The Public Prosecutor, High Court of Andhra Pradesh Vs Md. Ankoos and Others

Court: Andhra Pradesh High Court

Date of Decision: Oct. 4, 2007

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 161, 161(3), 172, 172(2), 174
Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 â€" Section 5, 7
Penal Code, 1860 (IPC) â€" Section 109, 114, 120B, 148, 149

Citation: (2008) 1 ALD(Cri) 54 : (2008) 1 ALT(Cri) 1

Hon'ble Judges: K.C. Bhanu, J; D.S.R. Varma, J

Bench: Division Bench

Advocate: Public Prosecutor, for the Appellant; C. Padmanabha Reddy, representing A. Prabhakar Rao, for the Respondent

Judgement

D.S.R. Varma, J.
Heard both sides.

2. This Criminal Appeal is filed by the State assailing the judgment of acquittal, dated 09.06.2003, in Sessions Case No. 425 of 2001, passed

against the respondents-accused 1 to 20 and 22 to 78, by the II Additional Sessions Judge, Warangal, for the offences allegedly committed under

Sections 148, 448, 307, 302 and 120-B read with Section 109 I.P.C

3. The case of prosecution, in brief, is as under:

In the year 1997, some villagers of Thimmapur suspected that their cattle died due to sudden ill health and the same was caused because of

practicing sorcery by some of their villagers. In order to identify them, accused 19, 60, 61, 62 and 69 called accused No. 16, who is a Mantrik,

from Lingapuram village and collected some donations from each family of the village and paid to him. Upon such payment, accused No. 16

revealed the names of deceased persons, who are five in number along with one Panduga Renuka and Poshala Yeshoda (P.Ws.6 and 7). That

apart, about 15 days prior to the incident one Rashaboina Bikshapathi, who was the son of accused 17 and 72 and brother of accused 71 and 73,

died at M.G.M. Hospital, Warangal while undergoing treatment. After five days, one Panduga Nirmala, who was a relative of accused 9, 10, 26,

59 and 76, also died in the village due to ill health. Then the villagers hatched a plan on 02.08.2000 to do away with the deceased persons

including P.Ws.6 and 7 suspecting them to be responsible for the said mysterious deaths because of sorcery played by them. Pursuant to the said

plan, accused 1 to 15, 17 to 59 and 62 to 78 formed themselves into an unlawful assembly and some of them armed with lethal weapons like

sticks and also some of the accused, who are women, holding chilly-powder gathered in front of the house of accused No. 7 near Rice Mill and

that accused 1, 5 and 6 brought the deceased V. Narsamma; accused 11, 13 and 14 brought the deceased V. Uppakantha; accused 9, 10, 26

and 29 brought the deceased K.N. Yellaiah and K. Rajamma; accused 2 to 4 and 17 brought the deceased S. Ilu Mallamma; accused 28, 32 and

33 brought P.W.6; whereas accused 18, 20 and 24 brought P.W.7 from their respective houses forcibly. Thereafter, accused 1 to 15, 17 to 59

and 63 to 78 beat the above said persons, who were so brought from their respective houses forcibly, with sticks and that remaining accused, who

were carrying chilly-powder, sprinkled the same into their faces. Somehow, P.Ws.6 and 7 managed to escape from the scene with injuries. Then,

accused 19, 65 and 66 brought a drum of kerosene. Accused 1 to 15, 17 to 59 and 62 to 78 poured kerosene on the deceased persons and set

fire due to which the deceased viz., (1) S. Ilu Mallamma, (2) V. Narsamma, (3) K.N. Yellaiah and (4) K. Rajamma died on the spot, and (5) V.

Uppakantha succumbed to the burn injuries while undergoing treatment at M.G.M. Hospital, Warangal.

4. A complaint in this regard was lodged by P.W.1, in charge V.A.O. of Thimmapur village, and the same was registered by the Police, Sangam,

and took up investigation. During the course of investigation, witnesses were examined, scene of offence panchanama was conducted and the

drum, which contained kerosene, was seized from the scene. After conducting inquest over the dead bodies, the same were sent for post-mortem

examination. The other formalities were also completed and eventually charge-sheet was filed against accused 1 to 15, 17 to 20, 22 to 59 and 62

to 78 for the offences punishable under Sections 148, 448, 307 and 302 read with Section 149 I.P.C.; and against accused No. 16 for the offence

punishable u/s 5 read with Section 7 of Drugs and Magical Remedies (Objectionable Advertisement) Act, 1954; and against accused 60 and 61

for the offences punishable under Sections 120-B, 302 and 307 read with Section 109 I.P.C.

5. However, the record reveals that accused No. 21 being found to be juvenile as on the date of offence, the case against him was separated

under Juvenile Justice (Care and Protection of Children) Act, 2000 and a separate charge-sheet had been filed against him before the Juvenile

Court, Warangal.

6. The trial Court framed the following charges against the accused:

Charge No. 1:- That accused 1 to 15, 17 to 59 (except accused No. 21) and 62 to 78 on 02/03.08.2000 at about 01.00 hour at Thimmapur

village were members of an unlawful assembly and did, in prosecution of the common object of such assembly, namely to commit the murder of

D.1) S. Iyla Mallamma, D.2) V. Narsamma, D.3) K. Nuri Yellaiah, D.4) K. Rajamma, D.5) E. Uppakantha, commit the offence of rioting by

pouring kerosene and that thereby committed an offence punishable u/s 148 I.P.C;

Charge No. 2:- That the above accused on the above mentioned date, time and place committed house-trespass by entering into the house of D.1

to D.5 with intent to kill them and that thereby committed an offence punishable u/s 448 I.P.C;

Charge No. 3:- That the above accused on the above mentioned date, time and place did an act i.e. murder of D.1 to D.5 with such intention and

under such circumstances that if by that act they had caused the death of D.1 to D.5 they would have been guilty of murder and that thereby

committed an offence punishable u/s 307 I.P.C;

Charge No. 4:- That the above accused on the above mentioned date, time and place did commit murder by intentionally causing the death of D.1

to D.5 and that thereby committed an offence punishable u/s 302 I.P.C.; and

Charge No. 5:- That accused 16, 60 and 61 on the above mentioned date, time and place were members of an unlawful assembly to do an illegal

act i.e. murder of D.1 to D.5 and that the same act was done in pursuance of the agreement which was committed in consequent of abetment and

that they had thereby committed an offence punishable u/s 120-B read with Section 109 I.P.C.

7. When the said charges were read over and explained to the accused in Telugu, they denied the same and claimed to be tried.

8. In order to bring home the guilt of the accused, the prosecution examined P.Ws.1 to 22 and got marked Exs.P-1 to P-37 and M.Os.1 to 5 on

its behalf. In defence, no witnesses were examined nor any document was marked.

9. The trial Court, having considered the entire material, including the evidence, both oral and documentary, available on record, recorded a finding

that all the accused persons were liable to be acquitted since the prosecution had failed to establish the offences, with which the accused were

charged.

10. Since in this case, five persons were died because of the alleged act of murder along with other offences on the ground of sorcery, we feel it

necessary to examine the evidence on record, both oral and documentary, with all care, caution and in detail.

11. The learned Public Prosecutor, appearing for the appellant-State, contended vehemently that there are eyewitnesses to the occurrence who

spoke about the presence of all the accused, however, could be identified by the eyewitnesses only to some extent; that merely because the

eyewitnesses did not speak about the presence of other accused and their involvement in the offence and the same since was not established

against many of the accused and on the ground that the accused are too many in number that the trial Court was in error in recording a finding of

acquittal against all the accused.

