R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 6TH DAY OF JULY, 2023

PRESENT

THE HON'BLE MR JUSTICE K.SOMASHEKAR

AND

THE HON'BLE MR JUSTICE RAJESH RAI K

CRIMINAL APPEAL NO. 665 OF 2017

C/W

CRIMINAL APPEAL NO. 641 OF 2017

CRIMINAL APPEAL NO. 833 OF 2017

CRIMINAL APPEAL NO. 943 OF 2020

IN CRL.A.665/2017:

BETWEEN:

BIDDANDA KUNJAPPA @ JEEVAN
S/O B.K.PONNANNA
AGED ABOUT 30 YEARS
R/O BAVALI VILLAGE
NAPOKLU HOBLI, PARANE POST
MADIKERI TALUK-571214.

...APPELLANT

(BY SRI. M T NANAIAH – SR. COUNSEL FOR
SRI. BALASUBRAMANYA B N - ADVOCATE)

AND:

THE STATE OF KARNATAKA
BY C.P.I. MADIKERI RURAL CIRCLE
NAPOKLU POLICE STATION, MADIKERI
BY SPP, HIGH COURT, BENGALURU.

...RESPONDENT

(BY SRI. VIJAYAKUMAR MAJAGE – ADDL. SPP)

CRL.A. FILED U/S.374(2) CR.P.C PRAYING TO SET ASIDE THE JUDGMENT DATED 05.04.2017 AND SENTENCE DATED 06.04.2017 PASSED BY THE PRL. DISTRICT AND SESSIONS JUDGE, KODAGU, MADIKERI IN S.C.NO.49/2015 FOR THE OFFENCE PUNISHABLE UNDER SECTIONS 341, 302, 201, 397 AND 224 R/W 34 OF INDIAN PENAL CODE AND ACQUIT THE APPELLANT.

IN CRL.A.641/2017:

BETWEEN:

BIDDANDA PEMMAIAH @ PRITHVI
S/O LATE B.K.APPACHU
AGED ABOUT 33 YEARS
OCC: AGRICULTURIST
R/O BAVALI VILLAGE
NAPOKLU HOBLI
PARANE POST
MADIKERI TALUK-571214.

…APPELLANT

(BY SRI. H S CHANDRAMOULI – SR. COUNSEL FOR
SMT. KEERTHANA NAGARAJ – ADVOCATE AND
SRI. PRATEEK CHANDRAMOULI - ADVOCATE)

AND:

THE STATE OF KARNATAKA
BY C.P.I. MADIKERI RURAL CIRCLE
NAPOKLU POLICE STATION, KODAGU
REP. BY THE STATE PUBLIC PROSECUTOR
HIGH COURT OF KARNATAKA
PRINCIPAL BENCH
BENGALURU-560001.

…RESPONDENT

(BY SRI. VIJAYAKUMAR MAJAGE – ADDL. SPP)

CRL.A. FILED U/S.374(2) CR.P.C PRAYING TO SET ASIDE THE JUDGMENT AND ORDER OF CONVICTION AND SENTENCE

DATED 05.04.2017 PASSED BY THE PRL. DISTRICT AND SESSIONS JUDGE, KODAGU-MADIKERI IN S.C.NO.49/2015 AND ACQUIT THE APPELLANT.

IN CRL.A.833/2017:

BETWEEN:

DERANDA AIYAPPA @ DALU
S/O SRI. SOMAIAH
AGED ABOUT 22 YEARS
R/O BAVALI VILLAGE
NAPOKLU HOBLI
MADIKERI TALUK
KODAGU DISTRICT-571236.

…APPELLANT

(BY SRI. M T NANAIAH – SR. COUNSEL FOR
SRI. BALASUBRAMANYA B N - ADVOCATE)

AND:

THE STATE OF KARNATAKA
REP. BY THE STATION HOUSE OFFICER
NAPOKLU POLICE STATION
MADIKERI RURAL CIRCLE
MADIKERI TALUK
KODAGU DISTRICT – 571236.

…RESPONDENT

(BY SRI. VIJAYAKUMAR MAJAGE – ADDL. SPP)

CRL.A. FILED U/S.374(2) CR.P.C PRAYING TO SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE DATED 05/06.04.2017 PASSED BY THE PRL. DISTRICT AND SESSIONS JUDGE, KODAGU-MADIKERI IN S.C.NO.49/2015 CONVICTING THE APPELLANT FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 341, 302, 201, 397, 224 R/W 34 OF INDIAN PENAL CODE AND ACQUIT THE APPELLANT.

IN CRL.A.943/2020:

BETWEEN:

SRI. CHOTTERA A. ERAPPA
S/O LATE APPAIAH
AGED ABOUT 31 YEARS
AGRICULTURIST
R/O KUNJILAGERI VILLAGE
VIRAJPET TALUK-571214.

…APPELLANT

(BY SRI. M T NANAIAH – SR. COUNSEL FOR
SRI. BALASUBRAMANYA B N - ADVOCATE)

AND:

THE STATE OF KARNATAKA
BY C.P.I. MADIKERI RURAL CIRCLE
NAPOKLU POLICE STATION, MADIKERI
BY SPP, HIGH COURT, BENGALURU.

…RESPONDENT

(BY SRI. VIJAYAKUMAR MAJAGE – ADDL. SPP)

CRL.A. FILED U/S.374(2) CR.P.C PRAYING TO SET ASIDE THE JUDGMENT AND SENTENCE DATED 05.04.2017 AND 06.04.2017 PASSED BY THE PRL. DISTRICT AND SESSIONS JUDGE, KODAGU-MADIKERI IN S.C.NO.49/2015 FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 341, 302, 201, 397, 224 R/W 34 OF INDIAN PENAL CODE AND SECTION 27(1) OF THE ARMS ACT, 1959 AND ACQUIT THE APPELLANT.

THESE CRIMINAL APPEALS, COMING ON FOR DICTATING JUDGMENT, THIS DAY, **K. SOMASHEKAR** .J., DELIVERED THE FOLLOWING:

JUDGMENT

Since all these appeals arise out of a common judgment in S.C.No.49/2015 rendered by the Prl. District & Sessions Judge, Kodagu-Madikeri, they are heard together and are disposed of by this common judgment.

2. This appeal in Crl.A.No.665/2017 is filed by the appellant / Accused No.1 challenging the judgment of conviction and order of sentence dated 05/06.04.2017 rendered by the Court of the Prl. District & Sessions Judge, Kodagu at Madikeri in S.C.No.49/2015 for offences punishable under Sections 341, 302, 201, 397 and 224 read with Section 34 of the IPC.

3. The appeal in Crl.A.No.641/2017 is filed by the appellant / Accused No.4 challenging the judgment of conviction and order of sentence dated 05/06.04.2017 rendered by the Court of the Prl. District & Sessions Judge, Kodagu at Madikeri in S.C.No.49/2015 for offences punishable under Section 212 read with Section 34 of the IPC.

4. The appeal in Crl.A.No.833/2017 is filed by the appellant / Accused No.3 challenging the judgment of conviction and order of sentence dated 05/06.04.2017 rendered by the Court of the Prl. District & Sessions Judge, Kodagu at Madikeri in S.C.No.49/2015 for offences punishable under Sections 341, 302, 201, 397 and 224 read with Section 34 of the IPC.

5. The appeal in Crl.A.No.943/2020 is filed by the appellant / Accused No.2 challenging the judgment of conviction and order of sentence dated 05/06.04.2017 rendered by the Court of the Prl. District & Sessions Judge, Kodagu at Madikeri in S.C.No.49/2015 for offences punishable under Sections 341, 302, 201, 397 and 224 read with Section 34 of the IPC and so also for offences punishable under Section 27(1) of the Arms Act, 1959.

