IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 8TH DAY OF FEBRUARY, 2019

PRESENT

THE HON'BLE MR.JUSTICE K. N. PHANEENDRA

AND

THE HON'BLE MR.JUSTICE K. SOMASHEKAR

CRL.A. NO.568/2014 (C)

Asif Pasha @ Asif
v/s.
State of Karnataka

JUDGMENT

The sole accused/the appellant herein – Asif Pasha @ Asif, has challenged the judgment of conviction and sentence passed in SC No.166/2011 dated 1/4.7.2014 by the Principal Sessions Judge, Bengaluru Rural District, Bengaluru. The trial Court has convicted the accused for the offence punishable under section 302 of IPC sentencing him to undergo imprisonment for life and to pay fine of Rs.10,000/- with default sentence of six months imprisonment; and also awarded a compensation of Rs.1,00,000/- to the father of the deceased i.e., PW-2 Abdul Khadar. It is further ordered that if the amount remains unpaid, the same shall be recovered from the accused or from his property according to Section 431 of Cr.P.C.

2. The above said judgment of conviction and sentence has been challenged on various grounds, which we would like to discuss little later.

3. Before adverting to the grounds of appeal as elaborated by the learned counsel for the appellant, it is just and necessary to bear in mind few facts of the prosecution case unfolded before the trial Court.

4. It is the case of the prosecution that, the deceased by name Sulthan is no other than the brother of the complainant i.e., by name Sri Parveez pasha @ Parveez. The complainant and the deceased are the residents of Rajaputara pete in Hoskote Town. It is the further case of the prosecution that, on 17.2.2011, in the night hours at about 9.45 p.m., when the complainant was in his house, PW-6 Noor Pasha informed the complainant that, some people have assaulted and killed the deceased Sulthan near I Grade College grounds at Hoskote Town. Immediately, the complainant had been to the place and observed lot of people who have already gathered there and he saw the dead body of Sulthan which was in the pool of blood. He has also observed that the neck of the deceased was cut and there was a long chopper stuck in the neck of the deceased. He has also observed a motor bike key and a pair of slipper, a black cap and a motorbike at the spot.

5. He suspected that the accused person must be the person who has committed the murder of the deceased on the basis of the motive that the said Sulthan had fallen in love with one Sayeeda Kauser daughter of Parveez Pasha. It is on record that on the day of the incident, in the afternoon some three persons

went to the house of the complainant and told that the family members of Sayeeda Kauser, were searching for bridegroom for her. On coming to know about the same, on the same day at about 4.30 p.m., the complainant, his Father-in-law and his three friends, and the uncle of the complainant had been to the house of Syed Pasha father of Sayeeda Kauser and requested them to give Sayeeda Kauser in marriage to Sulthan (deceased). In that context, it is said that, the brother of the said Sayeeda Kauser i.e., the accused by name Asif came out from the house and abused them and he also told that he will do something to Sulthan if the complainant and others once again visit his house in this regard. It was suspected that, perhaps on the basis of the said motive, the accused must have committed the murder of the deceased.

6. On the basis of the above said complaint, the Police have registered a case in Crime No.22/2011 for the offence punishable under section 302 of IPC and started investigation. During the course of investigation, the Police found that, the accused has committed the murder of the deceased Sulthan and thereafter, the Police laid a charge sheet against the accused for the above said offence.

7. After committal proceedings, the trial Court secured the presence of the accused on 18.2.2011 and framed charges for the offence punishable under section 302 of IPC against the accused. The accused pleaded not guilty and claims to be tried. Therefore, he was put on trial.

8. The prosecution in order to bring home the guilt of the accused examined as many as 18 witnesses PWs.1 to 18 and got marked Exhibits P-1 to P-24 and during the course of cross examination of PW-2, Exhibits D-1 and D-2 were got marked. MOs.1 to 18 are the material objects marked. After completion of the prosecution evidence, the court also examined the accused u/s.313 of Cr.P.C. and recorded his answers to the questions put to him. As the accused did not choose to lead any defence evidence. After hearing both the sides, the trial Court has arrived at a conclusion that the prosecution has proved the case against the accused beyond reasonable doubt and as such it recorded the impugned judgment of conviction and sentence as noted supra.

9. The learned counsel for the appellant Shri.Shankarappa very strenuously contends before the

court that though many number of witnesses have been examined, almost all the witnesses have turned hostile to the core of the prosecution. He contends that sole eye witness to the incident i.e., PW-4 Nagappa, has also not fully supported the case of the prosecution. If the cross examination of this witness is tested with other materials, he cannot be considered as an eye-witness to the incident. The trial Court has also in fact, not considered him as an eye-witness, he having not actually seen the incident. But in spite of that, the trial Court relying upon the other unnecessary materials, wrongly recorded the judgment of conviction and sentenced the accused accordingly. He further contends that there is no other circumstance like last seen circumstance. Identification of the accused by PW-4 has not been properly established. Further, the call list relied upon by the prosecution marked at Exhibits P-21 and P-22 is also not proved to the satisfaction of the court and the same is hit by Section 65B of the Indian Evidence Act. He also further contends that seizure of motor cycle is not established, and no witness has supported the same. He further submits that Ex.P-24 FSL report has not been proved in accordance with law and no witness has been examined in this regard.

