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SEENA @ SRINIVASA

v.

STATE OF KARNATAKA

(Criminal Appeal No. 165 of 2004 etc.)

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JULY 02, 2014

**[SUDHANSU JYOTI MUKHOPADHAYA AND RANJANA
PRAKASH DESAI, JJ.]**

C *Penal Code, 1860: ss.302/34, 326 - Murder - Allegation that accused 1 to 3 went with choppers where victim-deceased was grazing cattle and attacked him - PW1 rushed towards deceased but he was chased by the accused - PW1 ran upto land of PW2 - Accused started pelting stones at PW-1 - On intervention of PW2, accused left - Victim-deceased*

D *succumbed to injuries - Accused no.1 died during trial - Conviction by trial court u/ss.302/34 - High Court modified conviction of accused no.2 to s.326 and acquitted accused no.3 - On appeal, held: The evidence of PW.1 regarding participation of accused no. 1 and 2 and their presence nearby*

E *the place of incident and immediately after the incident found corroboration from the evidence of PW.2, an independent witness - No enmity was attributed to him and nothing was brought out in the cross-examination as to why PW.2 would falsely implicate accused no. 1 and 2 in the commission of*

F *the offence - There was no evidence to suggest that some other persons were involved in the commission of the offence - Recovery of choppers and blood stained clothes made at the instance of accused - As regards accused no. 2, there was ample evidence to prove his presence and participation in the commission of offence so he was rightly convicted by trial*

G *court for the offence u/s.302 - High Court though agreed that the prosecution proved the presence of accused no.2 in the commission of the offence, wrongly held that the charge u/ s.302 was not proved and wrongly formed an opinion that the*

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offence u/s.326 IPC was established against accused no. 2 - The impugned judgment in so far as accused no. 2 was concerned set aside - Prosecution witnesses did not speak about any specific act or presence of accused no.3, at the place of incident and, therefore, the part of the said judgment acquitting accused no.3 upheld.

Prosecution case was that on the fateful day, PW-1 sent his brother (the deceased) along with PW-7 to police station to lodge report regarding the threat caused to him by accused no. 1, 2 and 3. The deceased lodged the report and returned to the village at around 12 noon p.m. The deceased accompanied PW-1 to graze cattle. While the cattle were grazing, the deceased sat on a rock. At that time, accused no. 1 to 3 went to the spot armed with choppers. Accused no. 1 hit the deceased on his head with the choppers. Accused no. 3 hit the leg of the deceased. The deceased screamed which attracted the attention of PW-1. PW-1 rushed towards his brother-deceased but he was chased by accused no. 1 and 2 upto the land of PW-2. PW.1 ran and sought shelter. Accused 1 and 2 stood outside the land and continued to pelt stones at PW.1. The stone caused injury to his right thigh. The accused asked him to come out. At that time PW.2 intervened and asked them to go away. Thereafter, PW.1 went back to the place of occurrence. He found the deceased dead. Again he returned to his village and informed the villagers. Accused no. 1 died during the trial. The trial court held accused no. 2 and 3 guilty for offence punishable under Section 302/34 IPC. The High Court acquitted accused no. 3 and partly allowed the appeal filed by accused no. 2 by modifying the conviction under Section 302 IPC to the offence under Section 326 IPC.

Accused no. 2 filed instant appeal challenging conviction under Section 326 IPC. The State filed appeal

A challenging the acquittal of accused no. 3 and modification of conviction of accused no. 2.

