she was also assaulted by accused No.1; then he (P.W.3) started running away from the land. He stated that he did not see accused No.1 murdering Goudappa. He, further, stated that after he ran away, he did not go to 78 his land on that day again. On the next day, he went to cremate the dead body of his wife. He reiterated that accused No.1 killed his wife and others. He further stated that, as on the date of giving evidence, he was residing with accused No.4 in the house of accused No.2. The prosecution at that stage sought to treat him as hostile as he was not giving full picture of the incident.

37. In the course of cross-examination also, he reiterated that accused No.1 alone had come to the spot on that day and assaulted the deceased persons. He stated that Pondappa was not present at the time of the incident. Accused No.1 questioned his wife as to who has to clear the debt, but his wife did not answer the same, and suddenly, accused No.1 started assaulting them. The whole story of the prosecution was put to the mouth of this witness, but he sticked on to the version given by him in the examination-in-chief. 79 38. It is worth to note here that in the course of cross-examination by the defence counsel, it is suggested that on that particular day, Suresh Makavi and Ramu Dhamanekar along with 15 to 20 persons were harvesting the crop and it was suggested that there was fight between the group of Makavi people and the deceased persons and, therefore, this man ran away from the spot but he denied the said suggestion. He also admitted that they were all having sickles for the purpose of cutting paddy crop. it is suggested that accused No.1 has not committed any offence and the said suggestion has been denied.

39. Though this witness has turned hostile to the prosecution, but he fully corroborated the evidence of P.Ws.2 and 3. Though he implicated accused No.1 into the crime, nevertheless, from the evidence of this witness including the suggestions made to him, it is clear that some galata had taken place in the land of 80 P.W.3 on that particular day and four persons were murdered on the spot. It is the suggestions made to almost all the eyewitnesses that Makavi and Dhamanekar had come to the land with weapons and assaulted the deceased persons. Even in the course of cross-examination by the learned Public Prosecutor and in the examination-in-chief, this witness has categorically stated

that he along with P.Ws.1 and 2 and the deceased persons had been to the land for the purpose of harvesting the paddy crop, this fact has been consistently stated. But, in an isolated sentence, he stated that Pondappa was not present at that particular point of time. This has not been highlighted by the defence counsel.

40. What is to be noted here is that the evidence of hostile witness which is corroborated by other materials has to be taken into consideration. Here, the evidence of P.Ws.1 and 2 clearly shows that Pondappa- 81 P.W.1 was very much present. Even according to this witness in the examination in chief and cross-examination by the learned Addl. State Public Prosecutor, he admitted the presence of Pondappa for the question - Whether accused Nos.1 to 4 came to his land while Pondappa and Irappa were harvesting the crop in their land; and answered Pondappa was not present. Therefore, the said portion is unsupported, isolated answer given by this witness which is not corroborated by any other material. Therefore, the argument of the learned counsel that Pondappa-P.W.1 was not present at the time of the incident is not sustainable. In order to assail the evidence of this witness, the learned counsel for the accused has taken us through the cross-examination of two witnesses i.e., P.Ws.1 and 2. As we have stated, the evidence of P.W.3, though he turned hostile, can only be considered if his evidence corroborates the evidence of P.Ws.1 and 2. 82 41. The learned counsel first of all harped upon the presence of P.W.1 on the spot. He drew our attention that P.W.1 has admitted that he had given the complaint-Ex.P.1 in the land itself and that he remained on the land on that day and gave a complaint which was reduced into writing on the spot itself. But the learned counsel submits that P.W.30-Yallappa who was the Police Sub-Inspector, in his evidence has stated that the complaint was given in writing in the Police Station. He has stated that P.W.1 came to the police station along with him and thereafter he dictated the complaint to the writer and thereafter registered a case. Therefore, he contends that this discrepancy in lodging the FIR, coupled with the evidence of P.W.3, itself creates a doubt about the presence of P.W.1-Pondappa on the spot.

42. Of course, there is some discrepancy sofar as this aspect is concerned. P.W.1 in his evidence, at 83 paragraph 13, in the course of cross-examination, has stated that after arrival of the police, he did not go to Khanapur, but he went to Khanapur

at 7.30 p.m. on that day along with police, till that time he was in the land and he had given the complaint on the spot itself and the police had taken his left hand thumb impression in the police station. On overall understanding of the evidence of this witness indicates that he has given a vivid explanation with regard to how the incident happened. Moreover, in the course of cross- examination, lot of questions were put to him, particularly on the date of the incident he was in Badalankalgi village and he received a message from his sister and thereafter, he came to the spot and the said suggestion has been denied by him. It was also suggested that subsequently, he came from the said village and police took him and taken the complaint, he denied the said suggestion also. P.W.30, in this regard has deposed that on 15.11.2006, at 1.00 p.m., he 84 received a anonymous call about four murders having taken place at Dukkarwadi village. He took his staff in a departmental jeep and went to the Dukkarwadi village; there he saw four dead bodies lying near the thrashing floor. After seeing the dead bodies, he informed this fact to his higher officers. He was about to go to the police station, on the way, near the spot he met P.W.1- Pondappa, enquired him and brought him to the police station and obtained his oral statement and registered a case in Crime No.255/2006. In the course of cross- examination, he further reiterated that he reached the spot around 1.30 or 1.35 p.m. and he also stated that from the spot he went to the police station directly on that day. He also repeated that at about 100 or 150 meters from the spot, the complainant was present, he met him. Thereafter, some other people also came to the spot and the complainant informed this witness that his brother and wife of his brother were murdered by accused persons. Coupled with the above evidence, if 85 the first information is seen which is marked at Ex.P.1, it clearly discloses the details of the incident as to how the incident happened and it is also stated that this witness and others were all present on the spot and they were in grief and they lodged the complaint little later. Ex.P.1 also discloses that when the incident happened it was 11.15 a.m., they were in grief and thereafter, when the police came to the spot, he disclosed about the incident and gave details about the contents of the complaint. The FIR, which is marked at Ex.P.1(b), at column No.3(b), shows that the complaint was taken in writing.