10. The learned counsel further contends that PW-5 Parveez Pasha, an important witness and the mother of the deceased has turned hostile to the prosecution. Admittedly, the incident happened in the night hours at 9.45 p.m., the existence of light at the spot is also not properly established. The prosecution has also not examined the material witness Jayalakshmi in connection with this case and further, the motive pleaded by the prosecution has not been established. Therefore, on overall consideration of the entire materials on record, it cannot be said that the prosecution has proved the case beyond reasonable doubt.

11. Per contra, the learned Addl. State Public Prosecutor has contended that PW-4 Nagappa the eye-witness has supported the case of the prosecution. Though some of the witnesses who are the panch witnesses for recovery of a club at the instance of the accused did not support, the theory of the prosecutions the Investigating Officer's evidence can be believed in this regard. The Material Objects which are seized in this particular case pertaining to the accused and the deceased though clearly indicate that, the blood group of the deceased matches with the articles seized, which

is also fully supported by the FSL report Ex.P-24. It is contended that though there are some discrepancies in the evidence of the prosecution witnesses, and some of the witnesses have turned hostile, that itself is not sufficient to throw out the case of the prosecution as not proved beyond reasonable doubt.

12. In the wake of the above said submissions made, it is just and necessary for this court to find out:

> *(1) Whether the prosecution has proved the case as projected against the accused beyond all reasonable doubt that he has committed the murder of deceased Sultan and committed the offence under Section 302 of IPC.*
>
> *(2) Whether the trial Court has committed any serious legal and factual error in sentencing the accused as noted above?*

13. Before adverting to the material evidence available on record, we would like to have a cursory look at the evidence of the witnesses examined before the trial Court.

14. PW-1 Imran Khan is the inquest panch witness. According to the prosecution, he has seen the dead body at 9.00 p.m., Ex.P-1 is the inquest

proceeding. He has stated that he has signed the said inquest panchanama and he has also identified MO-1 Long, MO-2 Blood stained mud, MO-3 Sample mud, MO-4 Black cap, MO-5 Slippers, MO-6 Mobile handset, MOs.7 & 8 photographs of the back and front portion of the motor bike which was found on the spot of the scene of occurrence and MO-9 the Motor cycle key which were all seized by the Police at the time of inquest.

15. PW-2 Abdul Khadar @ Khadar is no other than the father of the deceased. He speaks about the motive and also the last seen circumstance.

16. PW-3 Amzad khan is also a panch witness to Ex.P-3 seizure Mahazar, under which the Police have recovered a club from accused and he is also panchwitness to spot Mahazar Ex.P-2 and he also says thatthe Police have recovered one T-Shirt, one Jeans Pant and one Mobile phone which are marked at MOs.11 to 18 under Ex.P-4 Mahazar.

17. PW-4 Nagappa is an eyewitness, who has seen the incident and also seen the dead body of Sulthan immediately after he was informed by a lady by name Jayalakshmi on the date of the incident. He has also identified MOs.1 to 10 before the court.

18. PW-5 is one Parveez Pasha. As we have already noted, he is the complainant. He in fact initially turned hostile to some extent, but he has supported the case of the prosecution, to the extent that he has lodged the complaint before Police. Rest of the aspects of the case with regard to the motive and other factors, he has not supported the case of the prosecution.

19. PW-6 Noor Pasha, is a witness who had been to the spot at about 9.30 p.m., and on 7.2.2011 he informed about the dead body of the deceased Sulthan to PW-5 Parveez Pasha. But, he has turned hostile to the prosecution to some extent.

20. PW-7 Imran Ulla Baig, is a panch witness to Ex.P-8 under which the Police have seized the clothes of the deceased. This witness has also not supported the case of the prosecution.

21. PW-8 Jubair Pasha, is another witness to the same panchanama Ex.P8. He has also turned hostile to the prosecution.

22. PW-9 Ashraf Unnissa is the mother of the deceased. She has also not supported the case of the prosecution. She was examined before the court to prove the motive and also about the information she

received on the date of the incident.

23. PW-10 Rizwana Banu, is the elder sister of the deceased. She was also examined for the purpose of proving the motive, but she has not supported the case of the prosecution.

24. PW-11 S. Vishwanath is the Assistant Engineer, PWD, who has drawn the sketch of scene of offence as per Ex.P-13.

25. PW-12 Afroze Pasha is the person who has taken the interim custody of the motor cycle involved in this case on the basis of the power of attorney given by the owner of the said vehicle.

26. PW-13 Srinivas is the owner of the motor cycle bearing No.KA-53/K-8866 which was found at the spot at the time of its seizure and at the time of spot panchanama. He has not supported the case of the prosecution. He was examined to show that he has sold the vehicle one year back to the accused, but he denied the same.

27. PW-14 Ram Prakash, Chief Officer, has stated that on the request of the then Police Inspector of Hoskote Police Station, he has issued the katha extract

pertaining to the place of offence and issued katha extract as per Ex.P-15 to the Police Inspector.