12. The learned Public Prosecutor further contended that in a case like this, it is not possible for the eyewitnesses to identify all the persons who

are involved in the offence which had taken place during night time and on that ground, it is not proper for the trial Court to acquit all the accused;

that the evidence of eyewitnesses cannot be attached with the stigma of falsity and hence, he supported the version of the prosecution by

contending that a case like this shall be handled with rational approach in appreciating the evidence on record.

13. On the other hand, Sri C. Padmanabha Reddy, the learned Senior Counsel, appearing for respondents-accused 1 to 20 and 22 to 78,

contended that no specific overt acts were attributed against any of the accused and that gathering of 78 persons and committing the offences,

under the circumstances stated by the prosecution, is highly improbable.

14. It is the further contention of the learned Senior Counsel that the names of accused were not mentioned in the complaint, Ex.P-1 given by

P.W.1 to the Police. The learned Senior Counsel further strenuously contended that the inquest over the dead bodies was conducted by the Police

while all the alleged eyewitnesses were present, but none of them did make any specific mention of any of the accused during the course of inquest

except accused No. 1. This fact of silence on the part of the eyewitnesses during the course of inquest would not only falsify but also improbablise

the entire case of the prosecution.

15. The learned Senior Counsel further contended that two sets of statements were recorded from the witnesses - one on 03.08.2000 and the

other on 04.08.2000 and in the statements, he pointed out, that the names of the accused were narrated in the same manner and in the same order,

which is some thing like a parrot repetition; that this is another aspect which is to be considered to disbelieve the evidence of the prosecution

witnesses and the same is to be doubted as highly improbable.

16. The other contention of the learned Senior Counsel is that mere presence of some of the persons who are added as accused does not by itself

amount to sharing the common object with the other accused, so as to brought under the purview of Section 149 I.P.C., and that therefore, the

accused cannot be charged either u/s 148 I.P.C., nor can Section 149 I.P.C., be attracted.

17. Here, it is to be noticed that no doubt, the charge u/s 302 read with Section 149 I.P.C., was not framed against the accused by the trial Court.

This absence of framing of charge u/s 302 read with Section 149 I.P.C., causes prejudice to the accused. This aspect would be separately dealt

with at a later stage of the judgment.

18. In view of the said contentions of the learned Public Prosecutor appearing for appellant-State and Sri C. Padmanabha Reddy, learned Senior

Counsel appearing for respondents-accused 1 to 20 and 22 to 78, the question that falls for consideration before this Court is - whether the trial

Court had appreciated all the aspects on record including the evidence of the eyewitnesses in arriving at the conclusion that all the accused were

entitled to be acquitted?

19. In view of the magnitude of the offences, we deem it appropriate to discuss in detail the evidence on record.

20. P.W.1 is the in-charge Village Administrative Officer of Thimmapur village, who stated that on 02/03.08.2000 the incident took place and the

same was brought to his notice at 6 am., on 03.08.2000, through the Village Servant; that immediately he went to the spot and found four persons

were already dead due to burn injuries and one person, by name V. Uppakantha was struggling for life; that immediately he rushed to Sangam

Police Station and lodged a complaint in Ex.P-1 and also reported about the incident to the Mandal Revenue Officer, Sangam, over telephone and

that he was examined by the Police. It appears, he made some arrangements to send the half burnt person, namely, V. Uppakantha, to M.G.M.

Hospital, Warangal, for treatment. Later, he came to know that while undergoing treatment, the said person also died.

21. In the cross-examination, he stated that he does not know whether the said Village Servant, who informed him about the incident, actually

witnessed the incident. On 03.08.2000 at about 8 am., accused No. 60 came to the village along with the Police. Except this, there is no useful

material that comes forth from this witness.

22. At this juncture itself, we feel it appropriate to mention that regarding the contention of the learned Senior Counsel appearing for the accused

that there was no mention in Ex.P-1 about the names or the particulars of the accused involved. Therefore, he pointed out that this is a doubtful

circumstance.

23. In this regard, we are of the view that P.W.1 is only a witness to who came to know through the Village Servant about the incident in the early

hours of 03.08.2000 i.e., on the next day of the incident. Actually, the incident took place in the intervening night of 02/03.08.2000. P.W.1 further

stated in his cross-examination that he does not know whether the Village Servant, who informed him about the incident, was actually an

eyewitness to the occurrence or not. Therefore, there was no occasion or specific information about the actual persons who participated in the

offences. Therefore, it is but natural for P.W.1 just to make a complaint in Ex.P-1 to the Police without giving out the names of the accused.

24. Further, it is to be seen that the settled law is to the effect that giving complaint to the Police is only to set the criminal law into motion, but all

the particulars need not necessarily find a place in the first information report and it is for the Investigating Agency to make necessary enquiry or

investigation into the matter. It is also not necessary that the affected person alone need to make any complaint. Any person who is in knowledge

of an offence can bring to the knowledge of the Investigating Agency about the occurrence of the offence and it is the further duty of the

Investigating Agency to probe into the matter. Therefore, the contentions raised by the learned Senior Counsel on this score cannot be sustained.

25. P.W.2 is the son of one of the deceased, by name Ch. Ilu Mallamma. He deposed that accused No. 19 collected Rs. 100/- per head about

three years prior to the incident from the house owners of his village to take steps to prevent the deaths of their cattle occurred due to sorcery; that

accused No. 16 is a Mantrik, who disclosed the names of five deceased persons as responsible for the death of the cattle in the village by way of

sorcery.

26. P.W.2 further deposed that on the death of one B. Bikshapathi, who fell in a drain and one P. Nirmala, who committed suicide by consuming

poison, the villagers particularly accused 60, 17, 7, 2 and 3 and others hatched a plan too away with the deceased persons suspecting them as

responsible for the unnatural death of their cattle in the village.

27. It is further deposed by P.W.2 that on 02/03.08.2000 all the five deceased persons along with one P. Renuka and P. Yashoda were forcibly

taken out of their respective houses and were beaten thoroughly on the road in front of the house of accused No. 7 by accused 2, 3, 59, 10, 6, 14,

12, 5, 11, 68, 9, 41, 48, 77 and some others on the ground that those two women (P.Ws.6 and 7) along with five deceased persons who were

lynched by them, were resorted to sorcery; and that thereafter accused 17, 3, 2, 10 and some others came to his house and forcibly took away his

mother from the house alleging that she was playing sorcery; that his attempt to rescue her failed; that the above said accused took his mother in

front of the house of accused No. 7 and beat her indiscriminately, and thereafter accused 65, 13 and 20 brought kerosene from the house of

accused No. 19; that accused No. 10 sprinkled kerosene on the deceased persons while they were being beaten; that P. Renuka and P. Yashoda,

who also were brought along with five persons killed, managed to escape; that accused No. 3 set fire the deceased persons with a match-stick;

that all the above named accused persons were present at the scene of offence till the four deceased, except V. Uppakantha, were died due to

burns; that after the accused left the scene of offence, one Sreenivas, who is the son-in-law of 5th person, namely, V. Uppakantha, shifted her who

was struggling for life to M.G.M, Hospital, Warangal, in a jeep on 03.08.2000 at about 6 am., where she succumbed to burn injuries. He further

stated that the other accused persons whose names have not given were standing and witnessing the incident at the scene.

28. Above all is the statement of P.W.2 in his examination-in-chief. What is to be seen from this piece of evidence is that he did not give the names

of the other accused, who were allegedly standing and witnessing the incident at the scene of offence.

29. In the cross-examination, he denied that his mother along with four other deceased persons did involve in any act of sorcery, or there was any

enmity between the accused and his deceased mother. He further stated that he was not present when accused 3, 7, 17, 16 and others hatched a

plan to do away with the deceased persons and that when he reached the scene of offence he found a gathering of 60 to 70 persons. He

specifically deposed that only 25 persons were at a distance; that the kerosene was poured on the deceased persons one after the other and they

were set on fire. He reiterated that while his mother was dragged out of his house he was beaten.