43. The above said facts, though, create some discrepancy in lodging the complaint and registering the same insofar as whether it was on spot itself or the complaint was given in the police station. But, the fact from the evidence of P.Ws.1 to 3 clears the doubt about the presence of P.W.1 on the spot at that particular 86 point of time. There are some discrepancy sofar as this aspect is concerned. But what is consistent is that P.W.1 and P.W.30 both state that they met together, P.W.1 has disclosed about the incident and P.W.30 has recorded his statement in writing and thereafter he registered the case. Sofar as this disclosure of fact by P.W.1 and registration of case are concerned, the evidence is consistent. Evidence of P.Ws.29 and 30 show that they also took writer to the spot. But, the evidence is silent sofar as to why that writer was taken to the spot. But, in our opinion, the said fact itself is not sufficient that P.W.1 was not there and he was unable to give any complaint as per Ex.P.1. The courts have to be alive to assess the evidence of rustic village people. Sometimes, due to atmosphere of the Court or due to threadbare cross-examination by the opposite counsel, they may give the evidence in a totally distorted version. It is the duty of the Court to look into the entire and overall evidence to come to the conclusion, whether 87 such discrepancy available is sufficient to totally discard the evidence of such witness when other evidence is abundantly available to show the presence of eyewitnesses on the spot. Therefore, the said argument of the learned counsel is not so strong enough to go to the root of the prosecution case to disbelieve the evidence of P.W.1.

44. The learned counsel also strenuously argued before us that P.W.1, in his cross-examination, admitted that lot of people used to harvest their paddy crop in the surrounding land, but the investigating officer has not given his attention with regard to this aspect. The evidence of PWs.1 to 3 show that there were other people who witnessed the incident but the investigating officer deliberately has not recorded the statement of those witnesses. P.W.1 has also admitted that he shouted at the time of the incident, and sought for help but nobody came to rescue. This also clearly goes to 88 show the presence of other persons present on the spot at the time of the incident. Even, P.W.2 also reiterated the same about the presence of other persons nearby the said land.

45. On perusal of the evidence of these witnesses, it is seen that P.W.1, of course, admitted that some other persons were also harvesting the paddy crop in the surrounding lands and at the time of incident, he shouted for help and nobody came to their rescue. As could be seen from the records, the investigating officer, in fact, stated in his evidence that he has made all his efforts to record the statement of owners of the surrounding lands. P.W.29 has stated, at paragraph 25, that he examined some of the owners of surrounding lands but they have stated that they were not present at the time of the incident, therefore, they were not shown as witnesses. It is not elicited from the evidence of P.Ws.1 to 3 as to whether all the land owners present 89 had actually seen the incident and the police have deliberately not recorded the statements of those persons. It is also evident from the materials available on record that, apart from, P.Ws.1 to 3, police have also recorded the statements of P.W.6-Tukaram, P.W.7-Vittal and P.W.11-Nane who are also cited as eyewitnesses to the incident and examined before the Court, but all of them turned hostile to the prosecution case. Therefore, it clears the doubt that there is no serious deliberate action on the part of the investigating officer to show that they have not recorded the statement of any witnesses who claim to be working in the surrounding lands. It is also worth to note here the topography of the area. As could be seen from Ex.P.47, which is the sketch, shows that the dead bodies were found at different places in the said land which land is covered towards North - there is a stream (halla); towards South - the land of Ramaning Patils Paddy land; towards West - nothing is mentioned; and towards East - Waste land 90 of Hanamant Dhamnekar. It is not elicited from the mouth of any of the eyewitnesses as to what exactly the distance between the place where actually the incident happened and the other lands in which the other persons were also harvesting the crops. It is also not clear as to whether, anybody screams for help, those persons working in nearby lands could hear the same and come to rescue the victims. In the absence of such materials before the Court, the Court cannot come to any inference that investigation done in this case is deliberate or perverse in nature. Ex.P.28 is the Spot Mahazar which also shows that the land where the incident happened is surrounded by big trees and a stream. The evidence of P.Ws.1 and 2 also clears the doubt that, in fact, they screamed for help, but nobody came to the spot. There is no suggestion put to P.Ws.1 and 2 as

to who are all the other persons present at the time of the incident and witnessed the incident. In the absence of that, it cannot be said that prosecution was 91 choosy in examining only the interested witnesses. Hence, we are unable to accept the said contention of the learned counsel to discard the evidence of PWs.1 to 3.

46. The learned counsel also strenuously contended that the eyewitnesses have deliberately suppressed about the presence of sickles at the spot and that they were also armed with sickles and that though they were armed with sickles, they did not make any efforts to rescue the four deceased persons from the clutches of only four accused persons. It is also contended by the learned counsel that the complainant and others were seven in number and the accused persons were four in number and it cannot be believed that accused Nos.1 and 2 could have done that act. He, therefore, contended that the evidence of these witnesses particularly P.Ws.1 and 2 is not creditworthy 92 but exaggerated and as they wanted to save some other persons, they falsely implicated the accused persons.

47. Of course, the evidence of P.Ws.1 to 3 read with evidence of P.Ws.29 and 30, the defence has made it amply clear that P.Ws.1 to 3 and the deceased persons went to the land for the purpose of harvesting paddy crop and they were having sickles; at the time of investigation also, the investigating officer found some sickles in the land, therefore, it has established during the course of cross-examination of these witnesses and investigating officer about the presence of six sickles in the land where the incident had happened. We have carefully examined the evidence of the witnesses. It amply clears the doubt that sickles were found on the land on that particular day. Of course, P.Ws.1 and 2 have blatantly denied the presence of any sickles in their hands or in the land. 93 48. Even assuming that P.Ws.1 to 3 and deceased persons were having sickles in their land, but there is no suggestion or the defence taken up by the accused that P.Ws.1 to 3 and deceased persons were actually holding sickles at the time of the incident. It is not the case of the accused that, in order to defend themselves, they assaulted the deceased persons. It is not the case of the accused that they acted to defend themselves; it is altogether a total denial of the prosecution case. On the other hand, the suggestions made to P.Ws.2 and 3 clearly discloses that on that

particular day, the other rival party i.e. Dhamanekar, Makavi and their followers came there and they actually assaulted the deceased persons, P.Ws.1 to 3 knowing fully well this fact, have falsely implicated the accused persons. When such defence is taken and there is no defence that the incident happened and in order to defend themselves, they have committed some act. In our opinion, mere presence of sickles in the land, even 94 admitting that they were taken by P.Ws.1 to 3 and others for the purpose of harvesting, it does not mean to say that at the time of the incident all these persons were holding the sickles. There is no evidence that, the deceased or PWs.1 to 3 were holding or used sickles at the time of incident.