28. PW-15 Nataraja Murthy, is the Police Constable, who carried the FIR and the complaint to the jurisdictional Magistrate.

29. PW-16 Dr.Shivakumar K.R. is the doctor who conducted the autopsy on the dead body of the deceased. He has given his opinion that the cause of death of the deceased was due to shock and hemorrhage as a result of injuries to the vital organs of the body and has stated that the death has occurred about 12-24 hours prior to the Post Mortem examination and he has given the report accordingly as per Ex.P-16.

30. PW-17 Shivaraju S. has stated that, while he was working as PSI at Hoskote Police Station, he has registered the case and dispatched the First Information Report to the jurisdictional Magistrate.

31. PW-18 M. Mallesh, Police Inspector, who took up the further investigation from PW-17 and after thorough investigation, laid the charge sheet against the accused.

32. In fact, the entire case of the prosecution revolves around the evidence of an eye witness and the circumstances, ie., the motive, last seen theory and recovery of some incriminating articles at the instance of the accused and connection of the recovered articles with the accused. No we would like to deal with the circumstances individually one after another.

33. MOTIVE: If we look at the sequence of events of the prosecution case, it is clear that there was a specific allegation regarding motive to kill the deceased by the accused.

34. It is the case of the prosecution that, the deceased Sulthan had fallen in love with Sayeeda Kauser D/o. Syed Pasha. The family members of Sayeeda Kauser were searching for the bridegroom for her. Therefore, on the date of the incident, at about 4.30 p.m., the complainant, his father-in-law, i.e., PW-5 Parveez pasha along with three friends of Sulthan and the uncle of Parveez Pasha had been to the house of Sayeeda Kauser, asking for giving her in marriage to the deceased Sulthan. But, they refused to give her in marriage to Sulthan and at that time, the brother of Sayeeda Kauser, came out from the house and told

them not to go again to his house asking Sayeeda Kauser to be given in marriage to Sulthan, otherwise, he will look after Sulthan. Thereafter, the said Sulthan was taken away by the accused on the same day evening.

35. So far as this motive is concerned, the complainant Parveez Pasha PW-5 himself has not supported the case of the prosecution though it is suggested in the course of cross examination conducted by the prosecution itself. No other witnesses have supported this particular aspect.

36. The mother of the deceased, PW-9 Ashraf Unnissa has also turned hostile so far as this aspect is concerned. Even in the course of cross examination, nothing has been elicited from the mouth of this witness. Likewise, PW-10 Rizwana Banu, who is the sister of the deceased turned hostile and not supported so far as this aspect is concerned. These three witnesses PWs.5, 9 and 10 who are the close relatives of the deceased Sulthan, have not supported the motive story, for the reasons best known to them.

37. However, PW-2 Abdul Khadar, who is the father of the deceased has to some extent supported this particular aspect. But, he has stated that they went to the house of the accused on the day of the incident, in order to ask Sayeeda Kauser to give her in marriage to the deceased Sulthan. At that time, the accused and his father, who were there in the house, have told that they have already given assurance to some other person that, they would give Sayeeda Kauser in marriage to them. Therefore, they refused for the proposal made by PW-2 and others.

38. Except the above said evidence of the father of the deceased, no other material is available so far as this motive factor is concerned. Further added to that, the close kith and kin, mother, sister and brother-in-law of the deceased have not corroborated the evidence of PW-2 in this regard. Even so far as this aspect is concerned, it is suggested to PW-2 in the course of cross examination, but he has not stated all these things before the Police when he was given statement before Police and therefore, it is an improvement made by PW-2 before this court.

39. In this regard, PW-18 M. Mallesha, the Investigating Officer has stated that he has recorded the statement of these witnesses. It is elicited in the course of cross examination of this witness at paragraph 26, that –

> " xxxxxx. *It is true to suggest that PW-2 has not given his statement before me stating that when they went for asking the bride, at that time, the accused was present in the house and he has acquainted to him and the accused told personally questioned him as to why they came to ask his sister in marriage to their son and said that he will see his son".*

Therefore, this particular aspect is proved to be an improvement and the same has been suggested to PW-2 that he has not stated the same before Police and the Investigating Officer has also affirmed the same. Therefore, this motive factor is neither corroborated by the evidence of other relatives of the deceased or PW-2 as noted above and further it is proved that it is an improvement made by PW-2 during the course of his evidence before the court. Even otherwise, there is no material to show that after refusal by the father of Sayeeda Kauser to give his daughter in marriage to deceased Sulthan, any quarrel has taken place in their house. There is no allegation of any abnormal behavior

of the accused at any point of time either prior to or after the said motive incident alleged to have taken place. Therefore, in our opinion, this is very feeble motive which has been projected by the prosecution and that too, the same has not been proved beyond reasonable doubt.

40. LAST SEEN CIRCUMSTANCE: Of course, the non-proving of the motive itself is not sufficient to throw out the case of the prosecution in its entirety. The other circumstance and the evidence of the eye witness and recovery if it is established beyond doubt, then also, the court can lay its hands to convict the accused.

