

State of Karnataka Vs. Mahantappa and Others

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Court : Karnataka

Decided On : Mar-18-1997

Reported in : 1998CriLJ238; ILR1998KAR817; 1997(3)KarLJ713

Judge : M.B. Vishwanath and ;M.F. Saldanha, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 149, 201, 300, 302 and 307

Appeal No. : Criminal Appeal No. 337 of 1990

Appellant : State of Karnataka

Respondent : Mahantappa and Others

Advocate for Def. : M.V. Devaraju, ;R.B. Deshpande and ;M.V. Seshachala, Advs.

Advocate for Pet/Ap. : S.R. Bannurmath, SPP and ;Shivakumar Kallor, Adv.

Judgement :

Saldanha, J.

1. As many as 17 accused persons were put on trial before the learned Sessions Judge at Raichur on a host of serious charges in relation to an incident that took place at Bappur village on the morning of 10-10-1985. We need to prefix this judgment with the observation that the facts of this case are extremely gruesome

and that the incident is accompanied by a high level of brutality which extended right up to the point of attempting to burn the corpse and destroy all traces of the evidence of the incident. It is alleged that on the morning of 10-10-1985 at about 8-30 a.m. the deceased Pampanagowda and P.W. 1. Veerabhadrapa had gone to the hotel of P.W. 4 Pampayya for some refreshments. When they came out of that place, they noticed a tractor belonging to accused No. 3 approaching with about a dozen persons in it. These persons had been identified as accused Nos. 2 to 14. The house of accused No. 1 is stated to be very close to the hotel and the allegation is that accused No. 1 on seeing Pampanagowda and Veerabhadrapa instigated the rest of the accused who had alighted from the tractor to chase these two persons and attack them. The mob thereupon got after the two who started running and they managed to get into the house of P.W. 8 Neelamma and closed the door. Accused No. 1 was apparently directing the operations and an attempt was made to get the victims outside the house by soaking cotton balls in kerosene oil, lighting them and throwing them on the roof of the house. Three of the accused are alleged to have got on the roof in an attempt to get them outside. Sensing the imminent danger, Neelamma opened the door as there were children in the house and came out. It is the version of P.W. 1 that A. 1 who was instigating others and leading them, told his companions that they should attack the real person whom they were after and therefore that they should not attack Veerabhadrapa but that they should attack Pampanagowda. A. 1 was armed with a sword and as far as the remaining accused are concerned, it appears that A. 2 was armed with an axe. A. 8 was armed with a spear and the others had sticks or clubs with them. P.W. 1 claimed that accused Nos. 2, 4, 5 and 8 had inflicted some injuries on him and after this Pampanagowda was subjected to a merciless assault by the accused persons. A. 1 inflicted grievous injuries on the deceased with a Sword, as a result of which Pampanagowda collapsed on the spot and died.

2. The incident does not stop there because even though we have on record the evidence of P.W. 8 who is an elderly lady and who claims that she had virtually begged the accused persons not to indulge in the savage attack, that they pushed her out of the way and continued with the operations and after they realised that Pampanagowda had been killed, they decided to do away with the body. It is alleged that accused Nos. 15, 16 and 17 who are women were ordered to bring

cans of kerosene oil which they did. The body of the deceased Pampanagowda was thereafter carried by the accused persons and taken to the hut of P.W. 6 Mahanthappa and despite his protestations kerosene oil was doused all over the place and the hut was set on fire after which the accused left. The incident took place in the broad day light in the village and the shocked villagers could only help to extinguish the flames after which P.W. 1 Veerabhadrappe made his way to the Police Station and lodged the FIR at 12-30 in the noon. In the FIR he has named 12 accused specifically and mentioned two others with them and he has given a broad outline of the incident. The Police thereafter commenced the investigation and it is alleged that the weapons which were used in the course of the assault were recovered at the instance of some of the accused. Even though the evidence in this regard is not very satisfactory, the case essentially depends on oral evidence and to some extent on the medical evidence and on completion of the investigation the 17 accused were put on trial before the learned Sessions Judge. The trial Court in the course of a detailed judgment has virtually dealt with each and every aspect of the oral evidence and the circumstantial evidence and has systematically demolished every single ingredient of this and has recorded the finding that there is virtually no material on the basis of which the charges could be sustained and consequently acquitted the accused. The State of Karnataka has assailed the order of acquittal through the present appeal.

