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IN THE HIGH COURT OF DELHI, AT NEW DELHI

Pronounced On : 18.08.2011

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CRL.APPEAL NOS.142/2004 & 518/2010

CRL.A. 142/2004

MOHSIN		 Appellant
	versus	
STATE		 Respondent

CRL.A. 518/2010

MOBIN & ANR		 Appellants
	versus	
STATE & ANR		 Respondents

Through : Mr. Imtiaz Ahmed, counsel for the appellants
in Crl.A. Nos.142/2004 & 518/2010.
Mr. M.N. Dudeja, APP on behalf of the State

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE G. P. MITTAL

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| 1. | Whether reporters of local papers may be allowed to see the Order? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the Order should be reported in the Digest? | Yes |

Mr. Justice S. Ravindra Bhat (Open Court)

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1. The appellants Mobin and Moin impugn a judgment and order of Learned Ms. Mamta Tayal, Additional Sessions Judge, Dwarka Court, Delhi, dated 21.02.2010 in SC No. 64/ 2009, by which they were convicted of the offence punishable under Sections 302/34 IPC. They were sentenced to undergo life imprisonment and fined a sum of ₹10,000 each. In default of payment of fine the convicts would further undergo simple imprisonment for 6 months each. For the offence under Section 323/34 IPC, they were further sentenced to undergo simple imprisonment

for three months each. Mohsin impugns an earlier judgment dated 02-1-2002, in the same Sessions case, by which he was convicted for the same offences, in respect of the same incident. It may be noticed that the prosecution took the matter to trial in two stages. Accused Moin and Mobin could not be arrested, and were declared proclaimed offenders. Charges were framed against the other accused, Ruksana, Mohsin, and Bashir. Yasin, being a juvenile, was referred to the Juvenile Justice Board. By judgment and order dated 4-1-2002, Ruksana and Bashir were acquitted of the charges of having committed the offence under Sections 302 IPC; they were convicted for the offences under Sections 323/34 IPC and given probation. Mohsin was however, convicted for the offence punishable under Section 302/34 IPC. Later, after arrest of the other accused, Moin and Mobin, they were sent to trial. The learned Additional Sessions Judge, by another judgment dated 20-01-2010, convicted them of the offences under Sections 302/323/34 IPC and sentenced them *inter alia*, to undergo life imprisonment, besides other prison terms and fine.

2. The Prosecution's story is that one Amir Ahmed used to reside in H. No. 109, Pocket- 8, Durga Park, Dabri, New Delhi, and his son Naeem used to reside at H. No. 120, in the same locality. One Lukman was a tenant in Naeem's House. Mobin, Moin, Mohsin, Rukshana, and Bashir (the accused) were also residents of the same colony. In the past, (before the incident) Anwar, the brother-in-law of Mobin and Moin had been arrested in the case of rape of the daughter of Panditji, a neighbour of Amir Ahmed. The accused and the family had requested Amir Ahmed to get the matter compromised, but he had refused, and this had led to animosity between the two families and the accused used to frequently threaten Amir Ahmed's family.

3. The prosecution alleged that on 28.8.1998, at about 5.00 PM, Naeem Ahmed and his tenant Lukman had bought an asbestos sheet from the Masjid, to repair the leaking roof of their house, and were keeping it outside their house, when Mobin went to them asking why they had brought the sheet. On being countered by Naeem Ahmed, he threatened him and left the place. In a short while, just after a few minutes, he returned with his other family members- Rukshana, Bashir, Mohsin (all three convicts) and Yasin @ Asim (JCL). Moin had a *churra* in his hand and Mobin had an iron rod. Moin attacked Naeem Ahmed with the *churra* and caused a stab injury on his forehead. Mobin attacked Naeem Ahmed and his father Amir Ahmed with the iron rod. Rukshana, her husband Munna, and her brothers Mohsin and Asim kicked and punched Naeem Ahmed, his father, Amir Ahmed and his wife Shammi. Amir Ahmed was injured on his head,

face and other parts of his body and was bleeding profusely. He ran from the spot to make a call to the police, but fell down on the way. All the accused persons fled from the place of occurrence.

4. The police were informed and the injured were taken to the hospital, where Amir Ahmed was declared brought dead. Rukshana, Mohsin, Bashir and Yasin were arrested immediately and sent for trial. Rukshana, Mohsin and Bashir were convicted under Section 323/34. A separate trial was initiated against the Juvenile Yasin and he was acquitted by the juvenile board.