Disposing of the appeals, the Court

B HELD: 1. PWs.1 and 2 gave similar statements that accused no. 1 and 2 chased PW.1 up to the land of PW.2. PW.2 further deposed that the next day police arrived and checked his garden land which was pointed out by PW.1. PW.1 acted as witness to the seizure of stones used by the accused to assault him. PW.7 was a witness to
 C seizure of material objects. i.e. stones from the land of PW.2. The witness spoke clearly that he was summoned by the police to the land of PW-2 which was pointed out by PW.1 and around 2.00p.m. mahazar was prepared seizing stones. PW.8 was working as Medical Officer who
 D had conducted autopsy on the dead body. The injuries nos. 1 to 10 were described as ante mortem in nature by the doctor. According to PW.8-doctor, death was due to shock and haemorrhage as the result of injury nos.1 to 10. These injuries were caused by external violence. While
 E describing the injuries, PW.8 deposed that injury nos. 1 to 8 were incised wound and could be caused by object like chopper. According to him injury nos. 1,2 and 3 could also be caused by similar object. PW.9 was a witness to
 F inquest. He deposed that police summoned him to the spot where dead body was lying. Body was near Hutta (anthill) and a sickle was also lying nearby. It was blood stained. There was also a kukke (basket). Witness submitted that the police searched clothes of the dead body and found 10 muchagada leaves, a thread and a red coloured cloth piece. All were blood stained. Like other
 G witnesses even this witness maintained consistency in statement with regard to aspects spoken to by him in examination-in-chief even though when cross-examined in detail. During cross-examination, the witness stated about the blood stains at the spot. [Paras 19 to 22] [1037-
 H F-H; 1038-A-C; 1039-D, G-H; 1040-A-D]

2. PW.11 was another important witness of the prosecution as he told about recovery of material object at the instance of the accused. In the presence of PW.2, CW.25 and CW.27, accused no.1 guided the police to Kharab land from under banyan tree and karegidda (head of dry leaves) he took out chopper and produced before the police. The said chopper was blood stained. He further stated that accused no. 2 who was also in the jeep guided the police to this land and from under dry leaves took out chopper and produced the same which was seized under mahazar. He told about accused no.3 guiding police to another spot and from under the banyan tree chopper. PW.11 further stated that accused no.1 of his own stated that he would give his clothes. He guided police to his house. From a drum he took out the panche and other clothes which were stained with blood. Accused No. 2 guided police to his house and produced shirt. Accused no. 3 guided police to his house and produced shirt. According to witness, accused no. 2 again guided the police to the land of PW-2 and produced a club. [Paras 23, 24] [1040-E-H; 1041-A-D]

3. According to PW.1 when he was grazing his cattle a little away from his brother, he noticed that accused persons approaching his brother and attacking him with choppers. When he attempted to reach the place of occurrence, the accused chased him till the garden of PW-2. He narrated the incident not only to PW.2 but also to PW.6 and his wife. Though PW.1 specifically stated that all the three accused assaulted his brother with chopper. PW.2 did not speak any specific act or presence of accused no.3. According to Ex.P.1, PW.1 stated in his complaint that Accused Nos. 1 and 2 chased him and he entered the garden of PW.2. Further, he stated that they pelted stones towards him. PW.3 also did not mention the presence of accused no.3 near the garden of PW.2. Therefore, the evidence of PW.6 also raised certain doubt

A regarding the presence of accused no. 3, therefore, some reasonable doubt arises as to the presence and participation of accused no.3 in the commission of the offence. The prosecution has failed to prove the presence and participation of accused no.3 in the commission of the offence and, therefore, accused no.3 was rightly acquitted by the High Court of the offence under Section 302 IPC. The evidence of PW.1 regarding participation of accused no. 1 and accused no. 2 and their presence nearby the place of incident and immediately after the incident found corroboration from the evidence of PW.2, an independent witness. No enmity was attributed to him and nothing was brought out in the cross-examination as to why PW.2 should falsely implicate accused no. 1 and 2 in the commission of the offence. There was no evidence on record to suggest that some other persons involved in the commission of the offence. Therefore, in so far as accused no. 2 was concerned, there was ample evidence to prove his presence and participation in the commission of offence so accused no. 2 was rightly convicted by the trial court for the offence under Section 302 IPC. The High Court though agreed that the prosecution proved the presence of accused no.2 in the commission of the offence, wrongly held that the charge under Section 302 IPC was not proved. The High Court wrongly formed an opinion that the offence under Section 326 IPC has been established against the accused no. 2. The impugned judgment in so far as accused no. 2 was concerned is set aside. The part of the said judgment acquitting accused no.3 is upheld. [Paras 25 to 30] [1041-E-H; 1042-A-G]

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 165 of 2004.

H From the Judgment and Order dated 09.12.2002 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 326 of 199.

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WITH

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CrI. A. Nos. 166-167 of 2004.

G.V. Chandrashekhar, N.K. Verma, Anjana Chandrashekar, Sanjay R. Hegde, V.N. Raghupathy, Ranjan Mukherjee (A.C.), S. Bhowmick, for the appearing parties.

