R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF FEBRUARY, 2023

PRESENT

THE HON'BLE MR. JUSTICE B.VEERAPPA

AND

THE HON'BLE MR. JUSTICE RAJESH RAI K

CRIMINAL APPEAL No.441 OF 2015

C/W

CRIMINAL APPEAL No.1055 OF 2015

IN CRL.A No.441/2015

BETWEEN:

1. KATTEMANE GANESHA,

...APPELLANT

(BY SRI S.G. RAJENDRA REDDY, ADVOCATE)

AND:

1. STATE OF KARNATAKA,
   BY MADIKERI RURAL P. S.,
   REP. BY PUBLIC PROSECUTOR,
   HIGH COURT BUILDING,
   BANGALORE 560 001.

...RESPONDENT

(BY SRI VIJAYAKUMAR MAJAGE, ADDITIONAL STATE PUBLIC PROSECUTOR)

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Location: High Court of Karnataka

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2) OF CR.P.C BY THE APPELLANT PRAYING TO SET ASIDE THE JUDGMENT OF CONVICTION DATED:24.03.2015 AND ORDER OF SENTENCE DATED 25.03.2015, PASSED BY THE PRINCIPAL DISTRICT & SESSIONS JDUGE, KODAGU, MADIKERI., IN SESSIONS CASE No.94/2002 -CONVICTING THE APPELLANT/ACCUSED No.1 FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 235(2), 302, 506 AND 341 R/W 34 OF IPC AND U/S 3 & 27 OF ARMS ACT.

IN CRL.A No.1055/2015

BETWEEN:

1. SMT. K.G. PREMA,
   AGED ABOUT 58 YEARS,
   W/O GANESH,
   RESIDENT OF MARAGODU VILLAGE,
   MADIKERI TALUK,
   KODAGU DISTRICT-571 252.

...APPELLANT

(BY SRI S.G. RAJENDRA REDDY, ADVOCATE)

AND:

1. STATE OF KARNATAKA,
   BY MADIKERI RURAL POLICE,
   BY STATE PUBLIC PROSECUTOR,
   HIGH COURT BUILDING,
   BANGALORE-560 001.

2. ITTANIKE JANARDHANA,
   AGED ABOUT 55 YEARS
   S/O. SOMAIAH,
   AGRICULTURIST,

3. MUNDODI NANAIAH,
   AGED ABOUT 50 YEARS,
   S/O. MUTHANNA,
   AGRICULTURIST,

4. *ITTANIKE MANOJ KUMAR,*
AGED ABOUT 51 YEARS,
S/O. CHITTIAPPA,
AGRICULTURIST,

ABATED V/O DATED 14.11.2019

5. HARIJANARA VENKATESH,
AGED ABOUT 57 YEARS,
S/O. MOTAIAH,
COOLIE,

6. MUKKATIRA DAYANANDA,
AGED ABOUT 49 YEARS,
S/O. NANAIAH,
AGRICULTURIST,

7. MUNDODI THIMMAIAH,
AGED ABOUT 49 YEARS,
S/O. MUTHAPPA,
AGRICULTURIST,

8. B.D. PRADEEP,
AGED ABOUT 43 YEARS,
S/O. DEVAIAH,

9. *P.K. BHEEMAIAH,*
AGED ABOUT 73 YEARS,
S/O. LATE KARIAPPA,
COFFEE PLANTER,

APPEAL AS AGAINST RESPONDENT NO 9
STANDS DISMISSED.

10. P.B. BEENU,
AGED ABOUT 42 YEARS,
S/O. BHEEMAIAH,

11. P.B. MADAN,
AGED ABOUT 43 YEARS,
S/O. BHEEMAIAH,

12. P.M. SHARATH,
AGED ABOUT 46 YEARS
S/O. MUTHAPPA,

13. BILLAVARA MOHANA,
AGED ABOUT 54 YEARS,
S/O. MUTHAPPA,
COOLIE,

14. M.T. SHIVANANDA,
AGED ABOUT 49 YEARS,
S/O. THIMMAIAH,

15. H.R. NAVEENA,
AGED ABOUT 49 YEARS,
S/O. RAMA,

16. M.R. SHASHI,
AGED ABOUT 39 YEARS
S/O. RAMU,

ALL ARE RESIDENTS OF
MARAGODU VILLAGE,
MADIKERI TALUK,
KODAGU DISTRICT-571 252.