5. Mobin and Moin evaded arrest for five years. They were declared PO, but were subsequently arrested, charge sheeted and their case was committed to Sessions. A separate trial SC No. 64/09 was initiated against them. They were charged under Sections 302/323/ 34 IPC, they pleaded not guilty and claimed trial. Over the course of the trial 19 witnesses were produced by the Prosecution.

6. The Trial Court relied on testimonies of the two injured witnesses PW-5 Naeem Ahmed and PW-15 on the basis that not only were they injured witnesses, (which added a special credence to their testimonies as it conclusively proved that they were eye-witnesses to the entire incident, as per the Supreme Court in **Jarnail Singh v. State of Punjab** (SC) 2009 (4) R.C.R Criminal 253); but also because they had been consistent in their statements, and had withstood the rigours of cross examination. They had deposed in the trial of Rukshana, Mohsin and Munna, and had been consistent there as well.

7. Apart from these two witnesses, the Trial Court relied on the eyewitness accounts of PW-8 Mohd. Shamshad and PW-9, Mohammed Lukman. It also inferred guilt from the fact that the two accused had absconded for five years. (relying on a Supreme Court Judgement in the case of **Krishna Ghosh v. State of West Bengal** 2009 2 RCR (SC) CrI. 609 , where it held that the conduct of the accused in absconding was an inculpatory circumstance against them) As per the post mortem, two injuries caused by an iron rod- one a lacerated wound on parietal region of the skull, and the other, an elongated contusion on the left forearm, were opined as being individually and collectively sufficient to cause death in the ordinary course of nature to cause death. On the basis of the above evidence, the Trial Court convicted Mobin and Moin under Section 302/34 IPC, they were sentenced to undergo imprisonment for life and fined Rs. 10,000/- each.

8. Counsel for the Appellants urged that the judgment was based on surmises and conjectures based on the reliance on the testimonies of witnesses who were unreliable and contradictory to each other. Elaborating, it was argued that the Trial Court failed to appreciate that PW-5 Naeem Ahmed and PW- 15 Shammi were interested witnesses who had previous animosity with the appellants. PW-5's statement should not have been relied upon, because he had stated that he had been attacked with a *churra*, but his MLC showed no injury caused by a sharp weapon. He had also deposed that his clothes had been blood-stained. However, PW-19, ACP Ved Prakash Arya, had deposed that no blood stains was found on the shirt of PW-5.

9. It was argued that the Trial Court failed to consider the fact that in the trial against Mohsin, Rukshana and Bashir, PW-5 had deposed that Mohsin had been holding the *churra*, but in this trial he had deposed that Moin had been wielding the *churra*. The Trial Court, says counsel, failed to appreciate the fact that PW-5 had stolen the asbestos sheet from the mosque, and hence an angry mob from the mosque had attacked PW-5, PW-15 and the deceased, and that when Amir Ahmed ran away to make a call to the police, he slipped on the stairs and hurt himself. This aspect was material during the trial. It was argued that the Trial Court had failed to appreciate that Mobin had been in Aligarh at the time of the incident as was deposed by DW-1, a police officer who stated that he had come to the Police Station to report that this purse was missing. The counsel argued that the trial Court did not consider the fact that, in their statements under Section 161 Cr. PC, none of the witnesses had stated that Moin was carrying a *churra*, but they had stated so only in Court.

10. It was argued that even if the prosecution version is said to have been proved in entirety, the Trial Court erred in convicting the Appellants under Section 302/34 IPC.

11. The APP, arguing for the prosecution submitted that the conviction returned by the Trial Court was justified and did not warrant interference. It was argued that there were three eyewitnesses, who had spoken about the attack, and the surrounding facts, during the investigation. The deceased's son and daughter in law too supported this version. This was backed by the evidence of PW-9; and so, the accused's effort to discredit such ocular testimonies was unsuccessful. The attack on the deceased, as well as the injured eyewitnesses was corroborated by independent documentary evidence. The Trial Court, in these circumstances, felt that having regard to the totality of circumstances, which included the information given to the police about the attack, at the earliest point in time, taking the deceased to the hospital, and the

prompt and timely recording of the FIR and witnesses' statements, there was no possibility of manipulation or false implication.

12. It was next submitted that though the incident was the result of a quarrel, which took place between the deceased and the Appellants, the further circumstance that the latter used dangerous or deadly weapons, proved their intention which was to murder the deceased.