49. The evidence of P.Ws.1 and 2 discloses that actually accused No.1 first assaulted Basawwa after a verbal altercation between them. It is not elicited from these three witnesses i.e. P.Ws.1 to 3 that at the time of accused No.1 assaulting the deceased persons, they were actually holding sickles, may be sickles were available in their lands. But, the question is whether those sickles were available to these witnesses when actually the incident happened immediately after the verbal altercation. Therefore, in our opinion though the defence has been able to establish the presence of sickles in the land, the same is not sufficient to draw an 95 inference that the witnesses could have made use of those sickles for protecting themselves or to assault the accused persons. If at all, the four deceased persons and P.Ws.1 to 3 were actually holding sickles in their hands, at least, some abrasion or contusion should have been caused to the accused persons. That also shows that the deceased persons and P.Ws.1 to 3 were without any arms at that particular point of time.

50. The learned counsel also drawn our attention that the accused No.1 while assaulting the deceased Basawwa, they (four deceased persons and P.Ws.1 to

3) were all seven in number on the spot but they did not try to rescue Basawwa and other deceased persons. But, this argument also falls to ground if we meticulously read the evidence of P.Ws.1 and 2, who have categorically and consistently in their evidence stated that when accused No.1 firstly assaulted the deceased Basawwa, Goudappa went to her rescue and 96 in that context,

accused no.1 also assaulted Goudappa and at that time, the wife of Goudappa i.e. Gourawwa went to rescue her husband and she was assaulted by accused No.2. After seeing the assault on these three persons, it is categorically stated by P.Ws.1 and 2 that they started running away to save themselves and, in that context, accused No.1 had chased another deceased i.e. Irawwa and also assaulted her, who also died in the incident. There is no much cross- examination insofar as this aspect is concerned. But, it is argued that they kept quite without making any efforts to rescue the deceased persons, which is not, in fact, true if the evidence is properly understood.

51. Even otherwise, admittedly, accused Nos.1 and 2 were holding axes in their hands. Normally in the villages, people will go to the lands holding agricultural equipment with them. Although, Sickles, Choppers, Axes are considered to be the weapons, but, normally, 97 the village people carry such type of weapons, while going to their lands. In that context, the witnesses and the deceased persons could not have anticipated that accused persons brought the axes for assaulting them and they would suddenly assault them. P.W.3, who partially supports the case of the prosecution stated that as soon as accused No.1 came to the land, he questioned the deceased Basawwa and immediately started assaulting the deceased persons. This also shows that so much of incident has been anticipated by the deceased persons and P.Ws.1 and 3 in order to suddenly prepare themselves to defend the assault of the accused persons.

52. In this regard, it is worth to mention here a decision of the Honble Apex Court reported in 2000 CRL.L.J.400 between State of Karnataka Vs. K.Yarappa Reddy, wherein it is observed that:

98. Appreciation of evidence of eye witnesses - Criminal Courts should not expect a set reaction from any eye witness on seeing an incident like murder. If five persons witness one incident there could be five different types of reactions from each of them. It is neither a tutored impact nor a structured reaction which the eye witness can make. It is fallacious to suggest that PW-11 would have done this or that on seeing the incident. Unless the reaction demonstrated by an eye witness is so improbable or so inconceivable from any human being pitted in such a situation

it is unfair to dub his reactions as unnatural 53. Therefore, in our opinion, the conduct of a witness normally varies from person to person. There cannot be any cast-ironed reaction to be expected as a model by every witness by witnessing the unexpected ghastly incident. As there are varieties of men, so the varieties of perceptions would surface. Different persons would react differently on seeing a ghastly incident. It 99 all depends upon how they were grown up, in which environment and also depends on their behavior and conduct. Therefore, the conduct of a witness, when a murder takes place, cannot be expected to be in a straight-jacket manner.

54. Coming back to the facts of this particular case, as we have already narrated, that when accused No.1 was assaulting Basawwa, Goudappa and Gourawwa who went to rescue Basawwa were also mercilessly assaulted, and therefore, it is stated by P.W.1 that himself, P.Ws.2 and 3 and deceased Irawwa started running away from the spot which, in our opinion, is a natural conduct of a person who had seen such ghastly murders. Therefore, we do not find any unnatural or abnormal conduct on the part of P.Ws.1 to 3 in order to totally dub them as created or planted witnesses. Hence, we are not inclined to accept the argument of the learned counsel. 100 55. Much has been argued by the learned counsel for the appellant with reference to the time of death of the deceased persons. It is contended that all the eye witnesses have stated, and even according to the prosecution case, that the incident happened at 11.00 to 11.30 a.m., but the post-mortem examination reports marked at Exs.P.34 to 36, show that the stomach of the deceased persons contained undigested rice particles and rigor mortis was present. He contended that when such being the case, the incident must have happened within an hour from the time the deceased persons had taken the food, and therefore, the incident must have happened between 8.30 to 9.00 a.m. He also contends that because of rigor mortis was present even on the next day when the dead bodies were subjected to post- mortem examination, the incident might also have happened after 3.00 p.m. on the date of incident and as such, it cannot be said that the incident happened between 11.00 to 11.30 a.m. Hence, the story projected 101 by the prosecution is doubtful.