30. A specific suggestion was made to P.W.2 during his cross-examination as to whether he stated before the Police that he tried to rescue his

mother and in that process he was also beaten. P.W.2 further deposed that the police station at Sangam is at a distance of 3 kms., from their

village; that the incident started from 9 pm., to 3 am; that due to fear he did not go to the police station and inform the police; that he went to the

police station on the following morning on 03.08.2000 at 5 am; that after arrival of the police he gave the names of the culprits to the police who

committed the offence; that the Assistant Sub Inspector of Police noted down the same and obtained a signature and that the inquest was

completed by 12 noon. He denied the suggestion that he did not give the names of the accused to the Police during the course of inquest.

31. P.W.3, who is the husband of one of the deceased persons by name V. Uppakantha, while speaking about the incident mentions about

accused 2, 10, 5, 34, 11, 6, 13, 12, 7, 37, 3, 54 and 1 who allegedly came to his house and took away his wife; that after some time he was

informed by his daughter Rajitha that his deceased wife was being beaten by the accused and that he rushed to the spot and saw accused No. 5

beating his wife with a stick on her head due to which she sustained a bleeding injury. He further stated that accused No. 71 sprinkled chilly-

powder on the bleeding injury; that the above named accused persons brought kerosene drums from the house of accused No. 19; that accused

No. 13 poured kerosene on his wife; that accused No. 3 set fire her with a match-stick; that the entire event was being supervised by accused No.

17 and that his wife sustained severe burn injuries, but, however, she died after she was shifted to hospital. He further stated that on the date of

incident the above named accused persons also set fire and killed four other deceased persons. However, he deposed that there were some other

persons who did not commit the offence, but the Police implicated them.

32. During the cross-examination of P.W.3, it was suggested to him by the defence that he did not give the names of accused 2, 10, 34, 11, 13,

12, 7, 37, 3 and 54 to the Police. But, again, upon verification of the record by this Court, it could be seen that he narrated the names of accused

1 to 49 in the same order as was stated by P.W.2. Except the above suggestions and few other suggestions, which are not very material, there is

nothing significant does come forth from the cross-examination of this witness.

33. P.W.4 is another eyewitness, who is the son of two deceased persons, by name K. Yellaiah and K. Rajamma. His evidence is also to the

same effect of the evidence of P.Ws.2 and 3, but he stated about the involvement of accused 1, 11, 12, 13, 5, 10, 7, 17, 48, 8, 15, 41 and 14. He

further deposed that accused 12, 13 and 5 brought kerosene drums from the house of accused No. 19 and the same was sprinkled on his

deceased parents and were set fire by accused No. 3.

34. In his cross-examination, he deposed that at the time of inquest over the dead bodies of his parents he did not mention the names of the

accused. However, he narrated the names of the accused to the Sub Inspector of Police at 10 am., on 03.08.2000; and that no other police officer

including the Circle Inspector of Police recorded his statement thereafter.

35. Because P.W.4 is an illiterate person, he may not differentiate who is Sub-Inspector and who is Inspector of Police. Because he narrated the

names of accused to Sub-Inspector, that that does not mean he was examined only by Sub- Inspector. As a matter of fact, it is P.W.20 who

examined P.W.4 and recorded his statement u/s 161(3) of Code of Criminal Procedure.

36. P.W.5, who, in fact, was declared hostile stated that on the date of incident at about 11 pm., after he came back to his house from his

agricultural land he came to know that his sister-in-law V. Narsamma was forcibly taken away from her house by some persons and set fire due to

which, she died in the centre of the village on a road and that his wife informed him about the said incident. He further stated that due to fear he

could not go out of his house; that on the next day morning at about 8 am., the village servant, by name Ramaiah came and informed him about the

murder of his sister-in-law; that he went and saw her dead body; that along with the dead body of his sister-in-law, he saw all the five dead bodies;

that all were with burn injuries and that he did not enquire as to how the incident took place.

37. Though, initially, he was projected as an eyewitness to the incident he did not support the version of the prosecution as regards the involvement

of the accused. But, we are of the view that the deposition he made to the extent that he saw five dead bodies in the centre of the village on the

road including the dead body of his sister-in-law can be taken into consideration.

38. P.W.6-P.Renuka, who is said to be an eyewitness to the incident and managed to escape from the accused persons, was also declared hostile

and her evidence upon our examination is found to be absolutely not useful to the case of prosecution. Same is the evidentiary value of P.W.7-

P.Yashoda, who is also said to be an eyewitness to the incident and managed to escape from the accused persons.

39. The evidence of P.W.8, who is the daughter of two deceased persons, by name K. Yellaiah and K. Rajamma, is only to the limited extent of

her knowledge through the wife of his brother (P.W.4) about the incident. Therefore, her evidence also is not of much use to the prosecution and

she was rightly declared as hostile witness.

40. The evidence of P.Ws.9 and 10, an alleged eyewitness to the incident and owner of the jeep, respectively, is also not of any use to the case of

prosecution and they were declared as hostile.

41. P.Ws.11, 12 and 13, who are to speak about the extra-judicial confession statements of some of the accused persons, were also declared

hostile and their evidence is of no use to the case of prosecution.

42. P.W.14 is the photographer, who had taken the photographs of four dead bodies at the scene of offence and they were marked as Exs.P-11

to P-19 with negatives.

43. P.Ws.15 and 16 are the punch witnesses for inquest over the dead bodies. P.Ws.17 and 19, who are the punch witnesses for confession and

seizure of jeep; and P.W.18 and 22, who were punch witnesses for confession and seizure of documents; and P.W.21, who is to speak about the

extra judicial confession of accused No. 17, were declared as hostile. Nothing worth mentioning is found from their evidence.

44. P.W.20 is the Investigating Officer. He stated that after receiving the intimation he reached the scene of offence on 03.08.2000 and took-up

investigation; that he conducted scene of offence panchanama under Ex.P-32, that photographs of the dead bodies were taken through P.W.14

and that the dead bodies were sent for post-mortem examination.

45. He stated further that he recorded the statements of P.Ws.1 to 14 on different dates; that on 04.08.2000 he arrested accused 18, 19 and 22

to 49; that on 05.08.2000 he arrested accused 50 to 58; that on 07.08.2000 he arrested accused No. 16; that on 13.08.2000 he arrested

accused 9, 21, 60 and 70 to 73 and sent them all to the Court for judicial custody; that similarly, he gave a Categorical account of the other

accused who were arrested on different dates; that after completion of investigation, he stated that the charge-sheet was laid against accused 1 to

20 and 22 to 78 by showing six accused persons i.e., accused 61, 74, 75, 76, 77 and 78 as absconding. He also stated about the seizure of jeep,

other books etc. He also gave an account of the inquest conducted on the dead bodies on the same day at different times.

46. The significant statement in his evidence is that all the 13 witnesses including P.Ws.2 to 4 gave the names of accused 1 to 49 in the same order

when he examined them after inquest u/s 161(3) of Code of Criminal Procedure.

47. In the cross-examination, he deposed that P.W.2 did not state the names of accused 2, 3, 59, 14, 12, 11, 68 and 77 in his Section 161

Cr.P.C., statement and that P.W.2 also did not give the names of accused 65, 13 and 20 who brought kerosene. Similarly, P.W.20 denied the

suggestion that P.W.3 did not give the names of accused 1, 2, 10, 34, 12, 7, 37, 3 and 54 who came to his house to take his wife. He further

stated that P.W.3 did not give the name of accused No. 5 beating his wife, accused No. 71 sprinkling chilly-powder, accused No. 13 pouring

kerosene and accused No. 17 supervising the whole event. He further stated that P.W.4 did not give the name of accused No. 10 who beat his

parents, who also did not give the names of accused 13, 12 and 5 who brought the kerosene. He further deposed that P.W.2 did not state before

him that accused No. 76 brought accused No. 16 to his village and that five days after the death of one Nirmala, accused 16, 17, 7 and 3 hatched

a plan at the outskirts of village to do away with the deceased persons.