13. At this stage, it would be necessary to analyze the evidence led by the prosecution in this case. PW-5 Naeem Ahmed the complainant stated that on 28.08.1998, at about 05.00 PM., he had brought some cement sheets from a Masjid, to his house with the help of his tenant Mohd. Lukman (PW- 9), to repair of the roof. Mobin, who was also a resident of the Colony, went and inquired why he had bought cement sheets. He replied asking him why he was asking him about it. Mobin went away and returned with his brother Moin, Mohsin, Rukshana, Asim, and Bashir @ Munna. Mobin was carrying an iron rod and Moin had a *churra* with him. All of them attacked him, and then Mobin attacked him and his father with the iron rod. His father suffered an injury on his head. All this happened outside his house. They again caught hold of his father and attacked him with the rod and the *churra*. On hearing cries, his wife came out. She too was beaten by all of them and suffered injuries on her back. PW-5 was injured on his forehead and shoulder with the iron rod. The police arrived and they were taken to Safdarjung Hospital. His father had died at the spot due to injuries. The assailants fled from the spot. In cross examination, he correctly identified Mobin and Moin in Court. He also spoke about Anwar, the brother in law of the two accused, who had been arrested on charges of rape. He said that the two accused and their family members had asked his father Amir Ahmed, the deceased, to compromise the matter with their neighbour, (whose daughter, he had allegedly raped). But his father had refused, and this had led to them nursing a grudge against his father.

14. PW-15 Shammi, the second eye-witness is the complainant's wife. In her testimony, she stated that on 28. 08.1998, her husband had bought a concrete sheet from a mosque. Mobin @ Guddu saw the sheet at their house, objected to it, and started quarrelling with her husband at about 5.00 pm. Her father-in-law was also present there at that time. Then he left, but returned just a few minutes later with co-accused Moin and other members of his family, namely, Mohsin, Rukshana, Bashir, Munna and Asim. Mobin had an iron rod and Moin had a *churra* and they attacked her father in law, who sustained injuries on his head. They assaulted her husband and her as well. She said that two-three days before the incident, the accused's family members

sought the deceased's help, to arrive at a compromise with his neighbour, Panditji, whose daughter, Anwar, the brother-in-law of the two accused had allegedly raped. But he had refused, due to which they bore ill- will against them. In the cross- examination, she stated that she went to the immediate vicinity of the incident only after hearing the cries. She said that she was assaulted by Rukshana and the others, and could not remember who had actually hit her as they were all together. She stated that she was attacked by a wooden *danda*.

15. PW-8 Mohd. Shamsad, a mason by profession, was, on the day of the incident, called by Naeem (PW-5), to install a concrete sheet at his house. He reached there at about 4.15 PM. He met Naeem and Lukman (PW-9). In his presence, the two accused Mobin and Moin came there, and asked Naeem and Lukman as to with whose permission, they had taken the concrete sheet from the Masjid. An altercation took place between them and in the meanwhile other family members of the accused came there armed with *danda* and *Churri*. Amir Ahmed, father of Naeem also came there. He was also attacked, and sustained serious injuries on his head and face. The police were informed; they arrived at the scene and took the injured to the hospital. He made a statement to the Police. He also stated that Mobin had an iron rod and Mohsin had a *churra*. In his cross examination, he stated that his statement was recorded after fifteen days

16. PW-9 Mohd. Lukman was a tenant in the complainant's (PW-5's) house. At 4/4.15 PM, Naeem and PW-9 had bought a cement sheet from a nearby Masjid and placed it outside their house. Naeem had also called a mason to install the sheets. When they were fixing the sheets Mobin came; there was a verbal dispute between him and Amir Ahmed (the deceased, father of Naeem). Supporters from both sides started pelting stones at each other. Amir Ahmed sustained injuries on his head, Naeem sustained injuries above his eye. By this time, the police arrived and Naeem and Amir Ahmed were taken to the hospital. This witness could not recall the weapons carried by Mobin and the other accused persons. He was cross- examined as he partly resiled from his Section 161 statement. He was questioned on whether Mobin had been carrying an iron rod and whether Naeem and Amir Ahmed, (the deceased) had been attacked with a knife and a rod. He said he could not remember such details as the incident had taken place about eleven years back. But he did state that on the day of the incident, he had told the police whatever he had seen.