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The Judgment of the Court was Delivered by

SUDHANSHU JYOTI MUKHOPADHAYA, J. : 1. These appeals are directed against the judgment dated 9th December, 2002 passed by the High Court of Karnataka at Bangalore in Criminal Appeal No.326/99 c/w Criminal Appeal No. 310/99. By the impugned judgment High Court reversed the judgment of Addl. District and Sessions Judge, Bangalore Rural District, Bangalore in S.C. No. 42/88 by acquitting accused no.3 who stood charged under Section 302/34 IPC and partly allowed the appeal filed by accused no. 2 by modifying the conviction from offence punishable under Section 302 IPC to the offence under Section 326 IPC.

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2. Criminal Appeal No. 165 of 2004 has been filed by the appellant-Seena @ Srinivasa (accused no.2) against the order of conviction and sentence under Section 326 IPC. Criminal Appeal Nos. 166-167 of 2004 have been preferred by the State of Karnataka; (i) against the acquittal of accused no. 3-Ramanna @ Rama and (ii) against modifying the conviction of accused no. 2 Seena @ Srinivasa from the offence punishable under Section 302 IPC to offence punishable under Section 326 IPC.

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3. Original accused no. 1 Chaluvaiah @ Chaluva and accused no. 3-Ramanna @ Rama are brothers while accused no. 2-Seena @ Srinivasa is the sister's son of accused no. 1 and 3. While the accused no. 2 is the resident of Yeshwanthapura, Bangalore, accused no. 1 and 3 are the

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A residents of Chinigappanapalya, Solur Hobli Magadi Taluk, Bangalore District.

4. Accused no. 1 died during the trial and, therefore, only the accused nos. 2 and 3 were tried for the offence under Sections 302 and 307 read with 34 IPC.

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5. The case of the prosecution is that on 22nd January, 1988 PW.1-Channarayappa decided to inform police about the threats caused to them by accused nos. 1,2 and 3. Therefore, he sent his brother Channegowda (deceased) along with Venkateshaiah CW 14 to Kudur Police Station to lodge report. Channegowda along with Venkateshaiah reached police station and after giving report, returned to the village near Hudukunte at around 12 noon. At 1.00 p.m. Channegowda, the deceased accompanied CW1 Channarayappa to graze cattle and donkeys to a place called Mandekal Bayalu. They left cattle for grazing and Channegowda sat on a rock. At 1.00p.m., the accused nos. 1, 2 and 3 were seen going to the spot where Channegowda was sitting, armed with choppers. According to the prosecution accused nos. 1, 2 and 3 proceeded to that spot in Mandekal where Channegowda was sitting, accused no.3 lifted the chopper and hit on the left leg of Channegowda causing injury above the knee and below the knee. Similarly, accused no. 1 raised chopper to hit the deceased-Channegowda on his head. The deceased raised his hand towards the blow, but the blow fell on the left hand. At the same time, accused no. 3 hit on the right leg of the deceased-Channegowda with chopper. Screaming of the deceased-Channegowda attracted the attention of CW1-Channarayappa.

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6. Further case of prosecution is that CW1-Channarayappa rushed towards his brother deceased-Channegowda but he was chased by accused nos. 1 and 2. They chased him upto the land of Gangadharappa. Gangadharappa -CW.3 saw the accused nos. 1 and 2 chasing Channarayappa and asked him the reason. Channarayappa rushed towards the land of

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Ganagadharappa CW.3. Accused no. 1 started pelting stones on Channarayappa causing injuries. Ganagadharappa advised accused nos. 1 and 2 to go away. He saw both the accused going with choppers. After accused nos. 1 and 2 left the spot, Channarayappa rushed to his house to bring water to be given to his brother deceased-Channegowda, when he returned to the spot, Channegowda had already succumbed to the injuries. He returned to the village and informed the residents of the village whose name is also described as Channegowda - CW.12 and Chandrapa -CW.13. He requested them to go and lodge report at the Nelamangala Police Station and they alongwith another person informed about the incident to police. At about 10.00 or 10.30p.m. police officials came to the spot Chanarayappa and others submitted the report to the Sub-Inspector of Police Sidegowda who visited at the place of occurrence. He received the report and sent it to Kudur Police Station to P.C. 1138 Nagaraj Gowda for being registered it as an FIR. At 11.30p.m. the Sub-Inspector of Nelamangala Police was informed and both of them searched for accused named in the report.