6. The Accused Nos.1, 2 and 3 were sentenced to undergo imprisonment for a period of one year and to pay a fine of Rs.500/- each along with default clause for the offence punishable under Section 341 read with Section 34

IPC; further they were directed to undergo imprisonment for life and to pay a fine of Rs.20,000/- each along with default clause for the offence punishable under Section 302 read with Section 34 of the IPC; they were further sentenced to undergo imprisonment for a period of seven years and to pay a fine of Rs.3,000/- each along with default clause for the offence punishable under Section 201 read with Section 34 of the IPC; further, they were sentenced to undergo imprisonment for a period of seven years and to pay a fine of Rs.3,000/- each along with default clause for the offence punishable under Section 397 read with Section 34 of the IPC; further, they were sentenced to undergo imprisonment for a period of two years and to pay a fine of Rs.2,000/- each along with default clause for the offence punishable under Section 224 read with Section 34 of the IPC; in addition to the above, accused No.2 was further sentenced to undergo imprisonment for a period of 3 years and to pay a fine of Rs.3,000/- along with default clause for the offence

punishable under Section 27(1) of the Arms Act, 1959. All the sentences were to run concurrently.

7. The appellant in Crl.A.No.641/2017 / Accused No.4, was sentenced to undergo imprisonment for a period of two months and to pay a fine of Rs.150/- along with default clause for the offence punishable under Section 212 read with Section 34 of the IPC.

8. The respective appellant in Crl.A.Nos.665/2017, 641/2017, 833/2017 and 943/2020 / accused 1, 4, 3 and 2 respectively, have preferred the present appeals seeking to allow the appeals and to thereby acquit the appellants / accused for offences for which they were charged, having regard to the grounds urged therein.

9. Heard, Shri M.T. Nanaiah, learned Senior Counsel for Accused Nos.1 to 3 / appellant in Crl.A.No.665/2017, in Crl.A.No.943/2020 and in Crl.A.No.833/2017 and so also the arguments of the learned Senior Counsel Shri Chandramouli H.S. in Crl.A.No.641/2017 in respect of

Accused No.4. Learned Senior Counsel Shri Chandramouli H.S. is represented by Ms. Keerthana Nagaraj. Further, we have heard the arguments of the learned Addl. SPP Shri Vijayakumar Majage for the State in all the appeals. Perused the impugned judgment of conviction and order of sentence rendered by the Trial Court in S.C.No.49/2015 consisting of the evidence of PW-1 to PW-38, the documents at Exhibits P1 to P55 and the material objects marked at MO-1 to MO-35.

10. The factual matrix of the appeals is as under:

It transpires from the case of the prosecution that on 04.11.2014 at around 8.30 p.m. at Kirundadu village, with a common intention to commit the murder of deceased Dinesh and to commit robbery / dacoity, Accused Nos.1 to 3 had gone in a Jeep bearing Reg.No.KA-12/N-3076 armed with a gun containing 7 bullets. They had waited for Dinesh on the road leading from Kikkera towards Kokeri near the estate of one Natolana Prakash. In order to capture him, the accused

No.3 tied a wire across the road where Dinesh would usually come on his bike. As planned, Dinesh had come on the said road on his Honda Scooter. Due to the wire being tied across the road, the said Dinesh had stopped his Honda Scooter and had got down from the scooter. Thereafter, Accused No.2 is said to have fired gun shots at Dinesh two times and caused his death. Further, after committing the murder of Dinesh, Accused Nos.2 and 3 robbed the gold chain and cash of Rs.25,000/- from the dead body of Dinesh and thereafter threw his dead body and his Honda scooter into the estate of CW-43 / Natolana Prakash, with an intention to screen themselves from legal punishment and cause disappearance of evidence. Thereafter, they left the spot in a Tata Magic vehicle bearing Registration No.KA-12/A-9526 brought by Accused No.1.

11. In pursuance of the act of the accused, on the filing of a complaint, criminal law was set into motion by recording an FIR as per Exhibit P23 for the offences stated therein. Subsequent to setting criminal law into motion, the

Investigating Officer had taken up the case for investigation and investigated the case thoroughly and laid the charge-sheet against the accused before the Committal Court. The Committal Court had passed a committal order as contemplated under Section 209 of Cr.P.C. and the case was committed to the Court of Sessions. Accordingly, the case in S.C.No.149/2015 was registered. Subsequently, accused were secured for facing of trial for offences reflected in the charge-sheet column. The trial Court heard arguments of the learned Public Prosecutor for the State and so also, the defence counsel for accused relating to framing of charge and having found *prima facie* that there are certain materials to frame charge against the accused, had framed charges against the accused for the offences reflected therein. The charges were read over to the accused in the language known to them whereby the accused did not plead guilty but claimed to be tried. Accordingly, the plea of the accused was recorded separately.

12. Subsequent to framing of charge against the accused, in order to prove the guilt against the accused, the prosecution let in evidence by subjecting to examination of PW.1 to PW.38 and got marked several documents as per Exs.P1 to P55 and also got marked M.Os.1 to 31 and closed their side. Subsequent to closure of evidence on the part of the prosecution, the accused were examined as required under Section 313 of Cr.P.C. to record incriminating statements which appeared against them. Accused had denied the truth of the evidence of the prosecution adduced so far. Accordingly it was recorded separately. Subsequent to recording the incriminating statement of the accused, the accused were called upon to adduce defence evidence as contemplated under Section 233 Cr.P.C. However, the accused did not come forward to adduce any defence evidence. Accordingly it was recorded separately.

13. Subsequent to closure of evidence of the prosecution and the defence, the Trial Court heard the

arguments advanced by learned Public Prosecutor and so also, the counter arguments advanced by the defence counsel and on an examination of the evidence of the witnesses inclusive of the exhibited documents, rendered a conviction judgment against the accused for the alleged offences. It is this judgment which is under challenge in these appeals by urging various grounds.

14. Learned Senior counsel Shri M.T. Nanaiah for Accused Nos.1 to 3 / respective appellants has taken us through the evidence of PW-1 / Bheemaiah, the author of the complaint who is none other than the father of the deceased Dinesh wherein he has stated in his evidence that his son Dinesh was running a provision store and he used to leave home at around 8.00 a.m. either in his car or on his scooter and would return at around 8.30 p.m. But on the relevant date, he did not return home till 9.00 p.m., and repeated calls made to contact his son Dinesh went unanswered. Therefore, PW-1 / Bheemaiah being the author of the complaint, went in scooter in search of his son.

The neighbourers around the shop had informed PW-1 that Dinesh left the shop at around 8.30 p.m. Though on thorough search, his son could not be found. Hence the complainant filed a complaint by approaching the police as per Exhibit P1. Subsequently, the complainant came to know that the appellant in Crl.A.No.665/2017 who is arraigned as accused and two others have committed the murder of his son namely Dinesh. This is the evidence let in by PW-1 who is none other than the father of the deceased Dinesh. This witness was subjected to cross-examination at length. However, merely because he has initiated the complaint at Exhibit P1, it would not suffice to render a conviction judgment for the offences indicated in the charge-sheet as well as in the operative portion of the order as contended by Senior counsel. In order to render conviction, the evidence of PW-1 is required to be corroborated with other independent evidence on the part of the prosecution.

15. PW-2 / Smt. Divya @ Likhitha who is the sister of the deceased Dinesh has stated in her evidence that on

4.11.2014 her brother namely Dinesh did not receive telephonic call even though repeatedly he was called between 8.30 to 8.45 p.m. The same was informed to her husband Mohan, who went along with PW-1 / Bheemaiah @ Raja and made a search of the aforesaid Dinesh. According to PW-2, she has given evidence on the part of the prosecution. She had also given evidence to the effect that PW-1 / Bheemaiah participated in the inquest proceedings held over the dead body from 1.00 a.m. to 4.00 a.m. and got identified MO-6 to MO-10 / clothes of the deceased and MO-3 / Empty cartridge along with Exhibits P2 to P11 / Photos of the dead body at the scene of crime. But her evidence is contradictory to the evidence of PW-1 on the part of the prosecution as contended.

16. PW-3 / Smt. Leelavathy who is the mother of the deceased Dinesh has stated in her evidence to the effect that the deceased used to wear gold neck chain. One piece of the chain was found in his Jerkin and another piece was robbed by the accused persons / perpetrators. She identified MO-3

/ empty cartridge and MO-4 and MO-5 / pieces of the gold chain and MO-6 to MO-10 / clothes of the deceased Dinesh.