48. From the above evidence of the Investigating Officer (P.W.20), it is revealed that P.Ws.2 to 4, who are the eyewitnesses to the incident,

categorically stated about the involvement of different accused in general and the involvement of some of the accused in particular. For example,

three accused i.e., accused 5, 13 and 20 were named as the persons who fetched the kerosene from the house of accused No. 19. Similarly,

P.W.2 stated that accused 13, 20 and 65 brought kerosene from the house of accused No. 19. P.W.3 also stated that the named accused in his

deposition brought kerosene and poured on the deceased persons in order to set fire them. P.W.4 also referred to accused 5, 12 and 13 as the

persons who brought kerosene from the house of accused No. 19.

49. Therefore there is consistency that kerosene was brought from the house of accused 19. Obviously there were 5 persons to be set fire. There

is nothing unusual for different persons to get adequate amount of kerosene from the house of accused 19. Among such persons, the witnesses

identified and named. The so-called discrepancy or inconsistency are absolutely possible, and natural because the witnesses are interested in each

of the deceased. In such situation each of the eyewitnesses cannot be very watchful about all the circumstances around.

50. Even though the names of the accused are not uniform in number as spoken to by P.Ws.2 to 4, still, some of the accused were commonly

mentioned by them. There is nothing unusual for different persons to fetch kerosene from somebody''s house, may be from the house of accused

No. 19, and, in such a situation, where there was a huge congregation, to identify the persons who actually brought the kerosene is somewhat

difficult. One person may identify and name few, and the other may identify some others. So, merely because there is no uniformity in the evidence

of P.Ws.2 to 4 as to who actually brought the kerosene in order to burn the deceased alive, it cannot be said that the basic case of the prosecution

that the deceased were killed by pouring kerosene and setting them to fire is shaken. It is not in dispute even as per the inquest panchanamas of

deceased Ch. Ilu Mallamma and V. Narsamma under Exs.P-20 and P-21, respectively, and the oral evidence of P.Ws.2 to 4 that all the five

deceased persons were killed after setting them fire who actually involved in committing the offence is a difficult task for anyone to put forth.

51. But, the method and manner, in which the offence was committed, was uniform as narrated by P.Ws.2 to 4.

52. Now, the next question would be among the huge gathering of 78 people, who were arrayed as accused, are really responsible for the death of

deceased sharing common object.

53. In this regard, P.W.2 stated in his cross-examination as under:

...When I reached the scene of incident I found a gathering of 60 to 70 persons. Only 25 persons were near the deceased persons and the other

persons were at a distance. The kerosene was poured on the deceased persons one after another and thereafter they were set on fire....

54. A combined reading of the evidence of P.Ws.2 and 3 on this aspect would show that all the accused persons were actually not involved in the

commission of the offence. Only some accused have actively participated either by way of offering assistance by fetching kerosene or one person

by lighting fire.

55. At this juncture itself, it is to be remembered that there is a unanimous version of all the eyewitnesses i.e., P.Ws.2 to 4 that it is accused No. 3

who had lit the fire after the kerosene was poured by different accused. Therefore, to the extent of the presence of accused No. 3 and his actual

and vital participation in committing the offence by lighting fire at the deceased persons is proved beyond doubt.

56. Furthermore, it is quite natural for anyone to concentrate on the main event of the offence. Here, the main event is lighting fire at the deceased,

which would be more watched. That is precisely what had happened in this case and that was observed by all the three eyewitnesses i.e., P.Ws.2

to 4, and accused No. 3 is the responsible person in this regard.

57. Nextly, it is the contention of the learned Senior Counsel appearing for accused that in the inquest panchanamas of deceased Ch. Ilu

Mallamma and V. Narsamma, under Exs.P-20 and P-21, respectively, the names of other accused persons were not given except accused No. 1.

It is the specific contention of the learned Senior Counsel that in the presence of P.Ws.2 to 4 the inquests were conducted, but they did not come

forward to name the accused and therefore, the same would improbablise the case of prosecution.

58. We cannot agree with this contention because P.Ws.2 to 4, who were the eyewitnesses to the incident, are not the punch- witnesses and in

fact they were cited only as eyewitnesses. Though the inquest was conducted in the presence of P.Ws.2 to 4 the purpose of holding inquest is to a

limited extent i.e., to ascertain the apparent cause of death of deceased persons. The questions as to who caused the injuries, with which weapons

or the specific overt acts of each of the accused are foreign to the ambit and scope of Section 174 Cr.P.C.

59. Furthermore, P.Ws.2 to 4 were examined by the Police and their statements u/s 161 Cr.P.C., were recorded after the completion of inquest

over the dead bodies of five deceased persons. Therefore, the question of naming the accused persons in the inquest panchanamas, Exs.P-20 and

P-21, by P.Ws.2 to 4 does not necessarily arise.

60. Therefore, we are of the view that non-mentioning of the names of the accused in the inquest panchanamas, Exs.P-20 and P-21, by the

eyewitnesses (P.Ws.2 to 4) by itself would not be a ground to infer that the accused are not the assailants of the deceased persons nor would be

fatal to the case of prosecution for the simple reason that though the inquest over the dead bodies was conducted in the presence of P.Ws.2 to 4,

their statements u/s 161 Cr.P.C., were recorded by the Police later to the inquest. Therefore, there was no occasion for them to speak about the

names of the accused or the method and manner in which the offence was committed at the time of conducting the inquest.

61. The learned Senior Counsel further submitted that as per the evidence of the Investigating Officer (P.W.20), two sets of statements of the

witnesses u/s 161 Cr.P.C., were recorded on two different dates - one was on 03.08.2000 and the other was on 04.08.2000.

62. Ex facie, the procedure if really adopted by the Investigating Agency is something very strange and unknown to the investigating procedure.

Maybe, in exceptional cases depending upon the facts and circumstances statements of the witnesses u/s 161 Cr.P.C., may be recorded on a

second occasion but not in normal course.

63. For example, the witnesses if come forward with a new version or with new facts or with additional facts or on some allegation that the earlier

statements were given or by way of resiling the earlier statements on account of some coercion by other interested persons or in a circumstance

when the investigation was entrusted to some other agency etc.

64. Clearly it is not the case of either the defence or the prosecution that under a new peculiar or special circumstances such statements of the

witnesses u/s 161 Cr.P.C., were recorded by the Investigating Officer (P.W.20) twice.

65. Therefore, as spoken to consistently by P.Ws.2 to 4, their statements u/s 161 Cr.P.C., were recorded after the inquests were conducted over

the dead bodies, as admitted by P.W.20 himself at one stage; and again, he gives a different version in his deposition that he examined the

witnesses on 04.08.2000 also without offering any plausible explanation to resort to that kind of investigation by recording the statements of the

witnesses on the second occasion. Therefore, to this extent the evidence of the Investigating Officer (P.W.20) neither appears to be totally

incorrect nor can be believed.

66. As a matter of fact and as already noticed, the Investigating Officer (P.W.20) described the events that had taken place in the process of

investigation on 03.08.2000, which are as under:

The Police was informed at the early hours about the incident. They came to the village at about 8 or 9 a.m., in the morning. Inquest had/has

commenced on all the deceased persons starting from 8 a.m., and ended by 5 p.m., and then the statements of the other witnesses were recorded

on the same day.