3. At the hearing of the appeal, the State was represented by the learned SPP, Sri Bannurmah who has done an absolutely first class job. On behalf of the respondents-accused, Sri Devraju, learned Senior Advocate has appeared and we need to also record that he has done an extremely admirable job arguing the appeal on behalf of his clients. The record in this case is relatively heavy. The appeal is a very hotly contested one. There are a large number of accused and intricate points of law have also arisen for decision. We have been admirably assisted by the two learned counsel which is why we consider it essential to make a special reference. Before we proceed to deal with the case on merits we need to record that original accused Nos. 3, 11 and 14 are dead and the learned SPP points out that as far as they are concerned, that the appeal is not pressed. Effectively the appeal abates as against these three accused and therefore, the order of acquittal as far as they are concerned would not need to be interfered

with.

4. The learned SPP has meticulously taken us through the evidence of the material witnesses in this case as also the supportive evidence. P.W. 1 Veerabhadrappa is the complainant and he is the person who has lodged the FIR. Veerabhadrappa also claims that he was in the company of the deceased on the morning of the incident and that he was along with him when they were chased into Neelamma's house by the accused. He is a resident of that village and all the accused are known to him personally. The incident is one which is spread over a considerable period of time and Veerabhadrappa has specifically identified all the 17 accused in the course of his evidence. Briefly stated, he has pointed out that accused No. 1 was the leader or instigator or virtually the director of operations and that it was he who set off the entire incident and got all the accused to chase P.W. 1 and the deceased and that even after they took shelter in Neelamma's house that the accused repeatedly tried to get them out from there by throwing burning cotton balls on the house. His explanation is that after Neelamma opened the door that even though he suffered some minor injuries at the hands of accused Nos. 2, 4 and 8 that accused No. 1 told his followers that they should go for Pampanagowda as he was the target whom they were after and that they should assault P.W. 1 which was why his life was saved. He very clearly attributes participation in the incident to all the 17 accused and that as far as accused Nos. 15, 16 and 17 are concerned, the role ascribed to them is that they were ordered to bring the kerosene oil which they did after the deceased had been finished off. He also deposed to the fact that the accused carried the body of the deceased to the hut of P.W. 6, that they doused it with kerosene oil and set fire to the hut. P.W. 1 has been cross-examined at considerable length and the line followed basically is that there is no reason why he would have remained in the midst of the assault when his life was in danger and furthermore, as to why he did not take any steps to extinguish the fire himself. It is also alleged that he is a companion of the deceased and that he is hostile to the camp of the accused and that therefore, his evidence is motivated. There is also a charge against him that he has involved more persons than those who were present and that therefore he should be totally disbelieved. The learned SPP submitted that this evidence which stood up to rigorous cross-examination is virtually unscathed and that the learned trial Judge

has wrongly rejected this evidence on grounds that are far from contestable. What was emphasised by the learned SPP was that the injuries on P.W. 1 clearly establish that he was not only present but that he was on the scene of the offence and that therefore, this evidence alone is sufficient to sustain a conviction.

5. On the other hand, Mr. Devraju, learned counsel who represents accused submitted that P.W. 1 is a partisan witness in so far as admittedly he belongs to the camp of the deceased and he has in so many words admitted that he is not well disposed towards accused No. 1 and other accused. He submits that undoubtedly there was an altercation on that morning and that P.W. 1 was also a participant in that incident which explains the injuries on him. The learned counsel submits that it would be highly dangerous to accept the evidence of such a witness whose loyalty was completely on the side of the deceased and who was viciously antagonistic to the entire group of accused persons. Also the learned counsel points out that the FIR has been lodged after the lapse of 4 hours for which there is no valid explanation and that it was clear that a lot of consultation has taken place before the FIR was lodged in order to ensure that as many persons as possible are implicated. The credibility of the witness is also seriously called into question and learned counsel submitted that where the learned Sessions Judge has totally discarded the evidence on the basis of elaborate reasoning, that in the absence of very strong grounds which are indicative of the fact that the reasoning is not only bad but perverse that this Court ought not to interfere with that finding.