41. It is the case of the prosecution that on the day that PW-5 and PW-2 had been to the house of the accused, requesting for the bride, on the same day in the evening the accused came to the house of the deceased and he took the deceased on his motor bike along with him and thereafter, the deceased did not return. At about 9.45 p.m., PW-2 received the information from one Noor Pasha that the deceased was done to death. Thereafter, PW-2 went to the spot and saw the dead body. In the course of his cross examination, this particular aspect has been denied by

the and again suggested that he has not stated the above said last seeing the accused with the deceased in his earlier statement before the Police. Again, it appears to be an improvement which has been proved in the course of cross examination of PW-18. PW-18 has also accepted and admitted that PW-2 has not stated before him in his statement that – *"The accused asked the deceased to go out on that day after having meals for which deceased told that he will be back by five minutes."* PW-2 has not further stated that his sister-in-law came at about 11.00 p.m., and informed him that the deceased had been beaten to death and then he proceeded to the place and saw the dead body lying there. In the course of cross examination also, he has admitted that on the said day, when he went to the spot at that time the Police enquired this man, but he did not inform the Police anything at that particular point of time. So, therefore, some shaky evidence is available with regard to the last seen circumstance that the accused taking the deceased along with him.

42. In this regard, the evidence of PW-9 is contrary to the evidence of PW-2. PW-9 is the mother of the deceased Sulthan. She in fact turned hostile to the prosecution. It is suggested in the course of cross

examination by the prosecution that, the accused on that particular day at about 8.00 p.m., came to the house of these witnesses and took the deceased along with his motor cycle and thereafter, they came to know at about 9.45 p.m., when the deceased was done to death. This suggestion has been denied by her in the course of cross examination stating that she has not given such statement before Police.

43. Likewise, PW-10, who is no other than the sister of the deceased has also not stated anything about the accused taking the deceased on that particular day. It is also suggested to her in the same manner in the course of cross examination but she has denied having given such statement before Police.

44. Therefore, these three witnesses who were said to be present in their house when accused took the deceased have not supported the case of the prosecution except PW-2, whose evidence is also shaky and the said evidence is also appears be an improvement. Therefore, in our opinion, this particular circumstance also has not been properly established by the prosecution.

45. Now we proceed to the vital and prominent evidence of the prosecution, i.e., the evidence of eye witness. The evidence of eye witness if credit worthy and trust worthy for acceptance, in such an eventuality irrespective of proving any other circumstance, the court can solely rely on such evidence and hold that the case of the prosecution stands proved. In this background now we discuss the evidence of PW.4.

46. VERSION OF THE EYE-WITNESS: As we have already narrated, the entire case stands on the evidence of the eye-witness to the incident i.e., PW-4 and also the recovery. The learned counsel for the appellant strenuously contended that PW-4 and one Smt. Jayalakshmi, are the eye-witnesses to the incident. But, the said Smt. Jayalakshmi has not been examined. In that context, the evidence of PW-4 has to be tested along with the surrounding circumstances whether he could be treated as an eye-witness or not, and his evidence can be relied upon by the prosecution or not.

47. Of course, in this case, the entire case revolves around the sole eye-witness PW-4 Nagappa. We have to bear in mind what are all the principles, the

court has to follow when a sole eye-witness is relied upon by the prosecution.

48. In decision reported in 1991 (Supp.2) SCC 677 between *Jayaram Shiva Tagore & Others and. State of Maharashtra*, wherein the Hon'ble Apex Court has held that –

> *"Conviction based on testimony of sole eye-witness is permissible, but a rule of caution has to be maintained. However, minor discrepancies are not fatal to the prosecution case." Where the prosecution rests on the sole testimony of an eye-witness, the same should be wholly reliable. However, that does not mean that each and every type of infirmity or minor discrepancies would render the evidence of such witness unreliable. Therefore, on facts, the court has to carefully examine the evidence of the eye-witnesses and it finds that no serious infirmity which isk sufficient to totally uproot the case of the prosecution, then the court can rely upon such sole eye-witness and record the conviction.*

49. In another ruling reported in (2015) 2 SCC 734 between *Inder Singh and Others and State of Rajasthan,* the Hon'ble Apex Court after relying upon

the rulings of the case reported in AIR 1965 SC 202 [Masalti Vs. State of UP], has in fact, considering the facts and circumstances of the case held that:

> "*The sole eye-witness can be relied upon though the other independent eye-witnesses turned hostile to the prosecution, but the sole testimony of the eye-witness must be reliable and trustworthy for acceptance. Therefore, there is no hard and fast rule that the sole testimony of sole eye-witness cannot be relied upon*.

50. The trial Court in fact has not treated him as an eye-witness but he is the circumstantial witness that he has seen the accused sitting on the chest of the deceased trying to remove the chopper (long). But actually he has not seen the accused assaulting the deceased. However, the trial Court has extensively relied upon the evidence of PW-4 holding that he has actually seen the accused and the deceased on that day and he has seen the accused sitting on the chest of the deceased. That is why, the trial Court has believed the version of PW-4.