17. The evidence of PW-4 namely Muddappa discloses that he was secured as a panch witness to hold inquest over the dead body by the I.O. Accordingly, inquest was held as per Exhibit P12. He deposed that deceased Dinesh had gun shot injuries on the right side of ribs and the dead body was lying in the scene of crime namely near the fence of the Estate of Prakash and scooter of the deceased was lying near the dead body. Further, empty cartridge and one wad were lying on the road and he saw that the clothes of the dead body were stained with blood. Further, he had also seen that wire was tied across the road. PW-4 had identified MO-6 to MO-10 / clothes, MO-1 / wire, MO-3 / empty cartridge and MO-11 / one wad. But there is no consistency in the evidence of the said witness, which is seen from the impugned judgment rendered by the Trial Court.

18. The second limb of arguments advanced by the learned Senior counsel is by referring to the evidence of PW-

5 / Smt. Ashwini, who is the wife of the deceased Dinesh. She had deposed that on 04.11.2014 as usual, deceased had left the house on a scooter at 7.30 a.m. but he did not return home till 8.30 p.m. Therefore, she called to his mobile but it was not reachable. Hence, she had informed the same to PWs 1, 2 and 3 and all of them went in search of her husband Dinesh. She was informed at 10.00 p.m. about the death of her husband Dinesh. She also narrated that the deceased was wearing a gold chain and part of it was found in his jerkin and other part was missing. PW-5 / Smt. Ashwini had identified MO-1 to MO-11 which were got marked on the part of the prosecution.

19. PW-6 / M.N. Shankari is a panch witness secured by the I.O. during the course of investigation and drew the seizure mahazar at Exhibit P13 in the presence of panch witnesses relating to the clothes of the deceased Dinesh. This witness was subjected to examination on the part of the defence. But nothing worthwhile has been elicited to believe

the version of the theory set up by the prosecution as contended.

20. PW-7 / Poovaiah @ Raja being a villager, has stated in his evidence that PW-5 / Ashwini, W/o. Dinesh had gone to his house and informed that that deceased Dinesh did not return home and requested him to go and search her husband. Therefore, PW-7 went in search of the deceased Dinesh to certain places and at a distance of 1 km. from their house, they saw blood stains and wad on the road. He also saw wire being tied across the road. PW-7 identified MO-3 and MO-11. PW-7 was summoned to the police station after two days where he saw Accused No.2 / Erappa and Accused No.3 / Dalu in the police custody. After a lapse of 8 days, he saw Accused No.1 in the police station and he came to know that Accused Nos.1 to 3 had conspired with each other and murdered the deceased.

21. PW-9 / Ravi, a Hotel keeper had deposed to the effect that on 04.11.2014 deceased had closed his provision store after 8.00 p.m. and came to his hotel and had milk

and went away. At about 10.00 p.m., the father of the deceased came to his hotel and enquired him about deceased and he had told the same. Thereafter, the complainant received a phone call asking him to go immediately to the spot where bloodstains were found on the road. Therefore, PW-1 immediately went away on his bike. PW-9 thereafter learnt that the dead body of Dinesh was lying near the estate and he saw Accused Nos.1 to 3 in his hotel and also near the provision store of the deceased, However, this witness had turned hostile to the case of the prosecution and though was subjected to cross-examination, nothing worthwhile was elicited. He identified MOs 1, 2, 3 and 11. Merely because he had identified the material objects, it cannot be a ground to convict the accused for the alleged offences as contended.

22. PW-10 / Viju @ Kalappa though had deposed that he learnt that Accused Nos.1 to 3 had committed theft of one gun, coffee, jewels in two or three house, there is no worthwhile evidence given by him to convict the accused

persons. The Trial Court did not appreciate the evidence on record in a proper perspective.

23. Learned Senior counsel further refers to the evidence of PW-11 / A.U. Suguna in respect of P-12, recovery mahazar conducted by the I.O. during the course of investigation. PW-11 had seen Accused Nos.2 and 3 who were arrested on suspicion as on 12.11.2014 when he went to the police station. He had further stated that all of them went to the house of accused No.2 / Erappa where they had recovered an empty cartridge. He had further taken them to another place from where they had recovered 17 gold ornaments which were robbed from the house of one Kamala. He had further deposed to the effect that all the persons went along with Accused No.3 to his house and recovered one gold chain, 10 notes of Rs.500/- denomination and a jeans pant worn by Accused No.3 at the time of the incident. They were then taken to the house of accused No.1 / Jeevan where Accused Nos.2 and 3 had shown the place from where they had stolen the cable wire

to tie the same across the road. Further, they had seized a jeep from the house of Accused No.1 / Jeevan which was used for commission of the offence by Accused Nos.1 to 3. PW-11 had partly turned hostile to the case of the prosecution. Therefore, the Trial Court had not appreciated the evidence of PW-11 in a proper perspective while convicting the accused persons.

24. PW-18 / K.M. Kariappa who had let in evidence on the part of the prosecution has stated that on 18.10.2014 at around 6.00 p.m. they went to Virajpet Kodava Samaja to attend the marriage of his relative by locking the house. When they returned at 11.00 p.m., they saw that the door was broken and gold ornaments, one mobile and cash of Rs.50,000/- was robbed from their house. On 3.3.2015, he got released the gold ornaments from Virajpet JMFC Court. He has further deposed that after 15 days he learnt that Dinesh was murdered and Accused Nos.1 to 3 were arrested. He also came to know that Accused Nos.1 to 3 had robbed his house and police seized gold ornaments from the

Ainmane of Accused No.2 Erappa and Accused Nos.1 to 3 had also committed theft in the house of one Kamala. These are the evidence let in by the prosecution. But the Trial court must prove the guilt of the accused by producing cogent, corroborative and acceptable evident.

25. PW-34 / K.M. Sadashiva being the Police Sub-Inspector has stated in his evidence that on the basis of Exhibit P1, Crime No.145/2014 was registered and the same was forwarded to the Jurisdictional Judicial Magistrate First Class and in his evidence, he has spoken regarding mahazar Exhibit P15 which was held in the presence of panch witnesses.

26. PW-35 / Smt. Leela Dayananda being a Sub-Divisional Engineer, BSNL has stated that on request of the CPI, she had given information and documents called for as regards mobile numbers provided therein.

27. PW-36 / Sri. B.C. Ravindra, Asst. Director in Ballistic FSL has stated that Article No.11 was SBBL gun and inside the chamber, one fired cartridge case was found

and SBBL gun bears the signs of discharge. Accordingly, he issued his report as per Exhibit P42, method of examination as at Exhibit P43 and sample seal chit as at Exhibit P44. PW-36 also identified MOs 3, 11, 20 and MOs. 2, 6 to 10, 21, 13, 14, 12, 15 and MO-1. However, this witness was not subjected to cross-examination on the part of the prosecution.

28. PW-37 / Sri. K.K. Raghu is the PSI who has stated that on 11.11.2014, they arrested Accused No.3 Aiyappa at Kannur, Kerala State around 3.00 p.m. He has deposed to the effect that on 14.11.2014 they had seized a Goods Auto by conducting a mahazar as per Exhibit P20 and that on 23.11.2014, they had arrested Accused No.5 / Ballachanda Manu from his house. However, it is the contention of the learned Senior counsel that his evidence has not been appreciated by the Trial Court in a proper perspective to convict the accused persons.

29. PW-38 / Sri. Karim Rowther is the Investigating Officer who conducted the investigation. He has spoken in

his evidence that 05.11.2014 he had visited the scene of crime and he drew the Inquest Mahazar over the dead body in the presence of CW-2, CW-3, CW-4 as per Exhibit P12. During the inquest mahazar, he recorded the statements of CW-5, CW-8 and CW-9. PW-38 had seized bloodstained mud and sample mud, empty cartridge, wad, pellets and scooter bearing Reg.No.KA-12/K-3640 and barbed wire, telephone wire and one broken piece of gold chain. PW-38 / I.O. had stated that on interrogating Accused No.2 / Erappa, he gave voluntary statement stating that he himself, Accused No.1 / Jeevan and Accused No.3 / Aiyappa together committed dacoity, robbery and theft in different houses and in this case, in order to earn money, himself, Accused No.1 Jeevan and Accused No.3 Aiyappa planned to kill Dinesh. In pursuance of the conspiracy, Accused Nos.1 to 3 brought a gun which was stolen from the house of Somanna and came to the spot in a jeep belonging to Accused No.1. Then Accused No.1 had dropped Accused Nos.2 and 3 in the scene of crime and went back to observe the movements of

Dinesh and inform the same to Accused Nos.2 and 3. Accordingly, Dinesh had come to the spot on his scooter and on seeing the wire tied across the road, he has stopped the scooter. At the said moment, Accused No.2 Erappa had fired a gunshot two times at Dinesh, as a result of which Dinesh died on the spot. Accused Nos.2 and 3 had then dragged the dead body to the nearby fence of Prakash and robbed Rs.25,000/- cash and gold neck chain piece of the deceased. Then Accused No.1 came to the spot in his Tata Iris vehicle and all the three accused persons went away from the spot. Though these statements have been made by PW-38 / I.O., the same cannot be believed to be gospel truth without there being any positive, acceptable, corroborative and conclusive evidence that the accused persons had committed the murder of the deceased Dinesh.