7. On 22nd January, 1988 the P.S.I. D.S. Siddegwoda-CW.17 continued investigation and prepared spot mahazar on next day between 6.45a.m. to 7.30 a.m. in the presence of panch witnesses by name Krishnappa, Kempahonnegwda, Muddeveeraiah and Shivanna. He also conducted inquest on the dead body in the presence of witnesses. He noticed injuries on the legs, left-hand and other parts of the body. He seized blood-stained mud and sample mud from the spot. He also saw a sickle lying on the spot and seized the same. Chanarayappa was also sent for medical examination with a memo. After autopsy, clothes were seized.

8. On 22nd January, 1988, Circle Inspector visited Hudkunte village and examined Channarayappa, Govindaiah and Gangadharappa and others. He recorded statement. He deputed the staff to search and after a long search on 9th

A March, 1988, the CI received information that the accused were hiding at a particular place. He visited R.M.C. Yard, Yeshwanthpura. On 10th March, 1988, at 3.30 a.m. he arrested the accused no. 1 Chaluvaiah from the house of his aunt. He interrogated him. Accused no.1 revealed the whereabouts of
 B accused nos. 2 and 3. Thus, he rushed to K.G. Circle in Bangalore and noticed that on the pedestrian cross bridge on the Kempegowda road near the circle, accused no.2 Seena and accused no.3 Ramanna were sleeping. They were apprehended. They were brought to Solur outpost and kept
 C them in safe custody. They were interrogated and they gave voluntary statement disclosing place where they have hidden the weapons used in the assault and their clothes. Accused no. 1 gave voluntary statements as per Ex.P.1 and Ex.P.2 respectively. Accused no.3 gave voluntary statement as per
 D Ex.P-3. They were taken to village Hudukunte. In the presence of witnesses by name Shivashakaraiah, Muddaveeraiah, Marirangaiah and Puttamallaiah, he guided police to a particular place and from behind bushes, he took out a chopper and produced the same which is marked MO.8. Mahazar was prepared vide Ex.P.11. Accused no.2 gave similar statement
 E and guided the police to another spot from where one more chopper was recovered which is marked at MO.6 and the same were seized under Ex.P-12. Seena also gave a voluntary statement which also lead to recovery of another chopper.

F 9. On the basis of eye witness account given by CW1 Channarayapa, CW.3-Gangadharappa, Shivanna, Rangaswamaiah, Govindaiah, Channegowda and also on the basis of recovery of blood stained weapons at the instance of
 G the accused, the investigating officer concluded that the accused Nos. 1 and 2 shared a common intention to murder Channegowda at around 4.30p.m. in Mandekal Bayalu on 22nd January, 1988. Thus, he arraigned them for offence punishable u/s 302 read with section 34 IPC and filed charge-sheet.

H 10. Since the accused had pleaded not guilty of the

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charges leveled against them, trial was fixed. Some witnesses were examined by the then I additional District and Sessions Judge but on his transfer, the trial was abandoned. Later trial was re-fixed and concluded after recording evidence of prosecution.

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11. The prosecution opened its case and examined 19 witnesses and produced in evidence Ex.P.1 to P.32. Prosecution also produced material objects M.Os.1 to M.Os.23 on behalf of the accused. Reliance was also placed as Ex.D.1 to D.10 on behalf of the accused.

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12. Accused no. 1-Cheluvaiiah @ Cheluva died during the trial. The defence counsel reported this fact to the Court on 20th December, 1996 and filed its report. Consequently, the charge against accused no. 1 abated.

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13. In the circumstances, the incriminating evidence led by the prosecution was brought to the notice of surviving accused viz., accused no.2 -Seena and accused no.3 -Ramanna. As required, both were examined under Section 313 Cr.P.C. and their explanation was sought. Both the accused denied all incriminating circumstances and put upon a defence of denial simplicitor. Even though called upon to lead evidence in defence, if any, the accused declined.

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14. Learned counsel for the appellant-State of Karnataka submitted that in view of statement of eye-witness PW.1-Channarayappa and PW.2 Gangadharappa, post-mortem report, as corroborated by PW-8 Dr.K.N. Rajanna, PW.9-Panch witness and PW.19 -Investigating Officer, the Trial Court was right in coming to a definite finding that the accused nos.2 and 3 were guilty for the offence punishable under Section 302/34 IPC.