56. The post-mortem examination reports as narrated by P.Ws.17 to 19 would support the said version of the learned counsel with reference to the presence of food particles in the stomach of the deceased persons and the presence of rigor mortis when the post-mortem examination was conducted. P.W.17 has conducted the post-mortem examination on the dead body of Goudappa on 16.11.2006 at 7.35 a.m. and completed at 9.00 a.m. and from 12.15 p.m. to 1.35 p.m. on the dead body of Gourawwa and he has stated that rigor mortis was present. P.W.18 who conducted the post-mortem on the dead body of Irawwa on 16.11.2006 from 9.30 a.m. to 10.45 a.m. also found rigor mortis. P.W.19, who conducted post-mortem examination on the dead body of Basawwa on 16.11.2006 from 10.50 a.m. to 12.15 p.m. also states 102 about presence of rigor mortis.

57. Of course, the presence of rigor mortis and presence of food particles in the stomach is only a guideline to ascertain approximate time of dead of deceased persons, but it cannot be a perfect evidence to come to any particular conclusion. The Court has to analyse the materials on record with reference to the time of death considering the surrounding circumstances. In this regard, the learned counsel also in detail took us through the evidence of witnesses, particularly, P.Ws.1 and 2 who have stated in their evidence that they went to the land on that day in the morning and the incident happened at 11.00 a.m. At paragraph 9 of his evidence, P.W.1 has stated that they went to the land at 9.00 a.m. P.W.2, in the course of cross-examination has reiterated the same thing and also admitted that they took food in the morning hours 103 at 8.30 a.m. Therefore, the learned counsel submitted that the presence of food particles shows that even prior to digestion of food particles, the incident had happened i.e. approximately at about 9.00 to 9.30 a.m. But, one cannot exactly say that at what time they had taken food, particularly, deceased persons and P.W.1 and P.W.2. Even otherwise, it cannot be said that there is no reason for them taking food after 9.00 a.m. If they had taken any food at 10.00 to 10.30 a.m., the chances of presence of food particles may be there even if the incident had taken place around 11.00 to 11.30 a.m. Therefore, one cannot definitely say, because of presence of food particles, the incident has not happened at 11.00 to 11.30 a.m. P.Ws.1 to 3 are consistent with regard to the time of the incident that from 11.00 a.m. the incident had started. P.W.30, in fact, has stated that at about 1.00 p.m. itself he had received the

information about four ghastly murder having taken place at Dukkarwadi village and he went 104 to the spot at 1.30 p.m. itself. It rules out that the incident happened after 3.00 p.m. as argued by the learned counsel. Therefore, the time of occurrence of the incident must be prior to 1.00 p.m.

58. The presence of rigor mortis in the body of these persons may scientifically show the approximate time of death. The normal occurrence of rigor mortis and discharge varies from place to place depending upon the atmospheric temperature, but the average period of its onset may be regarded as three to six hours after the death in temperate climates, and it may take two to three hours to develop and it usually commence in one or two hours after death. The usual duration of rigor mortis is twenty-four to forty-eight hours in winter and eighteen to thirty-six hours in summer and it gradually fades within that particular point of time. Though the learned counsel has argued that rigor mortis may appear immediately due to heat stiffening or 105 cold stiffening or due to fear stiffening if the person had scared seeing any ghastly incident, if they died in the incident. Therefore, he submitted that presence of rigor mortis on the next day also shows that the incident must not have happened as stated by PWs.1 to 3. As we have stated, the medical jurisprudence is only a guideline to arrive at a conclusion with regard to the approximate time of death. But, in our opinion, when the Court is having other sufficient materials to exactly show the time of death of deceased persons, particularly of the eyewitnesses version and other surrounding material, in such circumstances, if there arises any confusion, the eyewitnesses version shall be given prominence compared to the medical evidence. Though these things have been argued before us, there is no suggestion made to the doctors in this regard with regard to the approximate time of death that it must have happened between 9.00 a.m. to 9.30 a.m. on that day, in order to completely discard the evidence of 106 eyewitnesses.

59. It is worth to quote here a decision of the Hon'ble Apex Court reported in (2004) 10 SCC443between Ram Udgar Singh Vs. State of Bihar at head note B, wherein the Hon'ble Apex Court has held with regard to rigor mortis, the time within which it sets in is usually 3 to 4 hours but may vary according to climatic conditions. The Honble Apex Court has also relied upon the evidence of persons

who are stated to be the eyewitnesses and on comparing it with medical evidence held that courts were justified in holding that appellant was the assailant thereby giving prominence to the version of the eyewitnesses compared to medical evidence. Therefore, in our opinion, this ground urged by the learned counsel is not sufficient to disbelieve the version of the eye witnesses. 107 60. The learned counsel also, on another point, relied upon the evidence of P.Ws.17 to 19 and also evidence of P.Ws.1 to 3. He contended that though the weapons used in this case are axes by accused Nos.1 and 2 as per the prosecution story, the weapons produced before the Court cannot cause such injuries as found on the dead bodies. He drawn our attention to the measurement of the weapons i.e. to axes and also the measurement of the injuries and he contended that the measurement of the injuries does not correspond to the measurement of the weapons. With all curiosity, this court has secured the weapons at M.Os.1 and 2 and examined the same. Of course, we also find that there is some variation in the measurement of the injuries on the dead bodies and the weapons, but on examination of the weapons and the injuries there are some discrepancies regarding measurements, but it cannot be, in all certainty, stated that those injuries could not have been caused by using the axes. The 108 evidence of P.W.17 in the course of cross-examination, it is elicited at paragraphs 19, 20 and 21 that he has taken the measurement of the injuries and recorded the same. He has also stated that M.Os.1 and 2 compared to the depth of the injury, it is more in middle and lesser at edges. It is also admitted that if a person were to be hit by using M.Os.1 and 2, the depth of the injury would be more in the middle and lesser in the edges. Though it is elicited, it is not suggested that with what type of weapons those injuries could be caused. It is suggested that those injuries could not be caused with the help of M.Os.1 and 2, but the said suggestion has been denied. Likewise, is the evidence of P.Ws.18 and 19. In this regard we would like to say that both axes- M.Os.1 and 2 are sharp weapons having long width and sharp edge. The nature of injuries sustained by the deceased persons, as noted above, are all chopped wounds. The doctors have stated that the chopped wounds could be caused by using the axes like M.Os.1 109 and 2. In our opinion, it all depends upon the posture of the injured and posture of the assailant and also the pressure of the blow and place where actually the blow fell. These are all the factors which

decides how the injury could be caused.