67. This categorical account of the events that had taken place on 03.08.2000 till evening is most probable events and the procedure adopted is

the normal procedure in normal course. Any deviation from this has to be explained with reasons. Inadvertent admission made by P.W.20 that he

recorded the statements of witnesses on 04.08.2000 cannot be accepted. This part of the evidence of P.W.20 has to be rejected and insofar as

the first part of the evidence of P.W.20 as regards the procedure adopted by him regarding the conduct of inquest over the dead bodies and the

recording of statements of the witnesses u/s 161 Cr.P.C., which is supported by the record, alone, has to be believed.

68. Therefore, the contention of the learned Senior Counsel in this regard is also not sustainable for the above said reasons and accordingly, this

contention is in no way useful to the case of the defence. onsequently, basing on the evidence available on record, we have no hesitation to hold

that all the material witnesses were examined only once and that too on 03.08.2000.

69. The further contention of the learned Senior Counsel is that the accused persons who brought the deceased from their respective houses, that

some of the accused persons who brought the kerosene drums from the house of accused No. 19 and that some of the accused beat some of the

deceased persons or that some of the accused sprinkled chilly-powder or that some of the accused hatched up a plan to do away with the

deceased persons have not been stated to the Police when the eyewitnesses (P.Ws.2 to 4) were examined during the course of investigation u/s

161 Cr.P.C., and therefore, the statements of P.Ws.2 to 4 for the first time in the Court are totally improved and no reliance can be placed on the

above said statements of P.Ws.2 to 4 with regard to the involvement of some of the accused.

70. In this regard, to some extent we have already dealt with this subject. When a criminal incident had taken place in a larger magnitude and

where multitude of persons were involved, it is difficult for any stray witnesses, who are few in number, to identify the persons with their individual

acts.

71. In other words, when the eventuality of killing of the deceased persons started from dragging them from their respective houses by groups of

people of the same village, it is highly difficult to identify who actually dragged each of the deceased from their respective houses and took them to

the main centre in front of the house of accused No. 17, where the lynching activity had commenced by way of pouring kerosene and setting them

on fire had commenced and ended.

72. Out of P.Ws.2 to 4 who are actually affected parties, inasmuch as, it is their family members who were actually dragged out and were killed by

offering them to flames along with few others were present, each of them cannot identify each person in a big group of about 50 or more persons.

73. As a matter of fact, P.W.2 stated that his mother was surrounded by several people. In such an event, it is difficult for him to state as to who

actually fetched the kerosene and from whose house, these are all the things, which cannot be identified and attributed to a particular individual or

individuals. Each one of them may see and trace few people involved in a particular activity or activities. Therefore, the cumulative effect of the

evidence of the eyewitnesses alone has to be taken into consideration but not the individual statements.

74. If we put it in a different way, it is difficult to segregate the persons who actually participated in the offence with their commissions of the

offence.

75. But, one conspicuous thing that appears on record and as already noticed is that everybody pointed out accused No. 3 as the person who

lighted all the five people at fire. It is rather killing of five individuals by persons in massive scale. In such an event, the only thing that can be done

by this Court is to examine the evidence of each eyewitness and the cumulative effect of the entire evidence has to be taken into consideration

before arriving at a conclusion as to whether such evidence can be believed or not.

76. Therefore, as already pointed out, P.Ws.2 to 4 mentioned about the presence of different accused. Two witnesses said about one accused

twice and all the three witnesses stated about some accused from the beginning to end about their involvement. Some witnesses stated about some

accused, who fetched kerosene and poured the same on the deceased persons.

77. From the above evidence, the cumulative effect is that all the five deceased people were brought out of their respective houses by a swarm of

people and the deceased persons were lynched at one place, some people fetched kerosene from a nearby house, some people poured the same

on the deceased and they were set fire by another person.

78. So, the entire activity had passed through different stages and, at all the stages, the eyewitnesses (P.Ws.2 to 4) identified some people in

common and some people in stray. Therefore, it is a task before this Court against whom the involvement can be fixed in and who can be kept

aside from the offence.

Therefore, on this score itself, the case of the prosecution shall not get defeated.

79. It is yet another contention of the learned Senior Counsel that the witnesses P.Ws.2 to 13, including hostile witnesses, in their respective

statements, recorded u/s 161 Cr.P.C., narrated the names of the accused involved in the offence in the same seriatim. The learned Senior Counsel

submitted that the parrot repetition of the said witnesses, whose statements were recorded, about the conduct of the accused, is something unusual

and improbablises the version of the prosecution.

80. This submission of the learned Senior Counsel has to be tested again on the test-stone of the way in which the events that took place. Right

from the first action i.e., dragging out of the deceased persons from their respective houses till the inquest was conducted over the dead bodies and

the statements of the witnesses, u/s 161 Cr.P.C., were recorded, all the while, there was a big gathering because the incident was something rare,

rather, killing of five persons, at a time by pouring kerosene and setting fire by many of the villagers.

81. As stated by the Investigating Officer (P.W.20), the statements of the witnesses, u/s 161 Cr.P.C., were recorded soon after the inquest on the

dead bodies of the deceased was completed around 3.30 pm. It is not again unusual for one witness to name the accused in a particular order and

all the other witnesses, whose statements were recorded, would give the same manner or, as suggested by the Police, they would agree that the

narration of the individuals is correct. Therefore, this could only happen because of the method adopted by the Investigating Agency, in recording

the statements of the witnesses.

82. It is to be further seen that notwithstanding the same manner and the same order, the names of some accused were named by the witnesses in

their statements, while deposing before the trial Court, they did not do so in the same way as they narrated in their Section 161 Cr.P.C.,

statements, recorded by the Investigating Officer (P.W.20).

83. That apart, P.W.3 stated that only about 25 persons were actually involved in the offence and the remaining were at a distance and P.W.4

stated that some accused persons were actually involved in the offence and the remaining were watching. Therefore, mere recording of the

statements of the witnesses, u/s 161 Cr.P.C., by the Investigating Agency and arraying the accused in the same manner by all the witnesses cannot,

in strict sense, be a ground to defeat the case of the prosecution.

84. After all the statement of a witness, recorded u/s 161 Cr.P.C., has its own worth, since the same was recorded by the Police. The

trustworthiness of the said statement has to be approved by the person, who gave the statement, in the Court and the same has to be accepted by

the Court; otherwise, the value of the statement of a witness, recorded u/s 161 Cr.P.C., by the Investigating Agency and the narration of facts

therein has its own limitations. The sphere operative value of Section 161 Cr.P.C., statement is very narrow. Therefore, this contention of the

learned Senior Counsel need not be attached with much significance.

85. The trial Court gave findings in the impugned judgment that the evidence of eyewitnesses, P.Ws.2 to 4, is full of contradictions, inconsistencies,

exaggerations and discrepancies, and that P.Ws.2 to 5 and 8, who are interested witnesses, did not state the names of assailants while describing

the cause of deaths, in our considered view, are perverse findings. What are the contradictions, what are the improvements that made by the

witnesses or what are the discrepancies would go to the root of the case have not been stated or discussed. All the omissions or contradictions or

inconsistencies or exaggerations, which are minor in nature, would not affect the main case of the prosecution. The material contradictions, which

will go to the root of the case, have to be taken into consideration alone. Those material contradictions have not been stated by the trial Court in its

impugned judgment.

86. Further, the observation of the trial Court that P.Ws.2 to 5 and 8 are the family members of the deceased persons and, as such, they are

interested witnesses, cannot be accepted, because there is no law that the evidence of interested witnesses needs to be rejected on that ground. At

best, it only cautions the Court to scrutinize and appreciate their evidence after careful scrutiny and if the evidence is found to be only reliable, then

there is no legal bar in accepting their evidence and in convicting the accused.

87. One of the observations of the trial Court is that, as per the prosecution story, the kerosene was taken out from the mugs from the drum

(M.O.1) and poured on the deceased persons. It is not the case of prosecution at all that some of the accused took out the kerosene from the

drum with the help of mugs and poured on the deceased persons.