6. At this stage, we shall briefly deal with the submissions on points of law which the learned counsel advanced in so far as the learned SPP submitted that the powers of this Court in an appeal against acquittal necessarily required that the Court must intervene if a failure of miscarriage of justice has occurred and merely because this is a case in which very elaborate reasoning has been put forward by the learned Sessions Judge that this is no bar or fetter on the setting aside of that judgment. The respondent's learned counsel has very strongly and very vehemently contended that it is a basic principle of criminal jurisprudence that where two views are possible that the one in favour of the accused must be accepted and he submits that unless this Court can categorise the findings of the learned trial Judge as being wrong to the extent of being perverse that merely

because another view is possible that the High Court in an appeal against acquittal is not justified in interfering. The learned counsel drew our attention to the host of decisions on both sides and we shall briefly refer to them as it is essential to call out the conclusions that have emerged on the basis of this case law. Mr. Devraju relied on the decision reported in : 1981 CriLJ164 wherein the Supreme Court laid down that the High Court in such situations should not interfere in cases where the view taken by the trial Court is not so unreasonable to require the judgment to be set aside. In other words, the principle prescribed was that if the findings were based on reasoning that appears to be prima facie reasonable, that no interference would be justified. The allied principle was set out in another decision of the Supreme Court reported in 1981 SCC (Cri) 642 : (1981 Cri LJ 1010) wherein the Supreme Court held that if the view taken by the Session Court is reasonably possible, that the High Court would have to allow the matter to rest at that. In two other decisions of the Supreme Court reported in : 1978 CriLJ177a and : 1976 CriLJ638 the Supreme Court pointed out that one of the test to be applied would be as to whether portions of the evidence that are basically important and material aspects of the evidence have either been ignored or overlooked by the trial Court. Respondent's learned Advocate was quick to point out to us that this is one of the few cases in which the learned Sessions Judge had dealt with the evidence virtually threadbare and that therefore, these two judgments would squarely apply. In a slightly later decision reported in : 1976 CriLJ685 the Supreme Court held that while arriving at the difficult decision as to where interference would be justified, the High Court would have to examine whether the view of the Lower Court can be categorised as perverse and if the answer is in the negative then no interference is warranted. Once again in the decision reported in : 1976 CriLJ717 the Supreme Court laid down that between the conflicting views, it was impermissible for the High Court to impose its own view even though it was the superior Court as it was not as well equipped as the Sessions Court which had the benefit of witnessing the conduct of the entire proceeding. This view has been reiterated in the decision reported in : AIR 1977 SC785 .

7. Another aspect of the matter which has been referred to extensively in several decisions was set out in the decision of the Supreme Court reported in : 1977 CriLJ659 wherein the Apex Court had occasion to observe that one of the

important methods of assessing credibility is on the basis of demeanour of the witnesses which benefit the trial Court has and the Apex Court is not so fortunate. The Court pointed out that the conclusion arrived at by the Sessions Court ought not to be lightly disturbed and while reiterating this view in the decision reported in : AIR 1983 SC360 , the Apex Court held that interference by the High Court in several such situations was unjustified. In the case reported in : 1986 CriLJ809 , the Supreme Court has laid down that in case where the appeal Court decides to overhaul the findings of the trial Court, that Court must indicate sufficiently strong reasons. On the other hand, it was pointed out in the decision reported in : 1987 CriLJ974 that a plausible view of the trial Court should not be interfered with as it was one of the two possible findings. Again, in the decision reported in AIR 1968 SC 1158 (sic) the Apex Court reminded the appeal Court that the presumption of innocence which the accused is entitled to is something which ought not to be overlooked at any stage. A gentle reminder from the Supreme Court is to be found in the decision reported in AIR 1990 SC 2478 (sic) where the Supreme Court refers to the 'unwritten rules' or principles that have now been crystallised. As far as assessment of the evidence is concerned it is observed that unless the evidence unmistakably indicates an absolute assurance of guilt that the setting aside of an order of acquittal would not be in order. In another decision reported in : (1996)ILLJ979SC the Supreme Court laid down that no interference in such cases is permissible unless the view taken by the trial Court is wrong. The Supreme Court however clarified that the powers vested in the High Court are no different from those of any other appeal Court and that the High Court was free to come to an independent conclusion which otherwise means that regardless of the various cautions and guidelines that are required to be followed by the High Court while dealing with an appeal against acquittal and that it is not to be misunderstood as either curtailing or reducing the powers of the High Court to the rarest of the rare cases. In the decision reported in : 1971 CriLJ798 which decision follows the earlier decision of the Supreme Court reported in : 1968 CriLJ1647 , the Supreme Court laid down that before setting aside an order of acquittal passed by the Sessions Court that the reasons given by that Court in support of the acquittal must be dispelled properly as this was the condition precedent for the allowing of an appeal in such cases.