61. Unless there is an explanation in the evidence from the witnesses in this regard, the Court cannot draw any definite inference that those injuries cannot be caused with the help of M.Os.1 and 2. The learned counsel has not demonstrated before the Court as to these important aspect elucidated from the evidence of the doctors while cross-examining them. Therefore, we are of the opinion that when the doctors evidence is available; they are the experts, who have after seeing the weapons before the Court and then compared the same with the injuries sustained by the deceased and then gave their expert opinion that the injuries found on the deceased persons can also be 110 caused by using M.Os.1 and 2, the Court should not normally substitute its opinion unless there is any strong and consistent other evidence available before the Court. Therefore, we are of the opinion that the said argument of the learned counsel is also not acceptable one.

62. Though the learned counsel has argued before us that there are serious lapses in the investigation that is to say in not recording the statement of neighbouring land owners, not seizing the sickles and cap of the deceased Goudappa at the spot and also with regard to the discrepancy in registration of the FIR and sending the FIR to the Magistrate, but those discrepancies though available are not sufficient to totally come to the conclusion that those lapses in the investigation are sufficient to overcome the entire evidence. Though there is some padding up act done by the investigating officer by registering Section 107 111 proceedings on the previous day of the incident at 11.00 p.m., but, in our opinion, though it creates a doubt with regard to the investigating agency, whether they wanted to cook up a story with regard to the motive factor, but that itself is not sufficient to discard the said evidence of the prosecution available on record but at the most it affect the motive factor and not other materials. Therefore, on perusal of the entire oral and documentary evidence on record, even if there is any lapse on the part of the investigating officer, even considering such lapses, they cannot be called as deliberate, when the other materials on record are sufficient to hold the accused guilty. Much importance should not be given to such lapses.

63. In this regard the Honble Apex Court in the decision of C. Muniappan Vs. State of Tamil Nadu reported in (2010) 9 SCC567 has laid down the following guidelines:

112. "The defects in the investigation itself cannot be a ground for acquittal. Investigation is not the salutary area for judicial scrutiny in a criminal trial. Where suspicion, negligence on the part of the investigating agency or omissions etc., which result in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses carefully to find out whether the said evidence is reliable or not and to what extent, it is reliable and whether such lapses affect the case in finding out the truth. The conclusion of the trial in the case cannot be allowed to depend solely on the propriety of the investigation. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the Investigating Officer and whether due to such lapse any benefit should be given to the accused. If prominence is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and 113 confidence of the people in the criminal justice administration would be eroded."

(Emphasis supplied) 64. Ultimately, after going through the overall evidence of the prosecution, we do find that there are discrepancies, irregularities, minor contradictions and omissions, but the said minor contradictions or omissions or lapses are not sufficient to disbelieve the version of eyewitnesses. But, if these contradictions and omissions isolatedly or collectively are sufficient to totally uproot the case of the prosecution, then only, they play dominant role in criminal cases. Therefore, courts should not give much importance to those minor contradictions and omissions and discrepancies which are not sufficient to go to the root of the matter and shake the basic version of the prosecution. Therefore, on an overall consideration of the evidence on record, we are of the opinion that the prosecution has established its case and we do not find any strong 114 reason to differ from the opinion of the learned Sessions Judge in convicting the accused No.1 and 4 for the offence punishable under Section 302 of the Indian Penal Code.

65. With this background, now we proceed to examine the adequacy of the sentence imposed by the learned Sessions Judge.

66. REGARDING SENTENCE: The learned counsel appearing for the accused strenuously contends before this Court that at any stretch of imagination, the court cannot draw an inference that on the basis of the facts and circumstances, this case falls under the category of rarest of rare case in order to impose death penalty on accused No.1. The trial Court has not even made attempts to consider the mitigating circumstance and aggravating circumstance in the case in order to strike a balance between the two. The aggravating circumstance 115 should be more stronger than the mitigating circumstance in order to inflict such capital punishment. He further contends before this Court that looking at the over all facts and circumstances of the case and also considering the age, previous antecedents of accused No.1 and societal impact of the incident, definitely goes to show that the offence would not fall under the rarest of rare cases category to inflict such capital punishment on accused No.1. Therefore, he pleaded that it is not a case for recording death sentence. He alternatively argued without prejudice to the rights of accused No.1 for acquittal on the basis of the above said argument.

67. As we have already concluded that the Judgment of conviction recorded by the trial Court is proper and correct and the same deserves to be confirmed by this court. But the court has to consider whether the sentence passed by the trial Court commensurate with the offence committed by the 116 accused No.1.

68. The Additional State Public Prosecutor, strenuously contends before this Court that considering the diabolic nature of the offence that accused Nos.1 has committed gruesome murder of four persons inflicting lot of injuries on the deceased persons. Considering the nature and conduct of accused No.1 and also the pre-plan to commit the murders and also the previous disputes pending between the parties, belligerent rivalry between the parties coupled with the evidence of the doctors as to how barbericallly accused No.1 has slaughtered the deceased persons which makes it abundantly clear that accused No.1 is a menace to the society. His acts have sent a fearing message to the society. Therefore, in order to curb such persons, the death sentence passed by the trial

Court is appropriate and the same deserves to be confirmed. 117 69. As we have decided to confirm the judgment of conviction against Accused Nos.1 & 4, there is no need for this court to deal with the life punishment imposed upon accused No.4. However, it is just and necessary to find out on the basis of the materials available on record, whether this case is of such a nature which falls under the category of rarest of rare cases to impose death punishment on accused No.1.

70. The trial Court has considered the evidence of PWs.1 & 2, and relying upon various decisions has observed thus - Accused No.1 is aged 24 years, an agriculturist. He has made attempts illegally to remove 60 trucks of sand from the land of the deceased Basavva. There are previous cases pending against both the parties. In spite of that, he did not desist from obstructing the deceased Basawwa from harvesting the crop. He went along with A2 to A4 and attacked the deceased persons 118 with an intention to finish off them and he used a deadly weapon like axe, to inflict fatal injury on different parts of the bodies of the deceased Basavva, Gowdappa and Iravva who died on the spot. The defence has not been able to bring out any mitigating circumstance in favour of the accused during the cross examination. The killing is resorted to curb the liberty of the deceased Basawwa. Only quoting the above said factual aspects of this particular case, the trial Court has sentenced accused No.1 with capital punishment of death. But the trial Court has failed to consider as to what are the aggravating and mitigating factors available in the case, which is the basic and fundamental duty of the trial Courts.