30. Shri M.T. Nanaiah, learned Senior Counsel for the Accused Nos.1 to 3 / appellant in Crl.A.No.665/2017, in Crl.A.No.943/2020 and in Crl.A.No.833/2017 contends that the order of the Sessions Court is bad in law and the

appellants though innocent, have been falsely implicated in the instant case. The learned Sessions Judge had totally ignored the effective cross-examination of the material witnesses. The learned Sessions Judge consistently had stated that there is no worth mentioning points elicited to discredit the evidence of the prosecution. This observation is made in batch of witnesses who are all material witnesses. The Trial Judge made such observation without discussing the Cross-examination as contended. However, the order of the learned Sessions Judge is therefore totally without any basis. The defence had effectively brought on record in cross-examination covering several pages pertaining to the incident, which has not been considered by the learned Sessions Judge.

31. The learned Sessions Judge had not even balanced the evidence produced by the prosecution as well as the defence. The learned Sessions should have carefully scrutinized the evidence led in before coming to a conclusion holding that the appellants are guilty. Looking from any

angle, the order passed by the learned Sessions Judge is perverse and unacceptable and the appellant is liable to be acquitted as contended.

32. The Trial Judge has erred in appreciating the evidence of the prosecution witnesses and without appreciation has come to a wrong conclusion and convicted the appellant. The Trial Judge nowhere in his judgment discussed about the contradictions, omissions and exaggerations of the evidence led before the Trial Court. There are serious contradictions and omissions in the evidence of material witnesses.

33. Insofar as Accused No.3, it is contended that a reading of the entire evidence does not constitute the ingredients of commission of any offence charged as against the said appellant is concerned. The learned Sessions Judge committed a grave error in accepting the testimony of the above witnesses and convicting the appellant / Accused No.3 for the offences under Sections 341, 302, 201, 397, 224 r/w Section 34 of IPC. The judgment of conviction and

sentence being bad in law requires to be reversed and set aside and the appellant deserves to be acquitted. The learned Senior Counsel for the appellant / Accused no.3 states that there are no eye witnesses to the incident and the entire case of the prosecution rests on circumstantial evidence. Law is clear in view of several judicial pronouncements laid down by the Apex Court and various High Courts including this Hon'ble Court that the courts have to be cautious in dealing with cases resting on circumstantial evidence such that a chain of events should be interlinked in such manner that all links ought to lead to the only conclusion that would lead towards the guilt of the accused only. A reading of the entire evidence does not constitute the ingredients of the commission of any offence charged as against the Appellant / Accused No.3 is concerned. The learned Sessions Judge has committed a grave error in accepting the testimony of the above witnesses and convicting the appellant / Accused No.3 for the offences under Sections 341, 302, 201, 397, 224 r/w 34 of IPC. The

judgment of conviction and order sentence being bad in law, requires to be set aside and the appellant deserves to be acquitted of the offences.

34. The case against him as projected by the prosecution is that he tied a wire across the road due to which the deceased fell from his scooter and that after the accused No.2 shot the deceased with a gun, he and the accused No.2 lifted the deceased and put his body in the property of Natalana Prakash near the barbed compound along with his scooter with an intention to screen himself and to cause disappearance of the dead body and that the appellant along with the accused No.3 committed robbery of gold chain and cash of Rs.25,000/- from the dead body of Dinesh. Although the prosecution has examined 38 witnesses, none of the witnesses have substantiated the charges as against the appellant, as claimed by the prosecution. In fact, a reading of the entire evidence does not constitute the ingredients of the commission of any offence charged as against the appellant is concerned. The

learned Sessions Judge committed a grave error in accepting the testimony of the above witnesses and convicting the appellant for the offences under Sections 341, 302, 201, 397, 224 r/w 34 of IPC. It is further contended that the prosecution has not been able to prove recovery of the incriminating material objects from the accused and there is no recovery made from the person of the Appellant. The learned Sessions Judge committed a grave error in accepting the testimony of the above witnesses and convicting the appellant for the offences under Sections 341, 302, 201, 397, 224 r/w 34 of IPC. The Judgment of conviction and sentence being bad in law requires to be set aside and the appellant deserves to be acquitted.

35. It is the contention of learned counsel for Accused No.3 the post mortem report does not reveal that the gun shots found on the dead body could have been caused by M.O. 21. Further the Pellets and Wad shown as Articles 1 to 9 were not produced before the court for identification of the Doctor. Further, P.W.22 has also not opined that the

injuries sustained by the deceased through Gun shot injury could be caused by M.O. 21. The learned Sessions Judge committed a grave error in accepting the testimony of the above witnesses and convicting the appellant for the offences under Sections 341, 302, 201, 397, 224 r/w 34 of IPC. The Judgment of conviction and sentence being bad in law has to be aside and the appellant deserves to be acquitted.

36. The learned Senior Counsel for Accused No.3 states that the ballistic expert is examined as P.W.36, whose report is produced as Ex.P.42 and Method of Examination produced as Ex.P.43. As per the expert, although the injuries could have been caused by M.O.21, he was not in a position to ascertain as to the actual date and time of firing, although the gun was in working condition. Further, although presence of lead was found on the belongings of the deceased, the same were not found in the barbed wire or in the cloths said to belong to the appellant, thereby doubting the presence of the appellant at the spot at the time of occurrence. Such being the situation, the learned

Sessions Judge committed a grave error in accepting the testimony of the above witnesses and convicting the appellant for the offences under Sections 341, 302, 201, 397, 224 r/w 34 of IPC. Further, the prosecution had examined one Leela Dayananda as P.W.35 to state as regards the information pertaining to mobile Nos. 9483636323, 8277246401, 9483343205, 9482864167 and 8762349976 vide Ex.P.25, 26, 35 to 41. Other than the said materials the witness has not spoken about any other circumstance. Even otherwise, as Exhibits P25, 26, 35 to 41 being electronic documents, are inadmissible in evidence as they are not accompanied by a Certificate as required under Section 65A of the Evidence Act. Such being the situation, the learned Sessions Judge committed a grave error in accepting the testimony of the above witnesses and convicting the appellant / Accused No.3 for the offences under Sections 341, 302, 201, 397, 224 r/w 34 of IPC.

37. Further, the prosecution has failed to produce materials to show the date of theft of M.O.21 and lodging of

a complaint thereof, to substantiate its case that the said Gun was stolen from the possession of the actual owner Somanna who is examined as P.W.14. Such being the situation, the learned Sessions Judge committed a grave error in accepting the testimony of the above witness and convicting the appellant for the alleged offences The Judgment of conviction and sentence being bad in law, requires to be set aside and the appellant deserves to be acquitted of the offences.