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15. Learned counsel for the accused no.2-appellant (herein) in the connected appeal contended that both the PWs.1 and 2 are related to the deceased, there are material

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A contradictions in their statements and on the basis of such statements the appellant-Seena-accused no. 2 cannot be held guilty for the offence under Section 302 or even under Section 326 IPC.

B 16. We have heard the learned counsel for the parties and perused the evidence on record.

17. P.W.1 Channarayappa has deposed that on the date of incident he sent Chennagowda-deceased to Kudur police station to complain to the SHO about the threats caused by the accused. He sent C.W.14 -Venkateshaiah (PW.7) alongwith Chennagowda to lodge report. Both returned to the village at 12.00 noon. At 1.00 p.m. PW.1 Channarayappa accompanied Channagowda to Mandekal Bayalu. They allowed the cattle and donkeys to graze and spend time in that area itself. At 4.00P.M. accused nos. 1, 2 and 3 reached that spot from Holesidda near Mandekal Bayalu. They were armed with chopper. According to PW.1, Channagowda was sitting on a rock near Mandekal. Accused Nos. 1, 2 and 3 rushed towards him, Channagowda got up on the rock. Accused no.3-Ramanna hit on the left leg of Channagowda causing injury above the ankle and below the knee with chopper. At the same time, accused no. 1-Seena lifted chopper and hit Channagowda on the head. Channagowda tried to prevent the blow by raising his hand. The blow tendered by accused no. 1 on head fell on the left hand injuring his fingers. Simultaneously, accused no.2 assaulted the deceased with a chopper on the right leg. The deceased fell down. P.W.1 deposed that he saw all that happened and raised an alarm seeking help. The accused turned towards him causing threats. PW.1 started running away from the place and he was chased by accused 1 and 3.

According to PW.1 he was very much frightened and ran towards his village to get help. On the way the accused 1 and 2 continued to chase PW.1 upto the land of Gangadharappa who was examined as PW.2. PW.1 ran and sought shelter.

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Accused 1 and 2 stood outside the land and continued to pelt stones at PW.1. The stone caused injury to his right thigh. The accused asked him to come out. At that time PW.2-Gangadharappa intervened and asked them to go away. PW.1 returned to village and after collecting water went back to the place of occurrence. When he came to the spot he saw Channegowda dead. Again he returned to his village and informed the villagers.

18. PW.2-Gangadharappa deposed that 7 to 8 years ago he was working on his land around 4.30 P.M. when PW.1-Channarayappa came running from Bandekagalu shouting "Gangadharappa Gangadharappa". When he asked PW.1, he informed PW.2-Gangadharappa that accused nos.1 and 2 were chasing him. According to PW.2 both the accused reached there holding chopper in their hands. They stood outside and pelted stones at PW.1 which caused injury to his right thigh. PW.2 advised them to go away. The statement of PW.2 fully corroborates the statement of PW.1 that he was chased by accused nos. 1 and 2.

19. Learned counsel for the appellant (accused no.2) has seriously disputed the version given by PW.1 and PW.2 with regard to their being together during the incident. At this juncture, it would suffice to say that PWs.1 and 2 have given similar statements regarding accused no. 1 and 2 were chasing PW.1 up to the land of PW.2. PW.2 Gangadharappa had further deposed that the next day police arrived and checked his garden land which was pointed out by PW.1 - Channarayappa. PW.1 acted as witness to the seizure of stones used by the accused to assault him. The stones are marked as M.Os. 13(a) (b) (c) and (d). PW.2 has stated that the stone marked as M.O. 13(a) was thrown by accused no.2 to hit PW.1 and the same was seized under the mahazar Ex.P.2.

20. PW.7-Venkataiah is a witness to seizure of material

A objects. i.e. stones from the land of Gangadhara PW.2. The witness has spoken clearly that he was summoned by the police to the land of Gangadharappa which was pointed out by PW.1 -Channarayapa and around 2.00p.m. mahazar was prepared seizing stones totally four in number marked as M.Os.15 to 18
 B under Ex.P.2.