71. Now, let us consider as to what are the important aspects that require to be considered in order to categorise a particular case under rarest of rare cases. 119 72. There is no compartmentalised circumstances which decide a case as one of rarest of rare cases. Therefore, it has to be seen that, the choice as to which one of the two punishments provided for murder is the proper one in a given case. It all depends upon the facts and circumstances of each case. The court has to exercise its discretion judicially and on well-recognised principles after balancing all the mitigating and aggravating circumstances available in the case. Of course, when there is no legal or statutory guidelines to declare a case as rarest of rare case, then it should be by means of exercising judicial discretion, on the basis of well recognised judicial precedents and principles which are emerged from the

various decisions, and after balancing all the mitigating and aggravating circumstances of the case. The court also should bear in mind that on the basis of the facts on record, whether there is something uncommon about the crime which renders sentence for imprisonment for life totally 120 inadequate and calls only for imposition of death sentence. It should also to be borne in mind that the nature of the crime and the circumstances surrounding the offender and his social background, his previous antecedent, his age, responsibilities towards his family and society which may be taken into consideration towards mitigating circumstance. On the other hand, the nature of offence committed, previous conduct of the accused and the deceased, the societal impact of the offence with other circumstances has to be taken into consideration as aggravating circumstance. In order to strike a balance between the aggravating circumstance and mitigating circumstance, the court has to rely upon the rulings which dealt with the subject.

73. In the above said background, we would like to quote some of the rulings of the Hon'ble Apex Court which have laid down certain guiding factors, to ascertain in what manner, the court has to consider a 121 case to find out whether it falls under the category of rarest of rare cases. The decisions are helpful to draw an inference so far as this case is concerned.

74. In a decision reported in (1973)1 SCC20between Jagmohan Singh Vs. State of UP, the Hon'ble Apex Court has observed thus - The proposition laid down is that the discretion in the matter of sentence is to be exercised by the judiciary after balancing all the aggravating and mitigating circumstances of the crime. 75. Subsequently, in the case of Bachan Singh Vs. State of Punjab reported in (1980) 2 SCC684 the constitutional bench of the Hon'ble Apex Court has observed that - Standardisation of the sentence is highly impossible. The sentencing is the discretion is to be exercised judicially on the basis of the principles crystalised by judicial decisions to consider the aggravating and 122 mitigating circumstances of the case. After applying the principles and considering the provisions u/s. 354(3) and 235(2) of the code, the extreme penalty can be inflicted only in cases of extreme culpability and in making choice of the sentence in addition to the circumstances of the offence, due regard must be paid to the circumstances and

the offender also. Therefore, it is quite clear to us from the above said decisions that for making the choice of punishment, the court should bear in mind the provisions u/s.354(3) and 235(2) of the Code for ascertaining the existence or absence for special reasons. In that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors depends upon the facts and circumstances of each particular case. Sometimes, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because style is the man. In many cases, the 123 extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. But in some cases, such cruelty or beastly manner of the commission of the murder, considering other circumstances may not be sufficient to impose capital punishment, when that aggravating circumstance is compared with other mitigating circumstance. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two watertight compartments. In a sense, to kill is to be cruel and therefore, all murders are cruel. But such cruelty may vary in its degree of culpability. With such mindset, irrespective of the respect to the laws of the land, such culpability assumes the proposition of extreme capital punishment that too by assigning special reasons, which can be legitimately adverted to. 124 76. In this background, we quote some important decisions which are holding the field since long. In Machhi Singh and Others Vs. State of Punjab, reported in (1983) 3 SCC (CRL) 470, the Hon'ble Apex Court consisting of three Judges has observed, after considering in detail, the synthesis emerged in Bachan Singhs case, as to how to assess the evidence to consider that a case falls under the category of rarest of rare case for imposing death sentence. The guidelines indicated in Bachan Singhs case has also been taken note of in Machhi Singhs case and has observed in the following manner.

77. In order to apply the guidelines as noted in Bachan Singhs case, the court has to put two important questions and held those have to be answered: (a) Is there something uncommon about the crime which renders sentence of 125 imprisonment for life inadequate and calls for a death sentence?. (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating

circumstances which speak in favour of the offender?.

78. It is also notable point that in the above said two decisions, the Apex court, though not exhaustively but extensively considered about the aggravating and mitigating circumstance under which the court can impose death penalty at its discretion. The aggravating circumstances are: (a) If the murder has been committed after previous planning and involves extreme brutality; (b) If the murder involves exceptional depravity; 126 (c) If the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed - (i) While such member or public servant was on duty; or (ii) In consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or (iii) If the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the code, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance u/s.37 and Section 129 of the said code. 127 In the said Bachan Singhs case, the constitutional bench after examining various decisions has also considered the mitigating circumstances which are broadly divided as follows: (1) That the offence was committed under the influence of extreme mental or emotional disturbance. (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death. (3) The probability that the accused can be reformed and rehabilitated. (4) That in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence. (5) That the accused acted under the duress or domination of another person. (6) That the condition of the accused showed that he was mentally defective and that 128 the said defect impaired his capacity to appreciate the criminality of his conduct. Further, in Bachan Singhs case, the court after observing the aggravating and mitigating circumstance and also the purpose, object of considering the rarest of rare cases has also observed that the sentence may be properly accorded to fit the gravity of each case. It is not necessary that maximum sentence prescribed by law should be inflicted invariably in all gruesome murders, but it should be reserved for the rarest of rare cases which are oftenly in exceptional circumstances reflects the seriousness of the crime and respect

towards law. To provide just punishment for the offences and to afford adequate opportunity detrimental to criminal conduct and to prevent the similar offenders for such similar conduct.