8. In this regard, the learned SPP drew our attention to the decision reported in 1972 SCC (Cri) 88 : (1972 Cri LJ 606) wherein the Supreme Court made a very important distinction between merely finding fault with orally and circumstantial evidence and situation wherein genuine and reasonable doubts can justifiably arise and he submitted that if the reasoning appears to be biased or one sided as in the present case where the evidence has been virtually discarded from top to bottom that it is very necessary that the High Court takes corrective action. In this regard, he drew our attention to a decision in Shivaji Sahebrao Bobade v. State of Maharashtra, : 1973 CriLJ1783 in support of his contention that it is a total misnomer that the High Court should exercise any reluctance while hearing an appeal against acquittal because the Supreme Court had occasion to observe that in such situations the unfettered or plenary power of the High Court to interfere for purposes of bringing about a just result was not abridged in any manner merely because of an order of acquittal passed by the lower Court. The Apex Court also laid down another salutary principle in this case which is to the effect that the Courts must make allowance for rustic witnesses. This last observation would pre-suppose that uniform and absolute standards cannot be adopted while assessing oral evidence and that the mental make up, background, more importantly the economic and social conditions of the witnesses are paramount factors which a Court will have to predominantly assess and that while doing so a degree of flexibility rather than rigidity and a more realistic approach to the evidence will have to be adopted particularly in regard to this situation.

9. At this stage, we need to advert to a very relevant aspect of the law as also an issue of propriety which prescribes the two fold angle of the High Court's duty to set right the situation in circumstances of miscarriage of justice even in appeals against acquittal, as also the approach that is required to be observed to set right in the situation. In this context we refer to : 1973 CriLJ1783 and it is very essential that we remind ourselves of the correct legal approach to be adopted in circumstances such as this, which the Supreme Court has clearly summarised as follows (para 6) :

'Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffer from insufficient forensic appreciation. The dangers of

exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go scot-free but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting guilty person light heartedly as a learned author has silently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that 'a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent . . .' In short our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic or preponderant probability to punish marginal innocents.'

9A. It is equally relevant for us to reproduce the guidelines laid down by the Supreme Court with regard to appreciation of evidence in cases where witnesses are predominantly examined which has been summarised in the same decision as follows (1973 Cri LJ 1783 at p. 1789) (SC) :

'Where the witnesses to a criminal case are rustics, their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in Courts based on unreal assumptions about human conduct cannot

obviously be applied to those give to the lethargic ways of our villages. When scanning the evidence of the various witnesses the Court has to inform itself that variances on the fringes, discrepancies in details contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony, provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered.'

9B. We do not for a moment dispute the well settled position in law as repeatedly stressed upon by the respondent's learned counsel that an order of acquittal reinforces the original presumption of innocence and furthermore, that the appeal Court in such situations must be supported by very cogent and compelling reasons before interfering with such an order of acquittal. There is another aspect of the matter which assumes considerable importance particularly in recent times where indiscriminate orders of acquittal seem to have become the fashion of the day and where such orders are invariably cloaked with very logical and apparently convincing reasons. This in our considered view is one such case where we find that the learned Judge has virtually thrown out the entire evidence with rather elaborate reasoning by virtually setting one part of the record against the other and by even contriving various negligence that are hardly justifiable and in sum and substance indicating that everything adduced by the prosecution is unacceptable. Mercifully this is one of the few cases envisaged where the now familiar disease that is frequent or material witnesses turning hostile and the prosecutor keeping back material evidence has not taken place. It is undoubtedly a rare instance but fortunately that has happened. Despite this position, the evidence of witness after witness has been written off and we do concede that lengthy reasoning has followed. We have read and re-read these reasons but find it difficult to sustain even a single one of them. The question arises as to whether in such a background the interests of justice require that the order, merely because it appears superficially logical and it represents one possible point of view, should be interfered with or not. The often repeated argument that where a subordinate Court has recorded a possible view, that the High Court should not substitute it with another view, is an over-simplification of the principle and an incorrect statement of the law. The correct position is that the view propounded by the trial Court will first have to be shown to be correct and justifiable, it is only then that it