51. PW-4 has specifically stated in his evidence that on the date of the incident at about 8.30 p.m., or 9.00 p.m., he was in his house which is situated near the I Grade College, and the incident took place in the

play ground of the said I Grade College. At that time, his neighbour Jayalakshmi called this man and told that some galata was taking place near the college and after receiving the said information, he went near the said college compound and there was a street light near the said compound wall. He saw one person lying on the ground and on his neck there was a long (Chopper). He has also observed that a club which was blood stained, was lying near the said spot. He has further deposed that the accused, who is before the court was sitting on the deceased, who was lying on the ground and he was doing something to take out the chopper, then this witness called him to leave the deceased. Thereafter, he screamed for help and at that time, the accused scared and ran away towards the church. This witness went near the deceased and saw that he was already dead. He has further stated that he could not chase the accused and catch him. It is his further evidence that on the next day at about 11.00 a.m., the Police have called this witness to the Police Station and shown the accused and thereafter, his statement was recorded and he identified the chopper as MO-1 and club as MO-10 before the court. He has also identified the accused.

52. The evidence of this witness is seriously attacked in the course of cross examination that he has not given the statement before Police in the above said manner at any point of time though he had sufficient opportunity earlier to disclose the same and further, it is suggested to him that on that day, Jayalakshmi did not inform anything to him nor he went to that particular spot and saw the incident as such. At paragraph 12 of the evidence of PW-4, the entire statement of this witness shows that he is an eye-witness. It is suggested to him that he has seen the incident, but he has denied that he has seen such an incident. The same has been put to the mouth of PW-18 whether actually this witness has stated in that manner. At paragraph 27, the whole statement of PW-4 has been put to the mouth of PW-18, the Investigating Officer, wherein, PW-18 has stated that –

> *"27. Xxxxxxx. It is true to suggest that PW-4 has not stated before me in his statement that his neighbour Jayalakshmi called him and told him that some galata is going on in the college compound and asked him to see whether the person is dead or alive and immediately he ran towards the college compound and through the street light near the compound, it was a full moon night and saw the*

person lying on the ground with a long struck in his neck, and by the side, a blood stained club was lying, and the accused was trying to pull out the long by sitting on him, and he raised an alarm and asked him to leave him and screamed aloud that Police are coming and on hearing this, the accused got up and ran towards church and when he went near the said person who was dead and he could not jump the compound wall to catch hold the accused."

Therefore, the entire suggestion made to PW-18 is accepted and he has admitted that PW-4 has not stated so before him and he also admitted that PW-4 has not stated in his statement that the Police had shown MOs.1 to 10 to PW-4 and he identified the same in the Police Station. Therefore, the entire evidence of PW-4 is shown to be an improvement before the court.

53. The learned counsel for the appellant strenuously contends that the evidence of PW-4 is of total improvement and nothing has been elicited in the course of cross examination in comparison with the 161 Cr.P.C., statement of this witness, though the witness has given such statement before police. The learned counsel futher submit that the Trial Court has actually taken that duty and compared 161 Cr.P.C., statement with that of the substantive evidence before the court

and wrongly recorded the conviction judgment.

54. In this regard, it is worth to refer the judgment of the Trial Court, wherein at paragraphs 30 to 37, the Trial Court has considered this particular aspect available in the cross examination of PW-4 and the improved version of the evidence of PW-18 extracting the evidence and the statement under Section 161 Cr.P.C., Thereafter the court after relying upon a decision of the Hon'ble Apex Court in the case of *Tahsildaer Singh Vs. State of U.P.* reported in AIR 1959 S.C. 1012 has in fact come to the conclusion that in fact PW-4 has given his statement before the Investigating Officer but the Investigating Officer was so careless and without looking into the 161 Cr.PC., statement of PW-4, has given a casual answer in the cross examination.

55. We have also carefully perused paragraph 25 & 26 of the said judgment. The observation made by the Hon'ble Supreme Court reads as follows:

> *"25. "From the foregoing discussion the following propositions emerge: (1) A statement in writing made by a witness before a Police officer in the course of investigation can be used only to contradict his statement in the witness box and for no other purpose; (2) statements*

not reduced to writing by the Police officer cannot be used for contradiction; (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement; (4) such a fiction is permissible by construction only in the following three cases: (i) when a recital is necessarily implied from the recital or recitals found in the statement; illustration: in the recorded statement before the Police the witness states that he saw A stabbing B at a particular point of time, but in the witness box he says that he saw A and C stabbing B at the same point of time; in the statement before the Police the word "only" can be implied i.e., the witness saw A only stabbing B; (ii) a negative aspect of a positive recital in a statement: illustration in the recorded statement before the Police the witness says that a dark man stabbed B, but in the witness box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that he was not of fair complexion; and (iii) when the statement before the Police and that before the court cannot stand together: illustration: the witness says in the recorded statement before the Police that A after stabbing B ran away by a northern lane, but in the court he says that immediately after stabbing he ran away towards the southern lane; as he could

not have run away immediately after the stabbing i.e., at the same point of time, towards the northern lane as well as towards the southern lane, if one statement is true, the other must necessarily be false.