38. It is further contended on behalf of Accused No.3 that the investigation conducted is lopsided, perfunctory, mischievous and frivolous. Such being the situation, the learned Sessions Judge committed a grave error in accepting the testimony of the above witnesses and convicting the appellant / Accused No.3 for the offences under Sections 341, 302, 201, 397, 224 r/w 34 of IPC. It is the further contention of the learned Senior Counsel that the joint charges framed under Section 228 and the joint statement of the accused under Section 313 of the Code of Criminal

Procedure are not recorded in consonance with the legal requirements and the evidence is not in consonance with the charges framed and the accused statement does not show the intervening circumstances, which could be used against him. The learned Sessions Judge at Bangalore committed a grave error in accepting the testimony of the above witnesses and convicting the appellant for the alleged offences. Further, the accused No.3 has a statutory right of silence, which is guaranteed under Section 315 of Code of Criminal Procedure, which further states that the silence of the accused should not be made a subject matter of discussion or comment by either of the parties to the litigation or by the court. Such being the situation, the learned Sessions Judge committed a grave error in accepting the testimony of the above witnesses and convicting the appellant for the alleged offences. The Trial Court has committed a grave error in accepting the testimony of the above witnesses and convicting the appellant / Accused No.3 for the offences under Sections 341, 302, 201, 397, 224 r/w 34 of IPC. On

these grounds, it is contended that the Judgment of conviction and sentence is illegal, unlawful, improper, opposed to law, facts, and the same requires to be reversed and set aside and the accused has to be acquitted of the offences.

39. On behalf of Accused No.2 / appellant in Crl.A.No.943/2020, it is contended by the learned Senior counsel that he is innocent and he has been falsely implicated in the case. The learned Sessions Judge though had recorded that certain witnesses have turned hostile to the prosecution case, should have weighed the evidence of witnesses before coming to the conclusion that the appellant is guilty of the alleged offences. The materials placed by the prosecution are not sufficient to point out that the appellant is guilty of the offences. The prosecution has not proved the case beyond all reasonable doubt. There is no evidence to indicate that the appellant had fired at the deceased Dinesh. Though Dinesh was found dead, prosecution has not been able to prove as to who fired

gunshot. Further, the Kovi/gun said to be used by the accused is not easy to handle and in order to fire from the same two times, there must be a experienced shooter and only an expert can fire with precision and speed. Hence, the conviction held against Accused No.2 for offences punishable under Section 302 or 397 of IPC r/w Section 27(1) of the Arms Act, 1959 is too farfetched.

40. Looking at any angle, the order passed by the learned Sessions Judge is perverse and unacceptable and the appellant / Accused No.2 ought to be acquitted of the offences. The appellant is in judicial custody for more than 6 years, and he has no bad antecedents in his career. It is only in view of the statement given by the Accused No.1 that the other accused were arrested. The trial Judge nowhere in his judgment discussed about the contradictions, omissions and exaggerations of the evidence led before the Sessions Court. There are serious contradictions and omissions in the evidence of material witnesses.

41. As such, the impugned judgment of conviction and order of sentence rendered by the Trial Court is against the facts, circumstances and law on record. Hence the learned counsel for appellant / Accused Nos.1 to 3 prays to allow the appeals and thereby to set aside the impugned judgment of conviction for the alleged offences and to acquit the accused.

42. However, learned Senior Counsel Shri M.T. Nanaiah for Accused Nos.1, 2 and 3 alternatively contends that on a perusal of the facts and circumstances of the case, this case does not fall under the category of Section 302 of IPC, since by perusing the evidence available on record though being a conspiracy, the entire incident had occurred with an intention of committing robbery from the deceased Dilip and there was no intention to commit the murder of the deceased. Hence, according to the learned counsel, there is no such intention or preparation on the part of the accused to commit the murder of the deceased. Hence, at the most, the offence committed by Accused Nos.2 and 3 may fall

under Section 300 Exception 1 which is punishable under the provisions of Section 304 Part I IPC.

43. Learned Senior Counsel Shri H.S. Chandramouli addressed his arguments in continuity of the arguments advanced by the learned Senior Counsel Shri M.T. Nanaiah. The aforesaid learned Senior Counsel restricted his arguments to the case in Crl.A.No.641/2017 in respect of Accused No.4 / Biddanda Pemmaiah @ Prithvi.

44. It is contended by the learned Senior Counsel Shri H.S. Chandramouli for Accused No.4 that in order to constitute an offence punishable under Section 212 of IPC, it is required to prove that the appellant had knowledge or reason to believe that such person had committed the offence. However, in the instant case, the prosecution has not led even an iota of evidence to demonstrate that the Appellant / Accused No.4 had knowledge or reason to believe that he committed the alleged offences.

45. The learned Sessions Judge has erred in mechanically convicting the appellant without assigning any

reasons. Though the impugned judgment runs into more than 210 paragraphs, however discussion with regard to complicity of appellant in commission of alleged crime is found at paragraph No.206. The learned judge has not discussed anything as to nature and authenticity of evidence led, acceptability of such evidence etc. The entire approach in convicting and sentencing the appellant / Accused No.4 by passing cryptic and non reasoned order is contrary to settled judicial principles.

46. Without prejudice to the grounds urged, in the alternative, it is contended that even if the case of the prosecution is accepted *in toto*, the Appellant / Accused No.4 being a first time offender and there being no bad antecedents and the offences alleged in so far as Appellant is concerned is neither punishable with death or imprisonment for life. Hence, he seeks that the benefit of Probation of Offenders Act be extended to the Appellant / Accused No.4.

47. Thus, viewed from any angle, the impugned judgment of conviction and order of sentence as against

Accused No.4 is neither tenable in law or on facts and the same is liable to be set aside.

48. On the contrary, Shri Vijayakumar Majage, the learned Addl. SPP for the State has taken us through the contents of Exhibit P1 complaint and the evidence on record. It is contended by the learned Addl. SPP that Accused Nos.1 to 3 are habitual offenders and the list of cases registered against them have also been furnished for the purpose of reference of this Court.

49. It is contended that as the case against Accused No.6 was split-up, the case as against Accused Nos.1 to 4 were tried by the learned Prl. District & Sessions Judge, Kodagu at Madikeri in S.C.No.49/2015, who by its order dated 5.4.2017 convicted Accused Nos.1 to 3 for offences punishable under Sections 341, 302, 201, 397 and 224 read with Section 34 IPC and further convicted Accused No.2 for offences punishable under Section 27(1) of the Arms Act, 1959 besides convicting Accused Nos.4 and 5 for the

offences punishable under Section 212 read with Section 34 of the IPC.

50. PW-1 / complainant had deposed about a search made with others after his son deceased Dinesh did not return home as usual after closing his shop and when their attempts to contact him over mobile went in vain, a complaint was lodged as per Exhibit P1 on seeing the dead body of Dinesh. PWs 25 and 26 have deposed about hearing cracker sound twice around the same time as that of the incident and the sound of starting of a vehicle. PW-27 / Police Official has deposed about going with others in search of offenders and on suspicion stopping and enquiring accused No.1 on 10.11.2014 and then Accused No.1 admitting about commission of crime and disclosing the names of Accused Nos.2 and 3 and thereafter his escaping from their custody while being taken to the house of Accused No.2. He also deposed about apprehending Accused Nos.2 and 3 on 10.11.2014 and apprehending Accused No.1 on 23.11.2014. PWs 37 and 38 / Police

Officers have deposed about recording voluntary statements of Accused Nos.1 and 2 as per Exhibit P46 besides Accused No.3 as per Exhibit P47. At the instance of Accused No.2, the Kovi (SBBL gun) used in the commission of crime and other articles were recovered and gold chain was recovered at the instance of Accused No.3 under a Seizure Mahazar Exhibit P15. Further, at the instance of Accused Nos.2 and 3, blood stained cloths were also seized. PWs 11, 12 and 13 / panch witnesses to Exhibit P15 have partly supported the seizure mahazar. Apart from this, at the instance of Accused No.1 seized cutting machine, key, thota and burnt mobile panel, mobile phones besides purse of deceased containing Driving licence, ATM card, pocket book have been seized under Exhibit P50.

51. The evidence of PW-36 / Ballistic expert and his report at Exhibit P42 coupled with the identification of SBBL Gun – MO-21 used in the commission of crime which was stolen from the farm house of PW-14 prior to commission of the present crime, besides PWs 1 and 3 identifying gold

chain MO-5 recovered at the instance of Accused No.3 as that of deceased, supports the case of the prosecution against the accused. That apart, PW-22 Doctor who conducted post mortem of the body of the deceased, has deposed about the injuries on the deceased and the cause of death as a result of injury sustained due to gunshot and giving report as per Exhibit P22. The learned Sessions Judge, on appreciating the evidence of the witnesses and on considering the material on record, has held that the prosecution has proved the charges against the accused and has rightly convicted the accused persons. Hence, he contends that the judgment of conviction rendered by the Trial Court need not require any intervention at the hands of this Court.