can be categorised as one of the acceptable views and once this position is established, the well settled principle of criminal jurisprudence that another parallel view merely because it can lead to another conclusion should not be allowed to override the earlier one. There is a very clear and subtle distinction between the argument earlier stated and the position pointed out by us and it is necessary to correctly set out the law on this point as it is often wrongly contended that any view propounded by the lower Court must be regarded as one of the two possible views.

10. It is in this background that, we are required to assess in the first instance the question as to whether the learned trial Judge was at all justified in having discarded the evidence of PW 1 Veerabhadrapa. We see no justifiable ground on which his evidence can be discarded, particularly since there is intrinsic material on record from the fact that he was injured, that he was present at the scene of offence. We have decided the question as to whether he has exaggerated or falsely implicated any one through the evidence of other witnesses and other parts of the record and we are of the view that this allegation against PW 1 is unjustified.

11. The learned SPP thereafter placed reliance on the evidence of PW 2 Shankarappa and PW 3 Yenappa. These two persons who again are residents of the same village and who are familiar with the identity of all the accused have very clearly deposed to the fact that they had seen the incident from close proximity. It is unnecessary for us to reproduce their evidence in any great detail, but, we do find from their depositions that the entire incident right from the inception up to the stage at which the body was sought to be burnt has taken place within a relatively small area and that these two persons who claim to have been present there have deposed to the fact that this band of accused had in fact chased the deceased and PW 1 that they thereafter assaulted them and that the accused subsequently set fire to the hut of PW 6 after putting the body there. Despite the fact that they are villagers and the fact that they are deposing after a considerable lapse of time the broad outline of the narration tallies with that of PW 1. The learned SPP has submitted that the evidence of these two witnesses is of some importance because they do not belong to either group and that the criticism with regard to PW 1 namely that he is a partisan witness would not hold good as far as these

persons are concerned. It is true that the learned counsel representing the accused has seriously assailed this evidence on the ground that according to him neither of these two persons is able to adduce any valid satisfactory ground for his presence there and the learned Advocate submits that they are in the category of chance witnesses and that their evidence is seriously suspect. Also, he has submitted that if as residents of the village they personally identified all the accused that there is no reason why there should be minor variations between the persons whom they named, the weapons which are ascribed to them and more importantly the exact over acts that are attributed to each of the accused. We need to record here that the Court would immediately be put on suspicion if the witnesses deposed with computer like precision and more importantly if the evidence is so very identical, that it is almost a carbon copy of the earlier witnesses statement, for that matter a parrot like reproduction. The fact that there are minor blemishes lends a degree of credibility to the evidence and in our considered view, there is an absolute ring of truth to the statements of these witnesses. As residents of the village they do not have to ascribe any special reason for being present there and the fact that they happen to have seen the incident is evident from the fact that despite searching cross-examination, their evidence has withstood the test.

12. PW 4 'Pampayya is a witness of some importance because he has deposed to the earlier part of the incident namely the fact that accused No. 1 started the entire operation by coming out of his house armed with a sword that he was instigating and leading the rest of the group who had alighted from the tractor belonging to A-3. He has also deposed to the fact that the deceased and PW 1 had come to his hotel and had taken some refreshments there. The learned SPP submitted that this evidence is of considerable importance for two reasons, the first being that it is very clear proof of the fact that PW 1 was along with the deceased when the incident started and secondly of the fact that this witness indicates that all the accused persons has assembled together, that they shared a common objective and that they were participating as one body. On the other hand, the learned defence counsel has submitted that this evidence is totally and completely worthless for two reasons : firstly, he contends that if PW 4 was running his hotel obviously he was within the premises and attending to his business and that he