26. The aforesaid examples are not intended to be exhaustive but only illustrative. The same instance may fall under one or more heads. It is for the trial Judge to decide in each case, after comparing the part or parts of the statement recorded by the Police with that made in the witness box, to give a ruling, having regard to the aforesaid principles, whether the recital intended to be used for contradiction satisfies the requirements of law."

(emphasis supplied)

Therefore, we do not find any strong reasons to differ from the opinion expressed by the learned Trial Judge in considering the said aspect comparing the evidence of the witnesses with that of 161 statement only for the limited purpose and appreciating the evidence of PW-4 and PW-18. Therefore, in our opinion, this ground is not available to the learned counsel for the appellant.

56. We have carefully observed that there is a serious lapse on the part of the Investigating Officer as well as the Public Prosecutor who has conducted the case. The Investigating Officer, it appears, has not come to the court with full preparation to give evidence. Before coming

to the court, all the Investigating Officers should refresh themselves with regard to the investigation conducted by them and also the statementof the witnesses given before them and contradictions and omissions which are elicited during the course of the evidence of the witnesses, so as to answer the questions that may be put to them by the defence counsel during the course of cross examination. It is the duty of the Investigating Officer to assist the court in propermanner so as to find out the truth in the case. In this particular case, the Investigating Officer, though the records are available before the court, has not even bothered to look into the statement of PW-4 recorded u/s.161 of Cr.P.C., before answering the question put to him. This type of attitude of the Police personnel andthe Investigating Officers who are in the helm of affairs, requires to be deprecated and proper guidance is required to be issued by the Director General of Police and Inspector General of Police in this regard.

57. We have also found that the Public Prosecutor is also not diligent in properly conducting this case. Invariably wherever the contradictions and omissions are elicited during the course of evidence of the witnesses or any discrepancies in the evidence of the prosecution witnesses, it is the bounden duty of the prosecutor to clarify the same by either cross examining

the witnesses or re-examining the witnesses in a given case. The Public Prosecutor should not act in a very casual or mechanical manner. They should be alive and alert when the evidence of the prosecution witnesses are recorded particularly during the course of cross examination. They have to meticulously observe the contradictions and omissions elicited as to whether they are true and proved by establishing the same during the course of cross examination of the Investigating Officer. If the witness says that he has given a statement before Police and the contents of his evidence finds a place in 161 Cr.P.C. statement, in spite of that, if the Investigating Officer says that such statement is not there in the 161 statement, in such an eventuality, it was the duty of the prosecutor to re-examine the said witness or to cross examine the said witness in order to clarify the situation. Therefore, the prosecutors must take utmost care in assisting the courts by properly elucidating the factual aspects of the case. Even we have observed in many number of cases, that if the witnesses turn hostile to the prosecution, mechanically or casually cross examination is made. If a material witness turns hostile, it becomes the responsibility of the prosecution to show to the court as to what was the

reason for the witness to turn hostile or to give inconsistent evidence to the prosecution. Therefore, the Prosecutor shall make all his endeavour to cross examine the said witness effectively so as to bring out the truth before this court. Therefore, in this regard, proper directions have to be issued by the Director of Prosecutions to all the Public Prosecutors and putting a rider on them, that, if they do not properly conduct the cases in accordance with law necessary proceedings shall be initiated against them. Therefore, with this background, we would like to direct the Registrar (General) to communicate a copy of this Judgment to the Director General of Police as well as the Inspector General of Police, so as to take care of the prosecution cases hereinafter with reference to the above observation made by this court.

58. Apart from that, nothing worth has been elicited form the evidence of PW-4. Of course, though the witness was very much present at the time and place of the incident, when the police visited the spot and enquired this particular person, he disclosed same to the police about the incident, but the Police did not record his statement till the next day of the incident. But the evidence of this witness is very much clear in

the cross examination that he has actually disclosed the entire factual aspects of the case to the police when they reached the spot and even when the police were there on the spot in 9.20 p.m., to 1.00 a.m., but for the reasons best known to the PSI he has not recorded the statement of these witnesses. Though there is some delay in recording the statement of this witness, there is no other infirmity as to why this witness has to be disbelieved. In the course of cross examination, there is no material elicited as to why this witness has to falsely implicate the accused. During the course of cross examination of this witness no interested-ness or partisanity or enemity is established by the defence in fact, he being a respectable citizen of the country, who was residing near by the place of the incident, there was all possibility for him to go and see the incident, with no interested-ness or partisanity or enmity is establishedduring the course of cross examination. Nothing is there to disbelieve the evidence of this witness.

59. In fact, we have carefully perused the appreciation of the evidence of PW-4 by the Trial Court. All the points raised by the learned counsel have been meticulously considered and answered by the Trial Court and thereafter, the Trial Court has relied upon the evidence of such witnesses. We do not find any illegality

or perversity in the appreciation of evidence. As noted above, in the decision of the Hon'ble Apex Court cited supra in the case of *Jayaram Shiva Tagore Vs. State of Maharashtr,* the Hon'ble Apex Court has observed that if there is no reason for the witness to falsely implicate the accused though there are some minor discrepancies and delay in recording the statement of such witness that will not in any manner make the witness a interested-ness or the court cannot discard the evidence of such witnesses. Therefore, we do not find any strong reasons to interfere with the appreciation of evidence by the Trial Court so far as this witness isconcerned.