88. The other observation of the trial Court is that the mediators of the inquest panchanamas (P.Ws.15 and 16) did not state the names of the

assailants. Such an observation is perverse in view of the fact that the mediators of the inquest panchanamas are not the eyewitnesses to the

incident and there is no need to name the assailants of the deceased in the inquest panchanamas under Exs.P-20 and P-21.

89. Further, the presence of the eyewitnesses, P.Ws.2 to 4, at the scene of offence, is established beyond all reasonable doubt. Their presence at

the time of the incident even not denied or disputed by the accused.

90. Now, the question is whether the prosecution witnesses could be in a position to identify the assailants of the deceased in view of the fact that

the incident took place during nighttime?

91. No doubt, some of the witnesses, who did not support the case of prosecution, have stated that there was a failure of power but, at the same

time, their evidence cannot be accepted. It is for P.Ws.2 to 4 to explain as to how they could be in a position to identify the assailants. When they

specifically stated the names of several persons as accused persons who were present at the time of incident, it is for them to state in view of the

fact that some of the deceased persons were brought forcibly from their respective houses, it is reasonable to infer that the houses of the deceased

persons were illuminated with lights, thereafter they were taken to the centre of the village. Therefore, it is expected that there would be electric

lights burning at the centre of the village. Conspicuously not even a suggestion was made to P.Ws.2 to 4 that they could not be in a position to

identify the assailant persons because of darkness.

92. There is absolutely no motive for these witnesses P.Ws.2 to 4 to name the accused persons since they have no grouse against the said persons,

so named by them, when they were examined in the Court. If really they have any grouse against the accused persons, they could have as well

pointed out all the accused, who were present in the Court, as the persons involved in the offence.

93. On the other hand, they have categorically stated that some of the accused persons, who were present in the Court, did not commit the offence

and except those persons, who were named by them, the other persons did not involve in the commission of offence. In our considered opinion,

P.Ws.2 to 4 are eyewitnesses of truth and they were deposing about a fact, which was seen or witnessed by them, on the fateful day of the

incident. Therefore, an implicit reliance can be placed on the evidence of P.Ws.2 to 4.

94. The questions that are to be examined by this Court in view of the submissions made by either side of the Counsel are - (1) as to whether the

accused named by the eyewitnesses, P.Ws.2 to 4, are the members of unlawful assembly; (2) if so, their common object is to kill the deceased or

sharing the common object of killing the deceased; and (3) if so, how to identify those accused who shared such common object.

95. For the purpose of answering the above questions, we have to again fall back upon the evidence of P.Ws.2 to 4.

96. According to P.W.2, on the intervening night of 02/03.08.2000, five deceased persons and P.Ws.6 and 7 were forcibly taken out from their

respective houses and were badly beaten in front of the house of accused No. 7 by accused 2, 3, 5, 6, 9, 10, 11, 12, 14, 41, 48, 59, 68 and 77;

that thereafter accused 65, 13 and 20 brought kerosene from the house of accused No. 19; that accused No. 10 sprinkled kerosene on the

deceased persons; that, while they were being beaten, P.Ws.6 and 7 managed to escape from the scene and that accused No. 3 set fire the

deceased persons with a match-stick.

97. Whereas, P.W.3 stated that, on the date of incident, at about 9 p.m., accused 1, 2, 3, 5, 6, 7, 10, 11, 12, 13, 34, 37 and 54 came to his

house and stated that his deceased wife was called by the Village Sarpanch (accused No. 60); that then they took away her in front of the house of

accused No. 7; that they brought kerosene drums from the house of accused No. 19 and accused No. 3 set fire to her with a match-stick.

98. And, P.W.4 identified accused 1, 5, 7, 8, 10, 11, 12, 13, 14, 15, 17, 41 and 48, who beat his parents, and accused No. 3, who set fire to

them.

99. In view of the fact that when they were examined by the Police, as admitted by P.W.20, all the witnesses gave the names of accused 1 to 49.

Therefore, it can safely be concluded that accused 1 to 49 are the only persons allegedly participated in the commission of offence and hence,

accused 54, 59, 68 and 77 have not participated in the commission of offence, in view of the fact that their names were not mentioned when

P.Ws.2 to 4 were examined by the Police during the course of investigation. Therefore, the accused 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15,

17, 34, 37, 41 and 48 can again safely be concluded as having shared the common object with a view to eliminate the deceased persons.

100. The reasons for attack on all the deceased persons are that they were practicing sorcery and accused No. 16, who is said to be a Mantrik,

disclosed the names of five deceased persons as responsible for killing of cattle and also an accidental death of one B. Bikshapathy, about 15 days

prior to the incident, and one P. Nirmala, who committed suicide by consuming poison five days prior to the incident. Therefore, it can be said that

all these accused persons i.e., accused 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 34, 37, 41 and 48 had shared the common object with a

view to eliminate the deceased persons on the ground that they were practising sorcery.

101. Further, the ocular evidence of P.Ws.2 to 4 is supported by the medical evidence. As seen from the postmortem reports of five deceased

persons, namely, V. Uppakantha, V. Narsamma, K. Yellaiah, K. Rajamma and Ch. Ilu Mallamma, under Exs. P-23 to P-27, espectively, the

following ante-mortem injuries were present:

I. V. Uppakantha:

(1) A contusion of 3 x 2 cm present on scalp on vertex area;

(2) A contusion over an area of 20 x 8 cm, present on right shoulder outer aspect;

(3) A contusion of 10 x 8 cm, present on outer aspect of left arm;

(4) A contusion of 8 x 6 cm present on outer aspect of left wrist area;

(5) A contusion over an area of 16 x 10 cm present on right thigh, outer aspect;

(6) A contusion over an area of 10 x 8 cm present on outer aspect of left buttock; and

(7) Ante-mortem burns of mixed degree, present on face, scalp, neck, both sides of trunk, both upper limbs, both lower limbs and perenium, with

loss of entire superficial skin. About 100% of body surface area is involved.

II. V. Narsamma:

(1) A contusion of 6 x 4 cm present on occipital area of scalp;

(2) A contusion of 3 x 2 cm present on outer aspect of left elbow;

(3) A contusion of 6 x 4 cm present on outer aspect of right shoulder;

(4) A contusion of 8 x 6 cm present on back of trunk;

(5) A contusion of 4 x 3 cm present on right buttock;

(6) A contusion of 8 x 4 cm present on outer aspect of left buttock; and

(7) Ante-mortem, deep burns present on scalp, face, neck, both sides of trunk, both upper limbs, both lower limbs and perenium, with bone deep

on left side body over arm and buttock and cavity deep at abdomen. About 100% of body surface area is involved.

III. K. Yellaiah:

(1) A contusion of 6 x 4 cm present over vertex area of scalp;

(2) A contusion of 6 x 4 cm present over outer aspect of right arm;

(3) A contusion of 5 x 4 cm present over outer aspect of left arm;

(4) A contusion of 18 x 12 cm present over back of trunk;

(5) A contusion of 6 x 4 cm present on outer aspect of right wrist;

(6) A contusion of 3 x 2 cm present over right elbow, outer aspect;

(7) A contusion of 4 x 3 cm present over outer aspect of left elbow;

(8) A contusion of 4 x 3 cm present over outer aspect of left wrist;

(9) A contusion of 7 x 5 cm present on back of right buttock;

(10) A contusion of 8 x 6 cm present on back of left buttock;

(11) A contusion of 10 x 6 cm present on front of right thigh;

(12) A contusion of 8 x 4 cm present on front of left thigh;

(13) A contusion of 6 x 4 cm present on outer aspect of right leg;

(14) A contusion of 5 x 3 cm present on outer aspect of left leg;

(15) A contusion of 6 x 4 cm present on left sole; and

(16) Ante-mortem, mixed burn injuries are present on scalp, face, neck, both sides of trunk, both upper limbs, both lower limbs and perenium,

except over both feet. About 95% of body surface area is involved.