could not have been aware of what was going on outside. The learned counsel secondly submits that his entire story is a total fabrication at the instance of the Police and that therefore, it should be disregarded. As regards this aspect of the matter, apart from a sketch, we have also seen some of the photographs and it is very clear to us that the hotel was a small structure of the conventional type and that everything happening in front was more than visible to anybody who was inside the premises. Also, a group of persons assembling and thereafter chasing the victim is an incident which would generate considerable amount of attention and it is only human nature that PW 4 left whatever he was doing and went to watch the proceedings. There is an added reason for this in so far as the two persons happened to be his own customers who had recently come to his hotel. As regards this aspect of the matter the learned defence counsel has vehemently submitted that it is established that the entire deposition of PW 4 is false. He submits that the story of PW 1 that they went to the hotel is rendered false. These witnesses have very clearly indicated as to what they ate in the hotel on that day. Immediately thereafter the incident has taken place and it was one of short duration in which the deceased lost his life. The learned counsel draws our attention to the post-mortem notes and he submits that there is a reference to the effect that there were no traces of food in the stomach or for that matter he submits that this circumstance more than fully establishes the fact that these two persons could not have gone to the hotel at all and that they could not have consumed anything there as otherwise there would have been undigested food in the stomach. As far as this aspect of the matter is concerned, it is well settled law that too much of emphasis cannot be attached to passing references of this type which are to be found in the post-mortem notes. There was no specific examination of the gastro-intestinal system and it is only in passing, that the doctor has referred to the fact that there was no semi-digested food found by him. The evidence of PW 1 indicated that these two persons had partaken a small snack at that place and the quantity of that food being so very small that there is every possibility that it was not even noticed by the Doctor when the post-mortem was conducted. In any event, we are not inclined to discard the evidence of PWs 1 and 4 only on this ground because the overall assessment of their evidence indicates that there is a total ring of truth about it.

13. The next witness on whom reliance was placed is PW 8 Neelamma. It is in her house that PW 1 and the deceased took shelter. She is very clear about the identity of the accused persons and the two persons climbing on the roof and hurling ignited cotton balls on the roof of her house threatening to set fire to it if the inmates did not open the door. She begged accused No. 1 not to assault PW 1 and the deceased and that she was pushed away. She was very much present on the scene when A-1 gave a fatal blow to the deceased and she had also deposed to the fact that accused Nos. 2, 4, 5 and 8 among others had assaulted PW 1. She is an elderly person and the learned SPP has heavily relied on this evidence both as primary evidence as also the evidence which corroborates the other evidence and he submits that the rest of the evidence taken along with the earlier depositions more than fully establishes the prosecutions case. He has also pointed out that this witness was virtually standing there when the whole of the assault took place and she has also seen the accused taking the body of the deceased to the hut of PW 6 and setting fire to it. As far as her evidence is concerned, the respondents' learned counsel pointed out that she is in the category of a partisan witness and secondly it is pointed out that both the persons took refuge in her house which shows that she is very much interested in these persons and their welfare. In addition to this what is pointed out is that even though the accused are alleged to have threatened to burn her house and even though they were armed with weapons and were in the process of assaulting PW 1 and the deceased one of whom lost his life that she seems to have continued to stay there instead of running away from that place. It is contended that this conduct is highly unnatural, and that this circumstance alone disqualifies her from acceptance. Once again we need to take note of the fact that as an elderly person this witness obviously felt to some extent that she would be safe from attack principally because of her age. Secondly, the incident was taken place in and around her house and we do not really see much substance in the contention that she under normal circumstances should have run away from there because in her evidence she has expressed considerable concern about the fact that the part of the house itself and some of grain bags which she had stored there had caught fire and she had to save her possessions rather than to abandon that place and run away. Apart from the secondary aspects of the matter, we have in this case one more witness who has

hardly been shaken in cross-examination. Undoubtedly, she is a rustic witness. But, her evidence is virtually unscathed. In this background, we cannot for a moment agree with or reconcile ourselves to the flimsy grounds on which the learned trial Judge has discarded the evidence in question.