60. Of course, there is a lapse on the part of the prosecution in not examining another witness who is said to be that there with this PW-4 on that particular day. Merely because another eye-witness or another concocted witness has not been examined, that itself is no ground to discard the evidence of this witness PW-4. Hence, we are of the opinion that the prosecution has established its case on the basis of the sole eye-witness, irrespective of not proving the circumstance of motive and last seen theory.

61. RECOVERY: The prosecution also relied upon the recovery of incriminating articles at the instance of the accused. Of course, the evidence of PW-3 Amzad Khan and the Investigating Officer and also other police witnesses have to be looked into. PW-18, the Investigating Officer has stated before the court that on 18.2.2011 himself along with CW-26, CW-27 and PC 762 have apprehended the accused near H-Cross and thereafter accused was brought to the Police Station and his voluntary statement was recorded as per Ex.P-20 and on the basis of the voluntary statement, the accused took the Police and the panch witnesses to the scene of occurrence and spot panchanama was drawn as per Ex.P-2 in the presence of panch witnesses on the same day, the accused also took the panch witnesses and the Police to the Government Junior College, Hoskote where he has concealed a club inside the bush and the same was produced by him and recovered under Ex.P-3 Mahazar. It is also the case of the prosecution that on the same day, the accused had taken them to his house situated near by the Government Hospital and produced from his house, a blood stained full sleeved T-shirt, an Ash colour pant and a Micromax dual SIM mobile phone which were marked at MOs.11 to 18. The

same were recovered under Mahazar Ex.P-4.

62. PW-3 Amzad khan in fact has fully supported this particular Mahazars Exhibits P2 to P4 and he has re-iterated what the Investigating Officer has stated. They have categorically stated that the club which was recovered at the instance of the accused was stained with blood and other clothes of the accused were stained with blood. Nothing worth has been elicited in the course of cross examination. But the learned counsel argued before the court that on these Mahazars Exs.P-3 and P-4, the Police have taken the signature of the accused on the Mahazars, and therefore, the same is not admissible. But he has not drawn our attention to any law or any of the decision in this regard as to why the Mahazars drawn by the Police containing the signature of the accused should not be accepted, if the same are proved otherwise, to the satisfaction of the court. In such a circumstance the court should not give any importance to the signature of the accused.

63. Be that as it may, the very reading of the evidence of the Investigating Officer and this witness, it appears, the Police have seized some articles at the instance of the accused, but here it is clear from the evidence of the Investigating Officer that this witnessPW-

3 is from Hoskote village and he has not a localite residing nearby the house of the accused. PW-18 who is the Investigating Officer has admitted that he has not secured the neighbouring residents of the accused to act as a panch witness. The learned counsel argued that though a number of inmates were present in the house of the accused at that time, and one of them were selected as witnesses to the Mahazar. Further, through a number of inmates were present in the house of the accused at that particular point of time. The counsel argued, that, none of them were selected as witnesses to Mahazar. There is no hard and fast rule as to who has to be selected as witness. Normally respectable persons in the locality have to be selected, but that does not mean to say, the evidence of these witnesses can be rejected if their evidence is otherwise reliable.

64. It is also argued by the learned counsel that when drawing the Mahazar Ex.P-2 which is the spot mahazar, an iron chopper has already been seized, but in Ex.P-20 voluntary statement of the accused recorded by the Police, shows that accused has stated that he would show the long kathi and club concealed by him behind the stair case i.e., to say according to the Investigating Officer, the accused has told them that he

has concealed the club as well as the chopper behind the staircase. But the said club was not recovered from the staircase. According to Investigating Officer himself, the said club was recovered from a bush near the Government College. Whether the club has also been recovered at the spot or from a bush as stated in this context, it is worth to refer the evidence of PW-4, the so called eye-witness to the incident.

65. Though PW-4 in his examination in chief has stated that club was lying on the spot which was stained with blood, and he identified the same as MO-10 before the court. However, he has not stated that the said club was lying even after the accused went away from thespot. It is the case of the prosecution that, the accused has taken away the club and left the chopper in the neck of the deceased. Therefore though there is some discrepancy in the evidence of PW-4 with regard to the club, nevertheless, the evidence of the other witnesses amplifies recovery of the club and other articles at the instance of the accused. Therefore, the evidence of the Investigating Officer, coupled with the evidence of the other witnesses cannot be doubted. There is no suggestion to elucidate the facts from the mouth of the Investigating Officer as to why the Investigating Officer should falsely implicate the accused in the crime.