79. In Machhi Singhs Case, the Hon'ble Apex Court has again reiterated the guidelines which are emerged in Bachan Singhs case with some additional 129 guidelines which are enumerated below:- The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. (1) Before opting for the death penalty the circumstances of the offender also require to be taken into consideration along with the circumstances of the crime. (2) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiouisly exercised having regard to the nature and circumstances of the crime and all the relevant circumstances. (3) A balance sheet of aggravating and mitigating circumstance has to be drawn up and in doing so the mitigating 130 circumstance has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

80. Apart from the above said rulings, the Hon'ble Apex Court in several decisions has considered the mitigating circumstances. Some of the decisions, which we would like to refer has direct bearing so far as this case is concerned.

81. In a decision reported in (2010) 3 SCC508between Mulla and another Vs. State of Uttar Pradesh, wherein the Hon'ble Apex Court has observed thus - Consideration of aggravating and mitigating circumstances is the important aspect while imposing death penalty or otherwise mitigating circumstances which could be taken into account are, length of incarceration already undergone, socio-economic factors of the guilty, ability of guilty. Commission of offence due to economic 131 backwardness are some of the important factors, the court can also consider them as mitigating circumstances. (empahsis supplied) 82. In another ruling reported in (2011) 5 SCC317between Mohd. Mannan @ Abdul Mannan Vs.

State of Bihar, wherein the Hon'ble Apex Court at paragraph Nos.23 and 24 has observed thus - The death sentence can be inflicted only in a case which comes within the category of the rarest of rare cases but there is no hard-and-fast rule and parameter to decide this vexed issue. This Court had the occasion to consider the cases which can be termed as the rarest of rare cases. It is further observed that crime being brutal and heinous itself does not turn the scale towards death sentence. The said brutal and heinous offence is of extreme in nature so as to arouse intense and extreme indignation of the community and when collective conscience of the 132 community is petrified, one has to lean towards death sentence. Then only, the death sentence has to be preferred. Even if these factors are present, the court has to see whether the accused is a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence, then only the court has to further enquire and believe that the accused cannot be reformed or re-habilitated, then only the court should prefer to impose such extreme penalty of death sentence. (emphasis supplied) 83. In another ruling reported in (2014) 11 SCC129between Lalit Kumar Yadav @ Kuri Vs. State of UP, wherein the Hon'ble Apex Court has further observed that - While applying various principles to facts of present case, and guidelines for imposing commensurate sentence, the court should also consider the age of the accused, possibility of reforming him is an important 133 factor before imposing death penalty on the accused. (emphasis supplied) 84. In another ruling reported in (2014) 10 SCC261between State of Uttar Pradesh Vs. Narendra and Others, wherein, the Hon'ble Apex Court has re-iterated that - Before imposing the sentence of death, the Court has to consider the long period of incarceration and the facts of the particular case. In the above said case, the case involved commission of murder of four persons due to land dispute. On the basis of longevity of incarceration and that the case did not fall within the category of rarest of rare cases, the court can award minimum sentence of life. The High Court has rightly opined imposition of lesser sentence of life term altogether foreclosed. Compassion in sentence is also a key factor and it allows the scars to heal. Longevity of incarceration may make them see reason. Passage of time may make them ponder over crime they had 134 committed. This might arouse in them a feeling of remorse and repentance. (emphasis supplied) 85. In a recent

pronouncement of the Hon'ble Apex Court reported in (2015) 4 SCC467between State of Uttar Pradesh Vs. Om Prakash & Others, wherein it was held that - It is settled proposition of law that imposing death sentence is an exception and imposing life sentence is the rule and it should be awarded only in the rarest of rare cases. The question as to whether death sentence has to be imposed has been a vexed question engaging the attention of the courts considerably and consistently since a long time. There is no fixed yardstick or formula has been evolved for the same and its imposition is dependent upon the facts and circumstances of each case, vision and understanding of the Judge has been found to be inseparable. The phrase rarest of rare cases still remains to be defined while 135 the concern for human life, the norms of a civilised society and the need to reform the criminal has engaged the attention of the courts. It has equally been the view that sentence of death has to be based on the action of the criminal rather than the crime committed. The doctrine of proportionality of sentence vis--vis the crime, the victims and the offender has been the greatest concern of the courts. (emphasis supplied) 86. Bearing in mind the above said principles, this court has to again consider the factual aspects of the case in order to ascertain whether this particular case falls under the rarest of rare cases category. Though not we have to consider the evidence for any other purpose, but in order to ascertain the above said factors, we have to consider the evidence once again. 136 87. First we would like to consider the aggravating circumstances available in this particular case: (i) PWs.1 and 2 have stated that accused Nos.1 & 2 came along with accused Nos.3 & 4 but accused Nos.1 and 2 were only armed with axes. PW-2 has stated that all the four accused persons were hiding in the bushes. On seeing, they came out from the bushes and started quarreling and assaulted with the help of axe, particularly A1 assaulted twice on the neck of the deceased Basawwa, Gowdappa and Gowrawwa these injuries were held to be sufficient to cause the death of those persons. It is also in the evidence that four murders have been taken place at a time simultaneously one after another. the accused have come there with an intention to kill them. Therefore, their mindset is very serious in nature. (ii) The evidence of the doctor discloses that the deceased persons have 137 suffered grievous injuries on the vital parts of the body particularly PW-17 Dr. Ashok who conducted the Post Mortem examination on