14. Next we have the evidence of PW 6 Mahantappa. This witness claims to be a Barber and he states that since it was a market day and everybody was busy that he had no customers and that explains why he was sitting in his hut. According to him despite his protestations accused No. 1 accompanied by the other accused forcibly brought the dead body and threw it in his hut. They directed accused Nos. 15 to 17 to bring kerosene oil and as soon as it was brought, the oil was doused on the corpse and it was set on fire. He claims that his possessions were burnt in the process. The learned SPP submits that this witness more than fully corroborates the last charge namely the one under section 201, IPC because he contends that having committed the murder of the deceased the accused had obviously decided to destroy all traces of evidence and that was why they took the extreme step of trying to burn the body. He therefore submits that this evidence brings home the last charge under section 201, IPC. The respondents' learned Advocate has severely criticised this evidence of PW 6 and he submits that it is wholly and completely impossible to accept that PW 6 would have been sitting at his house in an idle position on the market day. His contention is that there would have been a larger number of customers and that therefore the presence of this witness at that particular place is rendered extremely doubtful. Secondly what is pointed out is that it has come on record that the hut which accused No. 6 claims to be his is an illegal structure that the site does not belong to him and that has no documentary proof of the fact that this particular hut was his. The learned trial Judge has upheld all these contentions and has totally and completely discarded the evidence of PW 6. Again what we need to note is that the reasoning is totally and completely erroneous. First of all we have taken cognizance of the fact that the incident has taken place early in the morning at 8.30 a.m. and this has happened before the weekly market gets going. Secondly there is no reason to disbelieve the evidence of PW 6 when on a market day all those present are prescribed with their trading and other activities and it is most unlikely that he would be busy with any of his customers. Also, the fact that there is no

documentary evidence of his hut belonging to him or for that matter the site belonging to him quite incidental because we have more than enough evidence on record from the other witnesses of the fact that the place where the body was burnt happen to be the hut of PW 6. Moreover, this is not a proceeding in which his title is to be determined nor is this a declaratory proceeding where the Court has to investigate the legality of his existence there. Even assuming that he is an encroacher and even assuming that the structure was unauthorised, if there is evidence to show that he was in fact staying in that hut which is very clear from a lot of circumstances on recording including the photographs of the burnt possessions in that premises, we have no reason to disbelieve the version of this witness.

15. The rest of the evidence in this case is essentially supportive and the learned SPP has only pointed out that the weapons which are attributed to various accused are alleged to have been recovered at their instance from the tractor-trailer. As far as this evidence goes, there are certain blemishes which have been upheld by the learned trial Judge and the learned SPP very frankly submitted that it would be difficult to overcome this handicap. He had however demonstrated from the injuries sustained by PW 1 and the deceased that there is total and complete corroboration in so far injuries on these persons have been established of being caused by the type of weapons which the witnesses have ascribed to the different accused. There was considerable debate with regard to this aspect of the matter and the respondents' learned Advocate did try to point out to us that it is not possible to co-relate the injuries with the weapons particularly, the injury that is alleged to have been caused by the spear. Factually this position is incorrect because the injuries totally and completely correlate to the weapons that were used in the incident.

16. On a careful analysis of the evidence before us, we have no hesitation in holding that the prosecution case stands established beyond reasonable doubt as far as accused Nos. 1 to 14 are concerned. Undoubtedly since accused Nos. 3, 11 and 14 have died during the pendency of the appeal, it would not be correct or legally permissible to disturb the order of acquittal that was recorded in their favour. As far as accused Nos. 15, 16 and 17 are concerned, the learned SPP

submits that their presence and participation is clearly established that they had brought the containers of kerosene oil for the purpose of setting fire to the hut. To this extent they are liable to be convicted along with the remaining accused. This position has been seriously disputed by the learned counsel for respondents for a variety of reasons. Firstly, he submitted that even assuming that the objective of the unlawful assembly was to injure or kill PW 1 and the deceased, that there is no clear evidence of the fact that accused Nos. 15 to 17 were participants in this part of the incident. His submission is that the incident is not one of a continuous nature and that even if the members of the unlawful assembly after committing the main offence came to the conclusion that the body should be burnt that it was a separate act and that therefore, it is not coupled with the earlier incident. He also submitted that the Court should view the conduct of accused Nos. 15 to 17 who are the wives of the accused in that context in so far as the only fault on their part is that they obeyed the directions of their respective husbands. The position in law is that it would have to be demonstrated to the satisfaction of the Court that these three accused who undoubtedly brought the containers of kerosene oil when they were asked to do so were participants in the act of destroying the evidence of a criminal offence and it would be rather difficult even if they were convicted for merely having brought the container of kerosene oil, to hold that these ladies shared the criminal intention. The correct approach in the matter would be to hold that even if it is established that they brought the containers of kerosene oil when they were asked to do so that it was neither at their instance nor was it their intention to participate in or collude in any criminal offence. Their act is clearly separable from the main act that can be ascribed to the acts of other accused. Even though the learned SPP submitted that if the other accused are punishable under Sections 149 read with 201, IPC that accused Nos. 15 to 17 would also have to be convicted of this offence, we are not inclined to accept his argument. As far as accused Nos. 15 to 17 are concerned, we uphold the submission canvassed by their learned Advocate that the material on record is insufficient to implicate them in any of the offence with which they stand charged.