52. He points out to the fact that as on 10.11.2014 at the time of interrogation, Accused No.1 escaped from police custody and Accused Nos.4 and 5 along with split up accused No.6, had given harbour to Accused No.1 in their respective houses at Kodagu and Bengaluru by providing

him protection and shelter knowingly and there was a reason to believe that Accused No.1 is an offender, with an intention to screen him from legal punishment. Hence, Accused Nos.4 and 5 along with Accused No.6 (whose case was split up), had committed the offences punishable under the provisions of Section 212 read with Section 34 of the IPC.

53. Further, the learned Addl. SPP pointed out to paragraph 206 of the impugned judgment to contend that the learned Sessions Judge has recorded a finding that in view of the evidence of PWs 27, 37 and 38, Accused No.1 was arrested from the house of Accused No.6 as on 23.11.2014 and moreover, Accused No.6 was also absconding while the case was at the stage of hearing before charge and therefore, a split-up case was also registered, that is S.C.No.34/2016 against Accused No.6. Therefore, there is sufficient and satisfactory material on record to convict Accused Nos.4 and 5 for the offences punishable under Section 212 read with Section 34 of the IPC.

54. Further, the learned Addl. SPP for the State contended that in the split up case pertaining to Accused No.6 in S.C.No.34/2016, the learned Sessions Judge, Kodagu, by its impugned judgment dated 2.08.2019, has acquitted Accused No.6 for the offence punishable under Section 212 read with Section 34 of the IPC as there was no material on record to prove that knowing fully well that accused No.1 is the offender in multiple cases, Accused No.6 has given shelter and concealed him with an intention of screening him from legal punishment and thereby the acquittal order passed by the learned Sessions Judge on 2.8.2019 has reached finality. He contends that since common charge was framed against Accused Nos.4, 5 and 6, Accused No.6 has to be convicted for the offences.

55. On these premise, learned Addl. SPP emphatically submits that the judgment of conviction and order of sentence rendered by the Trial Court for the offences indicated in the operative portion of the order being just and

proper, this appeal deserves to be rejected as being devoid of merits.

56. In the context of the contentions made by the learned Senior Counsel Shri M.T. Nanaiah for Accused Nos.1, 2 and 3 and the learned Senior Counsel Shri H.S. Chandramouli for Accused No.4, it is seen that on 04.11.2014 at around 8.30 p.m. at Kirundadu village, with a common intention to commit robbery / dacoity, Accused Nos.1 to 3 had gone in a Jeep bearing Reg.No.KA-12/N-3076 armed with a gun containing 7 bullets. They had waited for Dinesh on the road leading from Kikkera towards Kokeri near the estate of one Natolana Prakash. In order to capture him, the accused No.3 tied a wire across the road where Dinesh would usually come on his bike. As planned, Dinesh had come on the said road on his Honda Scooter. Due to the wire being tied across the road, the said Dinesh had stopped his Honda Scooter and had got down from the scooter. Thereafter, Accused No.2 is said to have fired gun shots at Dinesh two times and caused his death. Further,

after committing the murder of Dinesh, Accused Nos.2 and 3 robbed the gold chain and cash of Rs.25,000/- from the dead body of Dinesh and thereafter threw his dead body and his Honda scooter into the estate of CW-43 / Natolana Prakash, with an intention to screen themselves from legal punishment and cause disappearance of evidence. Thereafter, they left the spot in a Tata Magic vehicle bearing Registration No.KA-12/A-9526 brought by Accused No.1. On registration of a complaint by PW-1 / complainant, criminal law was set into motion by recording an FIR as per Exhibit P23 and the Investigating Officer had taken up the case for investigation and investigated the case thoroughly and laid the charge-sheet against the accused. Accordingly, the case in S.C.No.149/2015 was registered and the trial Court framed charges against the accused for the offences reflected in the charge-sheet and subjected to examination of PW.1 to PW.38 and got marked several documents as per Exs.P1 to P55 and also got marked M.Os.1 to 31. On closure of the evidence of the prosecution and the defence, and on

an examination of the evidence of the witnesses inclusive of the exhibited documents, the Trial court rendered a conviction judgment against the accused for the alleged offences. In this regard, it is required to refer to Section 34 of the Indian Penal Code, 1860, which reads thus:

> "34. Acts done by several persons in furtherance of common intention.—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone".

A reading of the said provision indicates that there must be a common intention among the accused persons to commit the alleged offences.

57. A clear distinction between common intention and common object is that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or pre-concert. Though there is a

substantial difference between the two sections namely Section 34 and Section 149, they also to some extent overlap and it is a question to be determined on the facts of each case. It is necessary to refer to Section 149 of the IPC, 1860. Section 149 IPC relates to mere agreement between two or more persons, which cannot be held that there was a conspiracy held among themselves. But in Section 34 of the IPC, there is active participation of two or more persons in the commission of offences under the IPC. By Section 149, liability arises with a common object and no active participation at all in perpetration or commission of crime. In the instant case, it is appropriate to refer to Section 34 of the IPC wherein the accused persons who were likely to cause death would be relevant. It is only the scope of Section 149 of the IPC. But Section 34 has to be established that there was a common intention by which one of the accused had committed the acts. In the instant case, main offences under Section 302 IPC has been lugged against the accused Nos.1 to 3 and other offences have been lugged

against Accused Nos.4 to 6. Accused No.6 has given shelter to co-accused Nos.4 and 5 but the case against Accused No.6 has ended in acquittal. All the accused had a common intention as under Section 34 of the IPC.

58. Further it is relevant to refer Section 300 of IPC, 1860 relating to murder. But there is no definition of murder in the aforesaid Section but Section merely takes the four more serious types of culpable homicide, basing on the *mens rea* and designates them murder. Keeping in view the tenor of Section 300 of IPC relating to murder, it is relevant to refer to what is motive. It is not essential for the prosecution to establish motive factor against the accused in all cases, but at some time it cannot be given to gainsaid that without adequate motive speaking normally, none is expected to take life of another human being. But the motive behind the crime is a relevant fact of which evidence can be given. The absence of motive is also a circumstance which is relevant for assigning the evidence. But the circumstances proving the guilt of the accused are however not weakened at all by

the fact that the motive has not been established. It often happens that only the culprit himself knows what moved him to certain course of action.

59. In the instant case, the accused persons with an intention to steal the money being the day's collection of his shop, as well as gold chain worn by him, had hatched a conspiracy among themselves. According to their plan, the accused had tied a rope across the road through which Dinesh usually used to return home by his scooter, so that he would stop his vehicle. As aimed by the accused persons, Dinesh who had come there on his scooter, had stopped the vehicle in view of the fact that rope was tied across the road. Immediately, Accused No.2 had shot at him with a gun, as a result of which he sustained injuries and died at the spot. Thereafter, Accused Nos.2 and 3 had stolen the amount of Rs.25,000/- as well as gold chain which were in the possession of deceased Dinesh.

60. At a cursory glance of the entire evidence of the prosecution as well as the cross-examination of the witnesses, in order to prove the charges leveled against the accused persons and to discharge the burden on the part of the prosecution under Section 101 of the Indian Evidence Act, 1872, the prosecution had examined several witnesses and got marked several documents inclusive of material objects seized by the I.O. during the course of investigation. The witnesses who were subjected to examination on the part of the prosecution have stated in their evidence in conformity with the averments made in the complaint at Exhibit P1 made by PW-1 / Bheemaiah, the father of the deceased.

61. Insofar as Section 134 of the Indian Evidence Act, 1872, no particular number of witnesses shall in any case be required for the proof of any fact. It is well-known principle of law that reliance can be based on the solitary statement of a witness if the court comes to the conclusion that the said statement is the true and correct version of the

case of the prosecution. Therefore, the domain is vested with the prosecution to prove the guilt of the accused by facilitating worthwhile evidence, which should not give any room for doubt in the theory put forth by the prosecution for convicting the accused.