IV. K. Rajamma:

(1) A contusion over an area of 20 x 17 cm present on entire area of scalp; and

(2) Ante-mortem, deep burns present on scalp, face, neck, both sides of trunk, both upper limbs, both lower limbs and perenium. The burns are

cavity deep at abdomen and intestines came out through the deficit and part of them are burns. They are bone deep and muscles are charred on

both upper limbs and lower limbs. About 100% of body surface area is involved.

V. Ch. Ilu Mallamma:

(1) A contusion of 8 x 6 cm present over the vertex area of scalp;

(2) A contusion of 6 x 4 cm present on outer aspect of left arm;

(3) A contusion of 7 x 4 cm present on outer aspect of right shoulder;

(4) A contusion of 16 x 10 cm present on back trunk;

(5) A contusion over an area of 9 x 5 cm present on right buttock; and

(6) Ante-mortem fresh deep burn injuries are present over scalp, face, neck, both sides of trunk, upper limbs, perenium and both lower limbs up to

knees, sparing both legs. The burns more deep over anterior abdominal wall and made a rent in it through which intestines are coming out. About

90% of body surface area is involved.

102. There were several injuries over the dead bodies of the deceased persons and the cause of their death was due to ''burns''.

103. From the above, it could be seen that all the five deceased were beaten thoroughly before they were killed by pouring kerosene and burnt.

Further, P.Ws.2 to 4 specifically stated that the accused named by them beat the deceased persons indiscriminately. Therefore, the ocular

evidence of P.Ws.2 to 4 is sufficiently corroborated by the medical evidence.

104. In this regard, it is to be further seen that though P.Ws.2 to 4 stated about the presence of the accused, as stated supra, the Investigating

Officer i.e., P.W.20, specifically denied that these witnesses did not mention about the names of the accused in their earlier statements recorded

u/s 161 (3)Cr.P.C.

105. As could be seen from the evidence of P.Ws.2 to 4, each witness had stated about the involvement of some accused. As we have already

noticed, it is not possible for every witness to identify all the accused, by name, in a large gathering of about fifty persons. Therefore, to the extent

of their remembrance, they spoke about the presence of some of the accused individually, some accused were identified by one witness, some

accused were identified by two witnesses and some were identified by all the three witnesses. We do not find anything unnatural in this

inconsistency. In other words, this inconsistency is, natural in the given circumstances of the case.

106. However, in view of the denial of the Investigating Officer (P.W.20) that P.Ws.2 to 4 did not speak about the presence of any of the

accused, we entertain a doubt and felt it expedient to verify the records. Consequently, exercising the jurisdiction conferred u/s 172(2) Cr.P.C.,

we perused the statements of P.Ws.2 to 4, recorded u/s 161(3) Cr.P.C., which form part of the Case Diary and, to our surprise, the names of all

the accused found place in those statements.

107. The only thing, as already noticed and contended by the learned Senior Counsel, appearing for respondents-accused, is that the names of all

the accused have been stated in the same seriatim, which, according to him, is unusual. But, in our view, the manner, in which the names of all the

accused have been recorded in Section 161(3) Cr.P.C., statements, was only for the convenience of the Investigating Officer (P.W.20).

108. But, the fact remains that there is a mention of all the accused in the statements of P.Ws.2 to 4, recorded u/s 161(3) Cr.P.C. So, this fact

itself had falsified the evidence of the Investigating Officer (P.W.20) to the extent that the names of all the accused were not recorded at all.

109. In this regard, it is relevant to look into the decision of the apex Court in Habeeb Mohammad Vs. The State of Hyderabad, wherein it is held-

Section 172 provides that any criminal court may send for the police diaries of a case under inquiry or trial in such court and may use such diaries,

not as evidence in the case "but to aid it in such inquiry or trial". It seems to us that the learned Judge was in error in making use of the police

diaries at all in his judgment and in seeking confirmation of his opinion on the question of appreciation of evidence from statements contained in

those diaries. The only proper use he could make of these diaries was the one allowed by Section 172 Cr.P.C., i.e., during the trial he could get

assistance from them by suggesting means of further elucidating points which needed clearing up and which might be material for the purpose of

doing justice between the State and the accused.

110. Same is the view expressed by the Privy Council in Dal Singh v. Emperor AIR 1917 PC .

111. Therefore, the contradiction between the evidence of P.Ws.2 to 4 and the Investigating Officer (P.W.20) about the presence of the accused

was proved to be incorrect upon verification of the statements of P.Ws.2 to 4, recorded u/s 161 (3) Cr.P.C., from the Case Diary. The

consequence would be, we have to examine the veracity of the evidence of P.Ws.2 to 4 as regards the presence of the accused, dehors the

evidence of the Investigating Officer (P.W.20) about the non-mentioning of the names of the accused by the witnesses in their statements, u/s 161

(3) Cr.P.C., inasmuch as, the statement of the Investigating Officer (P.W.20), in that regard, does not amount to omission.

112. In other words, we are clear in our mind that we are not taking the statements of P.Ws.2 to 4, recorded u/s 161 (3) Cr.P.C., which form part

of the Case Diary, as an evidence, but, the same are being used only to verify the statement made by the Investigating Officer (P.W.20), which

runs contrary to the evidence of P.Ws.2 to 4 and we are proceeding in the direction of examining the evidence of eyewitnesses only.

113. Section 149 I.P.C., deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in

furtherance of the common object, each of such person is liable for that act in the same manner as if it was done by him alone. The word ''object''

means the purpose, intention or design, and in order to make it common it must be possessed by all.

114. Admittedly, no charge was framed against the accused u/s 302 read with Section 149 I.P.C., by the trial Court.

115. The learned Senior Counsel, appearing for respondents-accused, places strong reliance on the decision of the apex Court in Bala

Seetharamaiah Vs. Perike S. Rao and Others, wherein it is held thus:

8. Unfortunately, the Sessions Judge did not frame charge against the accused persons for offence punishable u/s 302, I.P.C. read with Section

149, I.P.C. It is also important to note that the relevant prosecution allegations so as to bring in the ingredients of the offence punishable u/s 302,

I.P.C. read with Section 149, I.P.C. also were not incorporated in the charge framed by the Sessions Judge. The accused were not told that they

had to face charge of being member of the unlawful assembly and the common object of such assembly was to commit murder of the deceased

and in furtherance of that common object murder was committed and thereby they had the constructive liability and thus they committed the

offence punishable u/s 302, I.P.C. read with Section 149, I.P.C. Of course the mere omission to mention Section 149 may be considered as an

irregularity, but failure to mention the nature of the offence committed by them cannot be said to be a mere irregularity. Had this mistake been

noticed at the trial stage, the Sessions Judge could have corrected the charge at any time before the delivery of the judgment. In the instant case,

the accused were told to face a charge punishable u/s 302 simpliciter and there was no charge u/s 302, I.P.C. read with Section 149, I.P.C.

Therefore, it is not possible to reverse the conviction of the accused u/s 326, I.P.C. and substitute the conviction for the offence punishable under

Ss.302/149, I.P.C. as there was no charge framed against them for such offence.

116. Even the above decision would go to show that the accused were not told to face the charge of being members of the unlawful assembly and,

at best, it amounts to irregularity.

117. But, in this case, charge No. 1 reads as follows:

That you A.1 to A.15, A.17 to A.59 and A.62 to A.78 on 2/3.8.2000 at about 0100 hr at Thimmapur (v) were members of an unlawful assembly

and did, in prosecution of the common object of such assembly, namely to commit the murder of D.1) S. Iyla Mallamma, D.2) V. Narsamma,

D.3) K. Nuri Yellaiah, D.4) K. Rajamma, D.5) E. Uppakantha, commit the offence of rioting by pouring kerosene and that you thereby committed

an offence punishable u/s 148 IPC and within the cognizance of this Court.