…RESPONDENTS

(BY SRI VIJAYAKUMAR MAJAGE, ADDITIONAL STATE PUBLIC PROSECUTOR FOR R1;
SRI N.V. VASANTH, ADVOCATE FOR R2, R3, R5 TO R8 & R10 TO R16; R4 ABATED VIDE ORDER DATED 14.11.2019;
VIDE ORDER DATED 22.12.2021 APPEAL AGAINST R9 STANDS DISMISSED)

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THIS CRIMINAL APPEAL IS FILED UNDER SECTION 372 OF CR.P.C BY THE APPELLANT PRAYING TO SET ASIDE THE JUDGMENT OF ACQUITTAL PASSED AGAINST THE RESPONDENT Nos.2 TO 16 HEREIN IN S.C.No.81/2003 DATED 24.03.2015 AND TO CONVICT THEM FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 341,324,427,506(ii) R/W 149 OF IPC AND SEC. 3 R/W SEC. 25(1B)(a) OF ARMS ACT.

THESE CRIMINAL APPEALS COMING ON FOR FINAL DISPOSAL THIS DAY, ***B.VEERAPPA J.,*** DELIVERED THE FOLLOWING:

J U D G M E N T

Criminal Appeal No.441/2015 is filed by the accused No.1 against the judgment of conviction and order of sentence dated 24.03.2015 passed in Sessions Case No.94/2002 on the file of the Principal District and Sessions Judge, Kodagu, Madikeri, convicting the him for the offences punishable under Sections 302, 506(ii), 341 r/w Section 34 of the Indian Penal Code and Section 27 of the Arms Act, 1959. Criminal Appeal No.1055/2015 is filed by the injured victim-K.G.Prema/P.W.3 against the order of acquittal dated 24.03.2015 passed in Sessions Case No.81/2003 on the file of the very same Court i.e., Principal District and Sessions Judge, Kodagu, Madikeri, acquitting accused Nos.1 to 15 for the offences punishable under Sections 341, 324, 427, 506 (ii) of the Indian Penal Code and Section 3 r/w Section 25(1B)(a) of the Indian Arms Act r/w Section 149 of the Indian Penal Code.

2. Sri S.G.Rajendra Reddy, learned counsel for the appellant/ accused No.1 in Criminal Appeal No.441/2015 and for the appellant/ victim in Criminal Appeal No.1055/2015 contended that, evidence of prosecution witnesses includes

examination-in-chief, cross-examination and re-examination. However, the learned Sessions Judge has not considered and discussed the cross-examination portion of prosecution witnesses and thereby, the entire judgment passed in S.C.No.94/2002 is vitiated. He further contended that S.C.Nos.94/2002 and 81/2003 are case and counter cases. If judgment in one case is set-aside on the ground of non consideration of cross-examination of prosecution witnesses and the matter is remanded, the judgment in the other case also has to be set-aside and matter has to be remanded, since it is a case and counter case. In support of his contention, learned counsel relied upon the Full Bench decision of this Court in the case of ***State of Karnataka, by Circle Inspector of Police vs.Hosakeri Ningappa and another*** reported in ***ILR 2012 KAR 509***.

3. Sri Vijayakumar Majage, learned Additional State Public Prosecutor contended that both the Sessions Cases were conducted by the same Sessions Judge, one after the other, as held by the Full Bench of this Court in *Hosakeri Ningappa's* case, supra. However, while passing the judgment in S.C.No.94/2002, the learned Sessions Judge has not taken into

consideration the cross-examination of any of the prosecution witnesses. He further submitted that, if judgment in S.C.No.94/2002 is set-aside and remanded on the ground that the cross-examination of prosecution witnesses has not been considered, then, the judgment in S.C.No.81/2003 also has to be set-aside and the said matter also has to be remanded, since, they are case and counter cases.