62. Whereas, it is the quality of evidence and not the quantity of evidence which is required to be judged by the court to place credence on the statements of witnesses and material evidence facilitated, in order to prove the guilt of the accused. But the plurality of witnesses in the matter of appreciation of evidence of witnesses is the domain vested with the Trial Court alone. It is not the number of witnesses but the quality of their evidence which is an important, as there is no requirement in law of evidence that any particular number of witnesses are to be examined to prove / disprove a fact. The evidence must be weighed and not counted. Further, the test is whether the evidence has a ring of trust, is cogent, credible and trustworthy or

otherwise. Therefore, it is said that the domain is vested with the prosecution to prove the guilt of the accused by facilitating worthwhile evidence.

63. Learned Senior Counsel Shri M.T. Nanaiah has relied on a judgment in the case of ***SUBRAMANYA vs. STATE OF KARNATAKA (CRL.A.242/2022)*** decided on 31.10.2022. The learned Senior Counsel had emphasized and pressed into service paragraph 78 of the said judgment, which reads thus:

> *"78. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such*

statement before the two independent witnesses (panchwitnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is

deficient in all the aforesaid relevant aspects of the matter."

64. It is relevant to refer to Section 27 of the Indian Evidence Act, 1872 which reads thus:

> *"27. How much of information received from accused may be proved.— Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*

Section 27 of the Evidence Act is applicable only if confessional statement leads to discovery of some new fact. Relevance is limited as relates distinctly to fact thereby discovered. This issue was addressed by the Hon'ble Supreme Court in the case of ***NAVANEETHAKRISHNAN vs. STATE BY INSPECTOR OF POLICE (AIR 2017 SC 279)***

65. Section 3 of the Indian Evidence Act, 1872 as regards the concept of proving a fact, makes it clear that, 'a fact is said to be proved when, after considering the matters

before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.'

66. Further, Section 3 of the Indian Evidence Act, 1872 as regards the concept of disproving a fact, makes it clear that, 'a fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.'

67. Keeping in view Section 3 of the Indian Evidence Act relating to proved and disproved and the scope of Section 27 of the Indian Evidence Act, it is the domain vested with the Trial Court to appreciate the evidence facilitated by the prosecution. Therefore, the reliance facilitated by the learned Senior Counsel does not assist his case insofar as interference as sought for.

68. In the instant case, Accused Nos.1, 2 and 3 have caused bullet injuries over the person of Dilip with means of MO-21 / Kovi (SBBL gun) marked on the part of the prosecution and more so, Accused Nos.2 and 3 have assisted Accused No.1. Accused No.2 had shot the deceased Dilip with the said MO-21 / Kovi (SBBL gun) and caused injuries as indicated at Exhibit P22 / P.M. Report issued by PW-22 / Doctor who conducted autopsy over the dead body. Accused Nos.1 to 3 with common intention according to the theory set up by the prosecution, had tied a rope to both the ends of the road and made Dilip to stop there and thereby committed his murder. Thereafter they had robbed him of Rs.25,000/- cash and part of his gold chain. MO-21 / Kovi (SBBL Gun) seized by the I.O. is to be termed as disclosure statement. Therefore, Section 27 addressed by the learned Senior Counsel does not assist or help the case of the appellants / accused for seeking intervention relating to the role of Accused Nos.2 and 3 inclusive of the role of Accused No.1. The Trial Court has addressed the issues keeping in

view the evidence of prosecution. The role of Accused Nos.1 to 3 cannot be disturbed by any cross-examination.

69. But the learned counsel for the appellants seeks for intervention of the impugned judgment of conviction. With regard to the said intervention, it is required to take into consideration the ingredients of the offence of Section 302 IPC and the role of the accused to commit the said heinous offence of murder under Section 302 IPC.

70. In this regard it is relevant to refer to Section 299 of IPC, 1860 in respect of culpable homicide which reads thus:

> ***299. Culpable homicide****.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*
>
> *Explanation 1. – A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.*

Explanation 2 – Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3 – The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

71. However, there is distinction between culpable homicide and murder. Culpable homicide is the genus and murder is its species and all murders are culpable homicides but all culpable homicides are not murders. This issue was extensively addressed by the Hon'ble Supreme Court in the case of ***RAMPAL SINGH V. STATE OF UTTAR PRADESH ((2012) 8 SCC 289)***.

72. In the circumstances, it is also the contention of the learned counsel for the appellants that the alleged

incident does not fall under the category of Section 302 of IPC and at the most, it will fall under Exception (I) of Section 300 of IPC which is punishable under Section 304 part I of IPC. Exception I of Section 300 of IPC reads as under:

> *"300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-*
>
> *Secondly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—*
>
> *Thirdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—*
>
> *Fourthly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."*

Exception 1 differs from Exception 4 of Section 300 of the IPC. Exception 1 applies when due to grave and sudden provocation, the offender, deprived of the power of self-control, causes the death of the person who gave the provocation. Exception 1 also applies when the offender, on account of loss of self-control due to grave and sudden provocation, causes the death of any other person by mistake or accident. Exception 4 applies when an offence is committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel and the offender commits culpable homicide without having taken undue advantage of acting in a cruel and unusual manner. The Explanation to Exception 4 states that in such cases it is immaterial which party gives the provocation or commits the first assault.

73. Taking into consideration the fact that the incident occurred in order to commit robbery and not murder, the

incident occurred would attract the provisions of Section 300 Part I of the IPC.

74. The mitigating circumstances clearly indicate that there was no intention on the part of the accused and the act committed by the accused was in an intention to commit robbery and the accused had not taken undue advantage or acted in an unusual manner in causing the death of the deceased. In the aforesaid circumstances, the present case would not come under the purview of the provisions of Section 302 IPC but is a case falling under Exception (1) of Section 300 IPC and the act of accused Nos.2 and 3 is punishable under the provisions of Section 304 Part I of the IPC.

75. The allegation made against Accused No.4 is that this accused had provided shelter in his house at Kodagu and Bengaluru despite of the fact that Accused No.1 had committed the offence, with an intention to screen Accused No.1 from legal punishment. But the Trial Court has erroneously held that the appellant / Accused No.4 was

guilty of the alleged offences though the prosecution has miserably failed to establish the guilt against the accused by facilitating cogent and convincing evidence. The sentence held as against Accused No.4 / appellant is erroneous and unsustainable viewed from any angle. Though the prosecution has let in evidence by subjecting to examination CWs 27, 37, 38 who were cited as witnesses in the charge-sheeted materials, but in the absence of corroborative evidence rendered by the prosecution by independent witnesses, the Trial Court ought to have acquitted the appellant / Accused No.4.

76. The second limb of arguments advanced by the learned Senior counsel is as regards the role of Accused No.4 wherein Accused No.1 was apprehended from the house of Accused No.6. But the case against Accused No.6 ended in acquittal in S.C.No.34/2016 relating to offences under Section 212 IPC, by order dated 2.8.2019. The role of Accused No.6 as well as Accused No.4 appears to be one and the same and they are on the same footing. These grounds

were also urged by the learned Senior Counsel in support of the contention seeking to acquit the accused for offences under Section 212 of the IPC.

77. In the instant case, the prosecution has not let even an iota of evidence to demonstrate relating to Accused No.4 screening other accused from legal punishment relating to ingredients of Section 212 of the IPC. The Trial Court has erred in mechanically convicting Accused No.4 without assigning any justifiable reasons. Hence, we concur with the contention of the learned Senior Counsel Shri H.S. Chandramouli that the imposition of sentence against Accused No.4 is found to be harsh and also disproportionate to the degree of culpability and involvement of this accused insofar as harbouring Accused No.1 in his house and also as regards providing shelter to the accused persons in order to screen them from legal punishment. But viewed from any angle, the impugned judgment and order of sentence rendered against Accused No.4 / appellant is neither tenable in law nor on facts of the case and the same is liable to be

set aside. As regards the contention of the learned Senior counsel that co-accused No.6 faced trial and the case against him ended in acquittal by order dated 02.08.2019, the Trial Court had gone through the evidence of PW-1 and so also the cross-examination wherein he had stated that he did not know the house number or the name of the street in which the house of Accused No.4 who is said to have harboured the accused persons, was situated. He had further admitted that there are several houses around the said house and admitted that he has not recorded the statement of neighbourers and further admitted that he has not arrested Accused No.6 on the spot. But he has denied the suggestion made that Accused No.6 did not know the commission of the offence by Accused No.1. Therefore, the Trial Court in the aforesaid judgment, considered the evidence of PW-2 on the part of the cross-examination wherein he has stated that when they went to the house of Accused No.6, he had seen Accused No.6 and Accused No.1 in their house and they came to know that Accused No.6

had given shelter Accused No.1. He has further given evidence that they have not apprehended Accused No.6. The role of Accused No.6 and the role of Accused No.4 are on a similar footing. The split up case in S.C.No.34/2020 relating to Accused No.6, the case ended in acquittal.