Goudappa, and Gowramma has stated that the chopped wounds are seen over middle of the head and right side of the neck, chopped would over the right side of the neck, skull is fractured over the middle of the head, membrane was ruptured over middle of the head, brain is cut and exposed in both the dead bodies. PW-18 Dr. Narayan has stated that he has conducted Post Mortem examination on Irawwa. On examination he has found cut wound over the left cheek, chopped wound over the left side of the neck, chopped wound over the left shoulders, left hand, chopped wound over left forearm and both bones of left forearm was fractured. PW- 19 Dr. Pragati has conducted the Post Mortem examination of one Basawwa and has found chopped wound over left side of neck, skull and vertebrae were fractured. The above said injuries shows that the deceased suffered injuries particularly, on the vital part 138 assaulted by accused No.1 which is on the neck. (iii) The evidence also discloses that though the complainant and others were 7 in number, A1 to A4 were successful in threatening them and made them not to rescue the persons who died on the spot. The death of the deceased persons on the spot itself shows the aggravating nature of the offences committed by the accused persons. (iv) Accused No.1 particularly after the incident has also not repented and not made any efforts to shift the injured persons to the hospital, shows that he has not only brutally attacked the deceased person, but totally violated the law. The accused persons particularly A1 and A2 have lifted 60 trucks of sand from the land of deceased Basawwa and there was a criminal case lodged against them and prior to the incident also, there was 107 proceedings initiated against both the parties which is also one of the aggravating circumstance, as the crime is motivated. 139 88. Now, we will consider the mitigating circumstance which are available in the case: (i) Accused Nos.1 to 4 are no other than the relatives of the deceased persons. They are having both land dispute as well as criminal cases pending against each other. Except the allegations made against the accused persons, it is not shown to the court that accused No.1 is a menace to the society. (ii) He has not committed any offence previously at any point of time. No police records are produced to show that the accused either a rowdy sheeter or involved in any other criminal offences earlier. (iii) The accused No.1 is aged about 21 years having wife and children and other members in the family and there is chance of accused reforming himself. (iv)

Accused No.1 has not stated to be made any attempts during the course of trial or caused any inconvenience to the witnesses or caused any hindrance to the 140 trial and he had any antecedents during the course of his imprisonment in jail in connection with this case. (v) The accused has already undergone long incarceration of almost ten years. (vi) Accused No.1 and other accused and also the witnesses are residing in a very remote village in Khanapur taluk, Belgaum District. The said village is not even facilitated with any bus conveyance. (vii) The entire evidence of PWs.1 & 2 shows that only with reference to their land dispute, the parties are fighting each other. Particularly, the evidence of PWs.1 & 2 shows that A1 has actually no grievance against the deceased persons. But Accused No.2 Arjun was having grievance against his brother PW-3 Ramalinga with respect to the possession of the properties. There is no direct motive attributable to accused No.1. (viii) The evidence discloses that on the day of the incident there were verbal 141 alternations taken place between the accused and the deceased and thereafter accused No.1 assaulted Basawwa on her neck and at that time, Gowdappa went to rescue Basawwa and in that context, accused No.1 also assaulted Gowdappa. Gowrawwa wife of Gowdappa went to rescue Gowdappa. On that context accused No.1 has also assaulted the said Gowrawwa and caused the death of those three persons. (ix) No evidence regarding any meeting of minds of the accused or about any pre- plan. (x) The contradictions, omissions, lapses in the investigation as observed by us and absence of strong motive particularly about accused No.1, though are not sufficient to hold the accused are not guilty, but they can also be taken into consideration as mitigating circumstances. 89. By analyzing the above said aggravating and mitigating circumstances and the entire case of the prosecution, we come to the conclusion that mitigating 142 circumstances are persuasive than aggravating circumstance. Hence, we are of the opinion that this is not one of the rarest of the rare cases. More over, all the accused persons were not armed with deadly weapons.

90. Yet another important aspect that has to be taken into consideration is that u/s.235(2) of Cr.PC, the accused have to be questioned on the sentence elucidating the details of the circumstances and also their family background, their previous antecedents, character etc., As could be seen from the records, the trial Court has not made so much of genuine efforts to elicit from the mouth of the

accused which has a bearing on the question of sentence. Such procedure should not be casually followed as if it is a formality. Except hearing the accused u/s.313 statement, there is nothing in the judgment of the trial Court as to what questions have been put to the accused and what 143 answers were given with regard to the sentence. Therefore, in our opinion, it is also not in strict compliance of Section 235(2) of Cr.P.C., and this has not been properly observed by the trial Court. In fact, the learned trial Judge has to record the questions put to the accused u/s.235(2) of Cr.PC regarding the sentence and record their answers and thereafter the trial Judge has to proceed to consider the answers given by the accused whether they fall under the mitigating circumstances or not. Therefore, opportunity was not provided to the accused to explain mitigating circumstance for the purpose of seeking minimum sentence.

91. Before parting with this judgment, we feel, it is just and necessary to place on record a word of appreciation for the valuable assistance with the enodated arguments addressed by the learned counsel for the appellants Sri Mulawadmath, appearing for the 144 accused and as well Sri V.M. Banakar, learned Additional State Public Prosecutor, appearing for the State.

92. For the above said reasons, we are of the opinion, that the trial Court is not right in imposing death sentence on accused No.1. The life imprisonment in our opinion is an adequate punishment. The provision of Section 302 of IPC, not only prescribe death punishment but also prescribe life imprisonment and also mandatorily imposition of fine. It is not that if the court punishes the accused with death sentence or the life imprisonment, the imposition of fine can be ignored. It is a mandatory provision which requires the court to adhere to the provisions strictly and the fine has to be imposed as the fine is not an alternative punishment. The trial Court has also ignored this particular aspect. Therefore, the imposition of fine is also mandatory in this case. Hence, we proceed to pass the following:

145.

ORDER

The Criminal Appeal No.2549/2012 is partly allowed sofar as A1 is concerned. The conviction of A1 and A4 for the offence punishable under section 302 of IPC is

maintained. So also, the conviction of A4 for the offence punishable under section 341 of IPC is also maintained. The death sentence imposed against Accused No.1 is modified to that of life imprisonment. The sentence passed against Accused No.4 is not disturbed. In addition, fine is also imposed. The accused No.1 & 4 shall undergo Rigorous imprisonment for life and A1 and A4 shall also pay a fine of Rs.10,000/- each for the offence punishable under Section 302 of IPC and in default shall undergo rigorous imprisonment for six months. The Crl.RC No.31/2012 submitted by the learned Sessions Judge for confirmation of the death sentence is hereby rejected. 146 Accordingly, the Criminal Appeal and the Criminal Referred Case are disposed of as above. Sd/- JUDGE Sd/- JUDGE KMS/PL*