4. Sri Vasanth, learned counsel for respondent Nos.2, 3, 5 to 8 and 10 to 16 in Criminal Appeal No.1055/2015 has not disputed the fact that the learned Sessions Judge has not at all considered the cross-examination portion of all the prosecution witnesses in Sessions Case No.94/2002. He fairly submits that, if this Court is not convinced, the matter has to go back for reconsideration by the learned Sessions Judge and consequently, Sessions Case No.81/2003 also has to be remanded, since they arise out of common incident.

5. In view of the aforesaid contentions of the learned counsel for the parties, the only point that arises for our consideration is:

> "Whether the learned Sessions Judge is justified in ignoring the cross-examination portion of prosecution witnesses while passing the judgment in S.C.No.94/2002, when both S.C.Nos.94/2002 and 81/2003 arise out of common incident, as case and counter case, in the facts and circumstances of the present case?

6. We have given our anxious consideration to the arguments advanced by the learned counsel for the parties, only with regard to non-consideration of cross-examination portion of prosecution witnesses, in S.C.No.94/2002.

7. A careful perusal of the judgment in S.C.No.94/2002 depicts that, the learned Sessions Judge while considering the cross-examination of P.W.1, has observed as under:

> "In the cross-examination of P.W.1 made by learned defence counsels, I find no worth mentioning points elicited to discredit the evidence this witness, i.e., P.W.1".

In respect of remaining witnesses i.e., P.Ws.2 to 24 also, the same verbatim is used by the learned Sessions Judge.

8. At this juncture, it is relevant to consider the provisions of Section 137 of the Indian Evidence Act, which reads as under:

> ***"137. Examination - in - chief:-***
>
> *The examination of a witness by the party who calls him shall be called his examination-in-chief.*
>
> *Cross-examination.—The examination of a witness by the adverse party shall be called his cross-examination.*
>
> *Re-examination.—The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.*

9. Though the provisions of Section 137 of the Indian Evidence Act does not define "examine" to mean and include the three kinds of examination of a witness; it simply defines "examination-in-chief, "cross-examination" and "re-examination." Appreciation of evidence includes consideration of examination-in-chief as well as cross-examination.

10. The main object of cross-examination is to find out the truth and detection of falsehood in human testimony. It is designed either to destroy or weaken the force of the evidence of a witness who has already given evidence in person or to

elicit something in favour of the party which he has not stated or to discredit him by showing from his past history and present demeanour that he is unworthy of credit. It is the most efficacious test to discover the truth. It exposes bias, detects falsehood and shows mental and moral condition of the witnesses. It also exposes whether a witness is actuated by proper motive or by enmity towards his adversaries. Sometimes cross-examination assumes unnecessary length, then the Court has power to control it. The Court must also ensure that the cross-examination is not made a means of harassment or causing humiliation to the victim of crime.

11. The object of cross-examination is to elicit the truth and credit the witness produced. The Hon'ble Supreme Court, in the case of ***Sat Pal vs. Delhi*** reported in ***(1976)1 SCC 727,*** at paragraph 41, held as under:

> ***"41.*** *Unmindful of this substantial difference between the English law and the Indian law, on the subject, the Calcutta High Court in some of its earlier decisions, interpreted and applied Section 154 with reference to the meaning of the term "adverse" in the English statute as construed in some English decisions, and enunciated the*

proposition that where a party calling a witness requests the court to declare him "hostile", and with the leave of the court, cross-examines the witness, the latter's evidence should be excluded altogether in criminal cases. This view proceeds on the doctrine enunciated by Campbell, C.J. in the English case, Faulkner v. Brine [(1858) 1 F&F 254] that the object of cross-examination of his own witness by a party is to discredit the witness in toto and to get rid of his testimony altogether. Some of these decisions in which this view was taken are : Luchiram Motilal v. Radho Charan [AIR 1922 Cal 267 : (1921) 34 CLJ 107] ; E. v. Satyendra Kumar Dutt [AIR 1923 Cal 463 : 36 CLJ 173 : 24 Cri LJ 193] ; Surendra v. Ranee Dassi [AIR 1923 Cal 221 : ILR 47 Cal 1043 : 70 IC 687] , Khijiruddin v. E. [AIR 1926 Cal 139 : 42 CLJ 506 : 27 Cri LJ 266] and Punchanan v. R. [AIR 1930 Cal 276 : ILR 57 Cal 1266 : 31 Cri LJ 1207 (DB)]