78. Further, in order to attract the provisions of Section 212 IPC, it is necessary to establish (a) commission of an offence (b) harbouring or concealing the person knowing or believing him to be the offender, (c) such harbouring etc. must be with the intention of screening the offender from legal punishment. This is supported by a decision of the Hon'ble Apex Court in the case of ***((SANJIV KUMAR & ORS. vs. STATE OF H.P. (1999) 2 SCC 288)).***

79. For the aforesaid reasons, we find that Accused No.4 requires to be acquitted of the alleged offences.

80. Insofar as Accused No.1 is concerned, even though Accused No.1 stood for trial along with the co-accused, but

the prosecution has not established the guilt against the accused by facilitating worthwhile evidence, cogent evidence and consistent evidence. Further, there is no recovery made at the instance of Accused No.1. The prosecution has not established the guilt as against Accused No.1 relating to motive factor, even though he was involved in the offences. Therefore, Accused Nos.1 and 4 ought to be acquitted of the offences lugged against them.

81. In the instant case, Accused No.2 who shot the deceased with MO-21 gun and inflicted bullet injuries over his person, due to which Dinesh had died at the spot. The same was committed with an intention to rob money and certain jewellery from his possession. Cash in a sum of Rs.25,000/- and MO-4 and MO-5 / gold chain worn on his neck were robbed. But there was no mitigating circumstances proved by the prosecution relating to ocular evidence in terms of the same. But at the instance of Accused Nos.2 and 3, MO-21 / gun was seized during the

course of investigation on their disclosure statement and further MO-4 and MO-5 / gold chain which was worn by the deceased was seized at their instance. Therefore, a prudent man can infer that the accused alone had committed the murder of the deceased by inflicting bullet injuries. Taking into consideration the oral and documentary evidence, and in the facts and circumstances of the case, we are of the considered opinion that the impugned judgment convicting accused No.2 to 3 for offences punishable under Section 302 has to be modified and converted into one under Section 304 Part I IPC and taking into consideration the gravity of the offences and overall facts and circumstances of the case, we deem it appropriate to hold that the sentence which the accused Nos.2 and 3 / appellants had already undergone for a period of 8 years 7 months and 26 days shall be termed as service of sentence, in order to meet the ends of justice. The fine amount imposed by the Trial Court shall be intact and to modified the fine amount.

82. On a re-appreciation of the oral and documentary evidence, we are of the considered opinion that the impugned judgment and award has to be modified as stated supra and the accused Nos.2 and 3 are convicted for offences punishable under Section 304 Part-I IPC instead of Section 302 IPC.

83. In view of the aforesaid reasons and findings, we proceed to pass the following:

ORDER

Crl.A.No.665/2017 preferred by the appellant / Accused No.1 namely Biddanda Kunjappa @ Jeevan under Section 374(2) of the Cr.P.C. is hereby allowed. Consequent upon allowing this appeal, the judgment of conviction and order of sentence dated 05/06.04.2017 rendered by the Court of the Prl. District & Sessions Judge, Kodagu at Madikeri in S.C.No.49/2015 in respect of Accused No.1 is set aside and Accused No.1 is acquitted of the offences punishable under Sections 341, 302, 201, 397 and 224 read with Section 34 of the IPC. If Accused No.1 has executed

any bail bond, the same shall stand cancelled. Further, if Accused No.1 has deposited any fine amount before the Trial Court, the same shall be refunded to him, on due identification.

Crl.A.No.641/2017 preferred by the appellant / Accused No.4 namely Biddanda Kunjappa @ Jeevan under Section 374(2) of the Cr.P.C. is hereby allowed. Consequent upon allowing this appeal, the judgment of conviction and order of sentence dated 05/06.04.2017 rendered by the Court of the Prl. District & Sessions Judge, Kodagu at Madikeri in S.C.No.49/2015 in respect of Accused No.4 is set aside and Accused No.4 is acquitted of the offences punishable under Section 212 read with Section 34 of the IPC. If Accused No.4 has executed any bail bond, the same shall stand cancelled. Further, if Accused No.4 has deposited any fine amount before the Trial Court, the same shall be refunded to him, on due identification.

Crl.A.No.833/2017 preferred by the appellant / Accused No.3 namely Deranda Aiyappa @ Dalu under Section 374(2) of the Cr.P.C. is hereby allowed in part. Consequent upon allowing this appeal, the judgment of conviction and order of sentence dated 05/06.04.2017 rendered by the Court of the Prl. District & Sessions Judge, Kodagu at Madikeri in S.C.No.49/2015 in respect of Accused No.3 is hereby modified to the extent that the appellant / accused No.3 is convicted for offences punishable under Section 304 Part-I IPC instead of Section 302 IPC. The conviction in respect of offences under Sections 341, 201, 224, 397 read with Section 34 IPC shall remain intact. The period of 8 years 7 months 26 days for which appellant / Accused No.3 was in incarceration shall be treated of service of sentence, to meet the ends of justice in respect of the afore said offences. However, keeping in view Sections 357 and 357(A)(3) of the Cr.P.C., Accused No.3 shall deposit a sum of Rs.5,00,000/- (Rupees Five Lakhs only) before the Trial Court. The said amount shall be paid

by way of compensation to PW-5 / Ashwini, being the wife of the deceased Dinesh. On deposit of such amount, the Trial Court shall disburse the same to PW-5 / Ashwini, on due identification. In default of payment of compensation of Rs.5,00,000/- the accused shall undergo SI for a period of two years.

Crl.A.No.943/2020 preferred by the appellant / Accused No.2 namely Chottera A. Erappa under Section 374(2) of the Cr.P.C. is hereby allowed in part. Consequent upon allowing this appeal, the judgment of conviction and order of sentence dated 05/06.04.2017 rendered by the Court of the Prl. District & Sessions Judge, Kodagu at Madikeri in S.C.No.49/2015 in respect of Accused No.2 is hereby modified to the extent that the appellant / accused No.2 is convicted for offences punishable under Section 304 Part-I IPC instead of Section 302 IPC. The conviction in respect of offences under Sections 341, 201, 224, 397 read with Section 34 IPC and in respect of the offence punishable under Section 27(1) of Arms Act, 1959 shall remain intact.

The period of 8 years 7 months 26 days for which appellant / Accused No.2 was in incarceration shall be treated of service of sentence, to meet the ends of justice. Accordingly, the conviction held against Accused No.2. However, keeping in view Section 357 and 357(A)(3) of the Cr.P.C., Accused No.2 shall deposit a sum of Rs.5,00,000/- (Rupees Five Lakhs only) before the Trial Court. The said amount shall be paid by way of compensation to PW-5 / Ashwini, being the wife of the deceased Dinesh. On deposit of such amount, the Trial Court shall disburse the same to PW-5 / Ashwini, on due identification. In default of payment of compensation of Rs.5,00,000/- the accused shall undergo SI for a period of two years.

As a consequence of the above order, the appellant in Crl.A.No.943/2020 / accused No.2 namely **Chottera A. Erappa** and appellant in Crl.A.No.833/2017 / Accused No.3 namely **Deranda Aiyappa @ Dalu** shall be released forthwith, however subject to payment of compensation of Rs.5,00,000/- by each of the accused as stated supra.

Registry of this Court is directed to forward a copy of the operative portion of the judgment to the concerned Superintendent of Jail Authority where accused Nos.2 and 3 / are housed, with a direction to set them at liberty forthwith, if they are not required in any other case.

Ordered accordingly.

Sd/-
JUDGE

Sd/-
JUDGE

KS