118. The above charge indicates that accused 1 to 15, 17 to 59 (except accused 21) and 62 to 78 were found members of unlawful assembly and

did, in furtherance of common object of such assembly, viz., to commit the murder of deceased 1 to 5, commit the offence of rioting by pouring

kerosene. If their object was not to kill the deceased persons, certainly, those accused would not have poured the kerosene on the bodies of the

deceased persons.

119. Therefore, the decision of the apex Court, relied on by the learned Senior Counsel, appearing for respondents-accused, in Habeeb

Mohammad Vs. The State of Hyderabad, supra, is not applicable to the facts of the present case.

120. However, the learned Public Prosecutor places reliance on a decision of the apex Court in Ramkishan v. State of Rajasthan AIR 1997 SC

3997 wherein it was observed as under:

8. In view of the findings recorded by the learned Sessions Judge and the material on the record, we are unable to ascribe to the finding that the

appellants intention was to cause death of Bhura deceased. The findings betrays the observations of the trial Court as noticed above. The medical

evidence also does not support the ultimate finding recorded by the trial Court and upheld by the High Court. The offence in the established facts

and circumstances of the case in the case of the appellants would only fall u/s 304, Part II, I.P.C. read with Section 149, I.P.C. and not u/s 302,

I.P.C. Indeed no specific charge indicating the applicability of Section 149, I.P.C. was framed, but all the ingredients o Section 149, I.P.C. were

clearly indicated in the charge framed against the appellants and as held by the Constitution Bench of this Court in Willie (William) Slaney Vs. The

State of Madhya Pradesh, , the omission to mention Section 149, I.P.C. specifically in the charge is shown to have been caused to the appellants

by that omission it cannot affect their conviction.

121. Though the apex Court in Ramkishan"s case AIR 1917 PC supra had relied on the decision, rendered by the Constitutional Bench, in Willie

(William) Slaney Vs. The State of Madhya Pradesh, some more observations of Bala Seetharamaiah Vs. Perike S. Rao and Others, supra are

deserved to be noticed, since they are relevant in the context of the present case, which are thus:

(86) Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants,

accessories and men actuated by a common object or a common intention; "and the charge is a rolled-up one involving the direct liability and the

constructive liability, without specifying who are directly liable and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offences cannot be said to be fatal by

itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the

cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and

such evidence is of course relevant.

122. In view of the aforementioned discussion, observations and the legal position, we are of the view that though not all the accused were

participants in the offence and remained at a distance, however, the eyewitnesses spoke specifically about the presence and participation of some

of the accused. Segregation of the accused, who were said to be participants in the offence, specifically stated by P.Ws.2 to 4 as responsible for

the death of deceased Nos. 1 to 5, in pursuance of their common object, is thus:

Accused 2, 3, 5, 6, 9, 10, 11, 12, 14, 41 and 48 were identified by P.W.2; Accused 1, 2, 3, 5, 6, 7, 10, 11, 12, 13, 34 and 37 were identified by

P.W.3; Accused 1, 5, 7, 8, 10, 11, 12, 13, 14, 15, 17, 41 and 48 were identified by P.W.4; and Accused 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13,

14, 15, 17, 34, 37, 41 and 48 were commonly identified by P.Ws.2 to 4.

123. It is to be noted from the above details that all the above accused were identified either by one witness or two witnesses simultaneously or

some of them were identified commonly by all the three witnesses i.e., P.Ws.2 to 4.

124. As already noticed, merely because all the three eyewitnesses (P.Ws.2 to 4) identified the accused, as referred to above, in common, it is not

desirable for this Court to give benefit to those accused, who were identified either by one or more, in the peculiar and special circumstances.

125. It is a rarity for a person or few persons being identified by all the three eyewitnesses in such a big gathering committing an offence of this

nature, at different stages. Participation of a person or persons at crucial stage, sometimes may be indication that there was sharing a common

object of elimination of the deceased.

126. Therefore, even if one accused is identified by a particular person participating in the offence, at a particular stage, maybe at the stage of

fetching the kerosene or may be at the stage of pouring the kerosene, or may be at the stage of dragging the deceased persons from out of their

respective houses forcibly and pooling them up or setting them fire by lighting match-stick, such person can be held as having shared common

object.

127. Hence, in view of the above categorical statements and identification made by P.Ws.2 to 4 (as referred in paragraph No. 114), we are of the

view that the case u/s 302 read with Section 149 I.P.C., is clearly established against accused 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17,

34, 37, 41 and 48 beyond all reasonable doubt. Accordingly, they have to be convicted for the offence punishable u/s 302 read with Section 149

I.P.C.

128. Coming to charge No. 1, levelled against accused 1 to 15, 17 to 59 (except accused No. 21) and 62 to 78, for the offence punishable u/s

148 I.P.C., we are of the view that though the act of rioting is made out, regarding the persons and the weapons of offence said to have been used

by them, there is no evidence about their presence much less usage of deadly weapons. The evidence of P.Ws.2 to 4 is also totally silent on this.

So, in the absence of main ingredient i.e., the presence of deadly weapons, the act of the accused, even assuming that the same is made out,

cannot be brought into the ambit of Section 148 I.P.C. Accordingly, the acquittal of the accused recorded by the trial Court for the offence u/s

148 I.P.C., is confirmed.

129. Regarding charge No. 2, levelled against accused 1 to 15, 17 to 59 (except accused No. 21) and 62 to 78 for the offence punishable u/s 448

I.P.C., there is nothing on record as to who actually from the large crowd trespassed into the houses of the deceased and forcibly dragged them

out of their respective houses nor spoken to by the eyewitnesses. Therefore, it is difficult to fix any of the accused for the said offence.

Accordingly, we confirm the finding recorded by the trial Court acquitting the accused for this offence.

130. A bare perusal of the facts and the evidence on record would reveal that framing of charge No. 3 for the offence punishable u/s 307 I.P.C.,

against accused 1 to 15, 17 to 59 (except accused No. 21) and 62 to 78 by the trial Court, in our considered view, is totally misconceived.

131. Lastly and coming to charge No. 5, levelled against accused 16, 60 and 61 for the offence punishable u/s 120-B read with Section 109

I.P.C., except the sweeping statement of the witnesses that a plan was hatched by some of the accused with the assistance of accused No. 16,

who is a Mantrik, there is nothing further on record so as to establish the offence against the said accused u/s 120-B read with Section 109 I.P.C.

Accordingly, the order of acquittal recorded by the trial Court on the said charge is also confirmed.

132. In the result, the Criminal Appeal, filed by the appellant-State, is allowed in part, as under:

(i) The judgment of acquittal passed by the trial Court against accused 1 to 15, 17 to 20, 22 to 59 and 62 to 78 for the offences under Sections

148, 448 and 307 I.P.C., is confirmed.

(ii) The judgment of acquittal passed by the trial Court against accused 4, 18 to 20, 22 to 33, 35, 36, 38 to 40, 42 to 47, 49 to 59 and 62 to 78

for the offence u/s 302 I.P.C., is confirmed.

(iii) The judgment of acquittal passed by the trial Court against accused 16, 60 and 61 for the offence u/s 120-B read with Section 109 I.P.C., is

confirmed.

(iv) The judgment of acquittal passed by the trial Court against accused 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 34, 37, 41 and 48 for the

offence u/s 302 I.P.C., is set aside and instead, they are convicted for the offence punishable u/s 302 read with Section 149 I.P.C., and sentenced

to undergo "imprisonment for life".