12. The Hon'ble Supreme Court, in the case of ***Sunil Mehta vs. State of Gujarat*** reported in ***(2013)9 SCC 209*** held that setting aside the cross-examination or denying cross-examination would violate a person's life and liberty which are not only fundamental rights but also basic human rights. At paragraph 18, it is held as under:

"18. *Secondly, because evidence under Chapter XIX(B) has to be recorded in the presence of the accused and if a right of cross-examination was not available to him, he would be no more than an idle spectator in the entire process. The whole object underlying recording of evidence under Section 244 after the accused has appeared is to ensure that not only does the accused have the opportunity to hear the evidence adduced against him, but also to defend himself by cross-examining the witnesses with a view to showing that the witness is either unreliable or that a statement made by him does not have any evidentiary value or that it does not incriminate him. Section 245 of the Code, as noticed earlier, empowers the Magistrate to discharge the accused if, upon taking of all the evidence referred to in Section 244, he considers that no case against the accused has been made out which may warrant his conviction. Whether or not a case is made out against him, can be decided only when the accused is allowed to cross-examine the witnesses for otherwise he may not be in a position to demonstrate that no case is made out against him and thereby claim a discharge under Section 245 of the Code. It is elementary that the ultimate quest in any judicial determination is to arrive at the truth, which is not possible unless the*

> *deposition of witnesses goes through the fire of cross-examination. In a criminal case, using a statement of a witness at the trial, without affording to the accused an opportunity to cross-examine, is tantamount to condemning him unheard. Life and liberty of an individual recognised as the most valuable rights cannot be jeopardised leave alone taken away without conceding to the accused the right to question those deposing against him from the witness box."*

13. The right to cross-examination is a natural right and a part of natural justice, as held by the Hon'ble Supreme Court in the case of ***A.K.Roy vs. Union of India*** reported in ***(1982)1 SCC 271.***

14. The Hon'ble Supreme Court, in the case of ***Ameer Trading Corporation Limited vs. Shapoorji Data Processing Limited*** reported in ***(2004)1 SCC 702***, at paragraphs 15 and 16, held as under:

> *"15. The examination of a witness would include evidence-in-chief, cross-examination or re-examination. Rule 4 of Order 18 speaks of examination-in-chief. The unamended rule provided for the manner in which "evidence" is to*

be taken. Such examination-in-chief of a witness in every case shall be on affidavit.

16. The aforementioned provision has been made to curtail the time taken by the Court in examining a witness-in-chief. Sub-rule (2) of Rule 4 of Order 18 of the Code of Civil Procedure provides for cross-examination and re-examination of a witness which shall be taken by the Court or the Commissioner appointed by it."

15. *Phipson on Evidence (15th Edition, 2000, para 11-17, p 249)* states: "The object of cross-examination is of two fold-to weaken, qualify, or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witnesses." The right of cross-examination not only is referable to Section 138 but is one of the principles of natural justice that evidence may not be read against a party until the same has not been subjected to cross-examination, or at least an opportunity has not been given for cross-examination. Section 138 impliedly lays down that the statement of a witness would be read as evidence against a party only if it had been tested on the anvil of cross-examination or opportunity was afforded for the purpose.

16. The Privy Council, in the case of ***Vassiliades vs. Vassiliades*** reported in ***AIR 1945 PC 38***, has observed that, "Cross-examination is one of the most important processes for the elucidation of the facts of a case".

17. The provision of cross-examination is not merely a technical rule of evidence; it is a rule of essential justice. It serves to prevent surprise at the trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party, on whose behalf the cross-examination is being made, comes to give and lead evidence by producing witnesses. The party must be given a fair chance to cross-examine the witness. Our view is fortified by the dictum in the case of ***AEG Carapiet vs. Derderian*** reported in ***AIR 1961 Cal 359***. Thereby, natural justice which is required, is denied.

18. It is well settled that, One is required to consider the entire evidence as a whole with the other evidence on record. Mere considering the examination-in-chief and not considering the cross-examination, cannot be considered as consideration of the evidence in its entirety.