17. As indicated by us earlier, the totality of the evidence in this case establishes that accused Nos. 1 to 14 were present at the scene of evidence and that they were carrying weapons of assault of different types. It is true that the overt acts

that have been ascribed to the different accused at different parts of the incident vary from each other, but as far as accused No. 1 is concerned a dominant role is ascribed to him and the fatal blow with the sword is established to have been at his instance, but, as far as the remaining accused, there are passing references to them for having participated in the chasing, throwing ignited cotton balls, administering threats and actual acts of assault culminating in the carrying of the dead body and setting it on fire. The submission canvassed on behalf of the defence is that the Court will have to direct this evidence very clearly and draw a distinction between only those of the accused to whom specific overt acts can be ascribed and ignore the remaining. This approach has been vehemently opposed by the learned SPP. He submitted that as far as the law is concerned, the principle is well settled that once the gathering is characterised as an unlawful assembly and once the object of the unlawful assembly is established to be the commission of an offence that every member who forms part of that assembly will be vested with the same liability as the others. He has drawn our attention to two decisions of the Supreme Court, the first of reported in : 1995 CriLJ2665 wherein the Supreme Court has in unequivocal terms held that the mere presence fastens a criminal liability in the case of an unlawful assembly. The second decision reported in : [1995]3SCR1197 is even more eloquent in so far as the Supreme Court has clearly laid down that where the accused had come to the scene of offence armed with deadly weapons and participated for the purpose of sharing the common object that the criminal liability is complete. The third decision relied on by the learned SPP is the case, reported in : 1980 CriLJ735 wherein the Supreme Court has reiterated the well settled proposition of law that once it is established that an accused is a member of the unlawful assembly that it is unnecessary for the prosecution to ascribe individual over act and prove them because the liability of one is the liability of all under Section 149, IPC. This virtually concludes the position in law as far as Section 149, IPC is concerned. Having regard to this situation, the position that emerges is that accused Nos. 1 to 14 would have to be convicted of all the charges that are framed against them with the exception of accused Nos. 3, 11 and 14 who are dead. We therefore set aside the order of acquittal passed by the trial Court as against accused Nos. 1, 2, 4 to 10, 12 and 13 are concerned, whereas we confirm the order of acquittal as far as accused Nos.

3, 11 and 14 and 15 to 17 are concerned.

18. Original accused Nos. 1, 2, 4 to 10, 12 and 13 are convicted of the offence punishable under sections 149 read with 302, IPC and are sentenced to suffer RI for life.

19. Accused Nos. 1, 2, 4 to 10, 12 and 13 are convicted of the offence punishable under sections 307 read with 149, IPC and are sentenced to suffer RI for 5 years.

20. Accused Nos. 1, 2, 4 to 10, 12 and 13 are convicted of the offence punishable under sections 149 read with 449, IPC and are sentenced to suffer RI for one year.

21. Accused Nos. 1, 2, 4 to 10, 12 and 13 are convicted of the offence punishable under Sections 149 read with 436, IPC and are sentenced to suffer RI for one year.

22. Accused Nos. 1, 2, 4 to 10, 12 and 13 are convicted of the offence punishable under sections 149 read with 201, IPC and are sentenced to suffer RI for three years and we refrain from awarding any separate sentence for the substantive sentence under section 149, IPC. It is directed that the substantive sentence awarded to the different accused under different Sections shall run concurrently. The order of this Court shall be transmitted to the Court of Sessions for execution and if any of the accused are on bail, the bails bond shall stand cancelled and the respondents shall surrender to the Police.

23. The appeal substantially succeeds and stands disposed of.

24. Appeal allowed.