21. PW.8-Dr.K.N.Rajanna was working as Medical Officer in Primary Health Centre, Guddemaranahalli during 1987-88. His statement reveals that on 23.1.1988 he received requisition from the Investigating Officer to conduct autopsy on the dead
 C body. He proceeded to conduct the post-mortem on the body of the deceased -Channegowda. Post mortem conducted between 1.00p.m. to 3.00p.m.. According to the autopsy report the age of the deceased was around 45 years. External
 D examination revealed that Clotted blood was seen on four places. Right hand was fully flexed at elbow and left hand flexed at right angle over the elbow. Rigor mortis present. Blood stains were present over the right and left leg.

There were injuries described as follows:

- E i) Incised injury palmer aspect of proximal pharynx or left index finger situated horizontally measuring 1" x ½"x 1¼".
- ii) Incised wound palmer aspect of proximal pharynx of left middle finger ½"x ½"x ½" situated horizontally.
- F iii) Incised wound palmer aspect of proximal pharynx of left right finger 1"x½"x½" situate obliquely.
- iv) Incised wound inner aspect of left knee 1½"x½"x½".
- G v) Incised wound outer aspect of left ankle about 2" above lateral malleolus situate horizontally measuring 2½"x1½"x1" a lower end of left fibula bone cut along with the wound.

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vi) Incised wound over left calf area at the junction of lower 1/3rd and upper 2/3rd horizontally. 5"x2"x1" left Fibular bone cut along with the wound.

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Vii) Incised wound over left tender-achilles 1½"x½"x ¼".

Viii) Incised wound situated horizontally over inner aspect of right leg about 3% above medical malleolus measuring 1"x1¼"x1"and 1¼".

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ix) Incised wound outer lower part of right leg 3"x2"x2" cutting lower end of fibula bone on the right side.

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x) Incised wound over the right shin bone at the junction of lower 1/3rd and upper 2/3rd obliquely situated 1¼"x 1¼"x 1¼".

The injuries nos. 1 to 10 noticed above described as ante mortem in the nature by the doctor. After dissecting the body he examined the valves, ribs, cartridges, Piraeus, larynx and trachea and found those parts healthy. Right lung, left lung pericardium healthy but pale. Heart empty, Abdomen showed valve, petitionlum, mouth, pharynx, esophagus were also found healthy. Stomach contained undigested food particles. Genitals were found intact.

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During dis-section doctor noticed that the muscles and bones and blood vessels were good at the site of injury nos. 1 to 3, 5,6,8 and 9. There was fracture of left fibular bone cut along with injury nos. 5 and 6. Right fibular petitionlum bone cut with the wound injury no. 9. According to PW.8 -doctor, death was due to shock and haemorrhage as the result of injury nos.1 to 10. These injuries were caused by external violence. He issued post mortem report marked at Ex.P.3.

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While describing the injuries, PW.8 deposed that injury nos. 1 to 8 were incised wound and could be caused by object like chopper marked in this case as MO.6. According to him injury nos. 1,2 and 3 could also be caused by similar object like MO.6(a).

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A 22. PW.9 -Kempahonnegowda is a witness to inquest. He
 B deposed that police summoned him to the spot where dead
 C body was lying. He accompanied Krishnappa. Body was near
 D Hutta (anthill) and a sickle was also lying nearby. It was blood
 stained. There was also a kukke (basket). Police prepared
 mahazar seizing both items under Ex.P.7. The sickle was
 marked as MO.5. The witness also authenticated the inquest
 report marked as Ex.P.8. Witness submitted that the police
 searched clothes of the dead body and found 10 muchagada
 leaves, a thread and a red coloured cloth piece. All were blood
 stained and recorded in mahazar. Like other witnesses even
 this witness maintained consistency in statement with regard
 to aspects spoken to by him in examination-in-chief even
 though when cross-examined in detail. During cross-
 examination, the witness stated about the blood stains at the
 spot. Four to five spots were blood stained which were
 measured by police officials. It was also elicited that during first
 mahazar body was not shifted.