19. In view of the above, the point raised for consideration in the present Criminal Appeals is answered in the negative holding that the learned Sessions Judge is not justified in ignoring the cross-examination portion of prosecution witnesses while passing the judgment in S.C.No.94/2002, and the same has resulted in miscarriage of justice.

20. Since these two cases arise of out the same incident and are case and counter case, the matter has to be remanded to the Trial Court, in view of the dictum of the Full Bench of this Court in the case of *Hosakeri Ningappa*, supra, wherein, at paragraphs 16 and 17 it is held as under:

> ***"16.*** *To sum up, the procedure to be adopted in case and counter case is that the investigation should be conducted by the same Investigating Officer and the prosecution should be conducted by two different Public Prosecutors. The trial should be conducted by the same Court. After recording the evidence and after hearing the arguments, the judgment should be reserved in one case and thereafter the evidence should be recorded and the arguments should be heard in the other case. It is needless to observe that the arguments in both the matters shall be heard by the same Learned Judge.*

The judgments should be pronounced by the same Judge simultaneously i.e., one after the other.

In deciding each case, the Trial Judge can only rely on the evidence recorded in that particular case and the evidence recorded in the cross case (or counter case) cannot be looked into. The Judge shall not be influenced by the evidence or arguments in the cross case. However, if the evidence recorded in one case is brought on record in another case in accordance with the procedure known to law, then, such evidence which is legally brought on record can be looked into. Except in such situation, the evidence recorded in one case cannot be looked into in another case.

17. *If the Trial Court by not adopting the salutary procedure mentioned supra disposes of the case and the counter case on different dates acquitting the accused therein and no appeal is preferred in one of the cases and appeal is preferred in the case decided later, in our considered opinion, the proceedings in the later case are not vitiated. The Court cannot compel the State to file an appeal in any given case. It is left to the wisdom of the State to decide as to whether the judgment passed by the Court below needs to be questioned or not. If the State is satisfied about*

the judgment passed in one case it may choose not to file appeal in that case. However, the State may feel that in the other case (i.e., in the counter case), appeal may be necessary. In such an event, nobody can prevent the State from filing the appeal. If two cases arise out of the same incident and if two charge sheets are filed, two trials will be held. In a given case, the Trial Judge may choose to acquit the accused in both the cases or may choose to convict the accused in both the cases; the Trial Judge may even convict the accused in one case and acquit the accused in another case. The decision will depend upon facts and circumstances of each case. Merely because the appeal is not filed in one case and the appeal is filed in the other case, the proceedings will not get vitiated automatically in the later case. In our considered opinion, in such a situation, the accused in such cases will have to show prejudice suffered by him. However, as a proposition of law, it cannot be laid down that the appeal filed in the second case by the State questioning the Judgment and Order of acquittal needs to be dismissed in limine on the ground that the proceedings in the later case is vitiated. It all depends upon facts and circumstances of individual case to be decided by the Appellate Court to see whether any prejudice is

caused to the accused in not conducting the trial of the case and the cross case simultaneously."

21. In view of the above, we pass the following:

ORDER

(i) Criminal Appeal Nos.441/2015 and 1055/2015 are hereby ***allowed***.

(ii) The impugned judgment of conviction and order of sentence passed in S.C.No.94/2002 and impugned order of acquittal passed in Sessions Case No.81/2003, both dated 24.03.2015 on the file of the Principal District and Sessions Judge, Kodagu, Madikeri, are hereby ***set-aside***.

(iii) S.C.Nos.94/2002 and 81/2003 are ***remanded*** with a direction to pass fresh orders based on the examination-in-chief as well as cross-examination of witnesses available on record, and after hearing the learned counsel for both the parties in both the cases, strictly in accordance with law, within a period of three months from the date of receipt of copy of this Order.

(iv) The learned Sessions Judge shall not permit any of the parties to lead evidence, and shall proceed only on the basis of the evidence available on record, and in consonance with the Full Bench decision of this Court in the case of ***State of Karnataka, by Circle Inspector of Police vs. Hosakeri Ningappa and another*** reported in ***ILR 2012 KAR 509***.

Sd/-
JUDGE

Sd/-
JUDGE

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