66. Of course, the evidence of PW-16 doctor Shivakumar, who has conducted the Post Mortem examination on the deceased and issued the Post Mortem examination report as per Ex.P-16, discloses that the deceased has sustained as many as six injuries. Almost all the injuries are cut, lacerated wounds except the injury No.3 cut wound of about 3 cm x 8 cm x 7 cm deep was found at the anterior aspect of the neck extending from the sternocleido mastoid muscle to the other side cutting through the thyroid organ exposing the underlying cervical spine and the great vessels of the neck of the left side. The left index finger is totally cut through and hanging by the skin and a cut wound at the mid parietal region in irregular shape. The doctor has also admitted that the sharp edged weapon would have caused the incised wound. He has further admitted that MO-1 iron long is a sharp edged weapon and MO-10 Eucalyptus club is a blunt object. He has further stated that he did not notice either the incised wound or contusion wound over the dead body during the Post Mortem examination. Therefore, this also amplifies the recovery and connection of these MOs.1 and 10 that the weapons seized also could cause the above said injuries as admitted by the doctor though he

has not observed any incised or contusion wounds.

67. Apart from the above said evidence, the Investigating Officer has also deposed that on 18.2.2011, he visited the scene of occurrence and conducted the inquest panchanama as per Ex.P1 in the presence of panch witnesses and during inquest over the dead body, he has seized the blood stained mud, sample mud, an iron long, brown coloured pair of slipper, black coloured cap, Hero Honda motorcycle along with key. He has also stated that on 18.2.2011 itself, after the Post Mortem examination, the Head constable broughtthe clothes of the deceased from the Government hospital and the same were seized under Mahazar Ex.P8in the presence of the witnesses PW-7 Imran Ulla Baig and PW-8 Juber @ Juber Pasha and the said clothes ofthe deceased i.e., blood stained over coat, T shirt, white banian, underwear and pant, which are identified as MOs.14 to 18. He has also spoken to about the seizureof the clothes at the instance of the accused which we have already discussed. The witnesses examined i.e., Imran Ulla Baig PW-7 and Juber @ Juber Pasha, in fact have turned hostile so far as these aspects areconcerned. However, there is no reason as to why the Investigating Officer should not be believed so far as this aspect is concerned. Though these witnesses have not supported the case of the prosecution, but they have nevertheless identified their signatures on the Mahazar Ex.P8

which were signed in the police station. It is the case of the prosecution that the said Mahazar was drawn in the Police Station and the clothes were seized produced by the police constable. Though they have stated that they have signed the same in the Police Station, but it goes without saying that the said clothes of the deceased were not much disputed in this particular case.

68. After seizure of these articles and recovery of some clothes at the instance of the accused, the Investigating Officer has sent the said articles to the FSL and the report has been secured. The said report is marked at Ex.P-24. Totally about 12 items were sent for examination. Out of that the blood stained soil one long, one cap, one wooden club, one T shirt and one pant which were the articles particularly the T shirt and pant, wooden club were recovered at the instance of the accused. Sample soil and blood stained soil, one cap and one long recovered at the spot and over coat one T shirt one white banian and one pant were seized in the Police Station belonging to the deceased they are specifically marked as Sl. Nos.1 to 12. Except item Nos.1 and 2, all other items were stained with blood and it is stated therein that, they were stained with human blood and particularly A-group blood. This particular document

need not be proved before the court, but it can be treated as evidence before the court, as per Sections 292 and 293 of Cr.PC., if the contents of the said document is disputed by the accused, or the court feels it just and necessary, then only the witness can be called to prove that particular document. Otherwise, if the accused disputes the said document, he has to make a request to the court to secure the presence of the said witness who has issued Ex.P-24, to elicit any doubt with regard to the contents of the said document. Therefore, the above said documents also disclose that the blood group of the stains on the clothes of the accused as well as on the clothes of the deceased and the weapon used for the commission of the offence, the club and the (chopper) all contained A-group Blood which tallied with the blood group of the deceased. There is no explanation by the accused about this incriminating evidence. Therefore, the above said circumstance also very strongly connect the accused to the crime.

69. It is not that if one or two circumstances projected by the prosecution are not proved the entire case of the prosecution is not proved. Ultimately, the court has to see the cumulative effect of proved circumstance whether they constitute a complete link

particularly when eyewitness version is there. If some of the circumstances are not proved, on the basis of the evidence of the eyewitnesses, the court can draw necessary inference.

70. Therefore, on total and cumulative evaluation of all the proved facts, it would indicate that the accused must be the perpetrator of the crime. Though there are some inconsistencies, contradictions and omissions as noted above, the overall consideration of the entire evidence as appreciated by the Trial Court, would show that they are not sufficient to totally uproot the case of the prosecution. Hence, we do not find any strong reasons to deviate from the opinion expressed by the Trial Court. The Trial Court has in detail considered all the grounds urged before this court already and by reasoned judgment has passed the judgment of conviction and sentence against the accused which stands to the legal and logical reasons. Therefore, the same is not liable to be disturbed.

71. Under the above said circumstances, in our opinion, the appeal is devoid of merit and the same is liable to be dismissed.

Accordingly, dismissed.

The Registrar (General) is hereby directed to send a copy of this judgment to the Director General of Police and Inspector General of Police as well as to the Director of Prosecutions so as to take appropriate measures to train the investigating officers as well as Public Prosecutors by conducting refresher courses often or seminars in this regard and also to take serious action if there is any lapses on the part of the concerned officers in the light of the observations made at paragraphs 56 and 57 of this judgment.