E 23. PW.11-Marirangaiah is another important witness of
 F the prosecution as he told about recovery of material object at
 G the instance of the accused. According to him, Kudur police
 officials summoned him around 10.a.m. 8 years prior to
 evidence before the court. The police officials were
 accompanied by the officials of Nelamangala police. They
 brought Chaluvaiah A.1 along with other accused. In the
 presence of PW.2, CW.25 Shivashankar and CW.27
 Puttamallaiah, A.1 Chaluvaiah guided the police to Kharab land
 from under banyan tree and karegidda (head of dry leaves) he
 took out chopper and produced before the police which is
 MO.8. It was seized under Mahazar Ex.P.11. The said chopper
 was blood stained and marked as MO.6(a). He further stated
 that accused no. 2 who was also in the jeep guided the police
 to this land and from under dry leaves took out chopper marked
 as MO.6 and produced the same which was seized under

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mahazar Ex.P.12. He told about accused no.3 guiding police to another spot and from under the banyan tree chopper MO.7 which was seized under Ex.P.13, was recovered.

24. PW.11-Marirangaiah further stated that accused no.1-Chaluvaiah of his own stated that he would give his clothes. He guided police to his house. From a drum he took out the panche and other clothes which were stained with blood. They were seized under mahazar Ex.P.14. The shirt was marked as MO.19 and the panche marked as MO.20. Accused No. 2-Seena guided police to his house and produced shirt which is MO-21. The same was seized under Ex.P.15. Accused no. 3-Ramanna guided police to his house and produced shirt MO.22 which was seized under Ex.P.16. According to witness, accused no. 2-Seena again guided the police to the land of Gangadharappa and produced a club which was seized under Ex.P.17 and marked as MO.23.

25. According to PW.1 when he was grazing his cattle a little away from his brother, he noticed that accused persons approaching his brother and attacking him with choppers. When he attempted to reach the place of occurrence, the accused chased him till the garden of PW-2 -Gangadharappa. He narrated the incident not only to PW.2 but also to PW.6 - Channegowda and his wife. Though PW.1 specifically stated that all the three accused assaulted his brother with chopper. PW.2 does not speak any specific act or presence of accused no.3. According to Ex.P.1; PW.1 stated in his complaint that Accused Nos. 1 and 2 chased him and he entered the garden of PW.2 Gangadharappa. Further, he stated that they pelted stones towards him. PW.3 also did not mention the presence of accused no.3 near the garden of PW.2. Therefore, the evidence of PW.6 also raises certain doubt regarding the presence of accused no. 3., therefore, we find that some reasonable doubt arises as to the presence and participation of accused no.3 in the commission of the offence.

26. On review of the entire evidence on record, we find that

A the prosecution has failed to prove the presence and participation of accused no.3 in the commission of the offence and, therefore, accused no.3 was rightly acquitted by the High Court of the offence under Section 302 IPC.

B 27. The evidence of PW.1 regarding participation of accused no. 1 and accused no. 2 and their presence nearby the place of incident and immediately after the incident finds corroboration from the evidence of PW.2-Gangadharappa, an independent witness. No enmity is attributed to him and nothing is brought out in the cross-examination as to why PW.2 should
C falsely implicate accused no. 1 and 2 in the commission of the offence. There is no evidence on record to suggest that some other persons involved in the commission of the offence.

D 28. Therefore, in so far as accused no. 2 is concerned, we find ample evidence to prove his presence and participation in the commission of offence so we hold that the accused no. 2 was rightly convicted by the Trial Court for the offence under Section 302 IPC.

E 29. The High Court though agreed that the prosecution proved the presence of accused no.2 in the commission of the offence, wrongly held that the charge under Section 302 IPC was not proved. The High Court wrongly formed an opinion that the offence under Section 326 IPC has been established
F against the accused no. 2.

G 30. In view of the findings recorded above, we have no other option but to set aside the impugned judgment dated 9th December, 2002 passed by the High Court of Karnataka at Bangalore in so far as accused no. 2 Seena @ Srinivasa is concerned. The part of the said judgment acquitting accused no.3-Ramanna @ Rama is upheld. The Trial Court judgment dated 13th January, 1999 passed by the I Additional District and Sessions Judge in respect of accused no. 2 stands restored.

H

SEENA @ SRINIVASA v. STATE OF KARNATAKA 1043
[SUDHANSU JYOTI MUKHOPADHAYA, J.]

Criminal Appeal No. 165 of 2004 filed by the accused no. 2 is dismissed. A

The Criminal Appeal Nos. 166-167 of 2004 filed by the State of Karnataka is allowed in part, in so far as it relates to accused no.2 -Seena @ Srinivasa. He is directed to be taken into custody if he is on bail, for undergoing the remainder period of sentence. B

Devika Gujral

Appeals disposed of.