17. It is settled law that where the prosecution case is based on the evidence of eye witnesses, the existence or non-existence of motive, sufficiency, or its insufficiency will not play

a major role as it would, in a case which is based on circumstantial evidence. If the prosecution is able to prove its case on motive it will be a corroborative piece of evidence. But even if the prosecution has not been able to prove its case on motive, that will not be a ground to throw overboard the prosecution case because merits of the prosecution will have to be decided on the basis of the merits of the evidence of such witnesses ((1993 Cri LJ 1656)*Jarnail Singh v. State of Haryana*). Therefore, here it is important to see whether the four eyewitnesses are credible, and trustworthy. The entire incident revolved around the fixing of an asbestos sheet, brought by PW-9 to be fixed at PW-5's house. Moin reached there, and a quarrel between him and the deceased (father of PW-5) took place. Moin went away, and reached the spot, this time with other accused. A fight or altercation appears to have occurred, in the course of which the deceased received fatal injuries. This is corroborated by PW-8, the mason called in to fix the asbestos sheet, and PW-15, the deceased's daughter in law. The use of a *churri* or sharp edged weapon, and also of a *danda* (stick) is proved independently, through the testimony of PW-11, the postmortem doctor, who in his report listed five injuries on the deceased. Interestingly, PW-9 also mentioned that when the attack took place, both sides were attacking each other and pelting stones. The injuries on the eyewitnesses Naeem and others was corroborated by the MLCs placed on the record. All these facts show that the accused participated in the attack on the deceased, which resulted in his death. It would now be necessary to discuss the role of each Appellant to discern what was his possible intention, or whether all Appellants shared the same intention to commit murder.

18. The doctor who deposed about the injuries in this case, stated that injury Nos. 2 and 5, which were head injuries were the cause of death and that they were the result of *danda* blows. The testimony of Naeem (PW-5) is that Mobin had an iron rod; Moin had a *churra* (dagger). This was corroborated by PW-15. However, the testimonies of PW-8 and PW-9, the other two eyewitness, are unclear as to who was armed with what weapon. The injuries – testified to by PW-16, which caused the death of Amir Ahmed, were the result of rod, or *danda* blows (Injury Nos. 2 and 5). The doctor also stated that Injury Nos. 3 and 4 could have been caused by a fall on the ground. The question, in these circumstances, is as to what was the intention of the accused, and whether all of them would be guilty of the same offence.

19. It would now be necessary to consider whether the prosecution, which has successfully proved the presence and identity of the Appellants before the court, was able to prove that they had the common intention with the aggressor, so as to be criminally responsible

for murder. It is clear enough from the prosecution evidence that all the Appellants before the court were not armed. Moin had a *churra*; Mobin had an iron rod, the use of which led to death of Amir Khan. They were accomplices, alleges the prosecution, which also points out at Section 300 (4) IPC, stressing that they had accompanied one armed with a deadly weapon, which could have been used only for one purpose, in the dead of the night. While that contention sounds attractive, the court is also mindful that in order to attract criminal responsibility, presence of the co-accused alone, in the attack, is not always sufficient. Section 34 IPC, in cases involving blow by one accused, to fasten guilt for murder on co-accused, has engaged the attention of courts on several occasions. While there is no universally acceptable formula that in such instances, the intention to cause death cannot be attributed to such non-participating co-accused, at the same time, courts have to recognize the need to exercise caution.

20. The *rationale* for fixing joint responsibility on a co-accused who does not participate in the actual attack, but might play a covert role, or might even be a mere by-stander, was explained by the Supreme Court, in the following words, in *Ramesh Singh v State of MP* 2004 (110) Cr. LJ. 3354:

“As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to guilty. By introducing Section 34 in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to produce direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (Noor Mohammad Yusuf Momin, AIR 1971 SC 855) (1971 Cri LJ 793 : AIR 1971 SC 885).”

21. In this case, the Appellants have relied on judgments of the Supreme Court, and of this court, to contend that even if they were present, their common intention to kill the deceased could not be proved beyond reasonable doubt. The authorities cited by them undoubtedly support such a proposition. Similarly, in *Smt. Tripta v. State of Haryana* [AIR 1993 SC 948] the deceased died after some time of the attack. A lacerated wound on the left side of scalp was found. The appellant went to him (the deceased) to question as to why he had transferred his lands. It was held that the deceased's response must have irked her, and the main accused started assaulting him (the deceased). Having regard to the role played by the appellant, it was held that no case under Section 302/34 was made out as she had no role to play in causing injuries to other persons present there, although the main accused had assaulted them. In *Prakash v State of Madhya Pradesh*, 2006 (7) SCC 496, where the accused, one of the four assailants of the deceased, had hit him on the leg, and one of the others had inflicted a fatal blow on the head, the Supreme Court held that common intention to cause injury of the kind punishable under Section 304 Part I had been proved. Likewise, in *Raju Trambak Magare v State of Maharashtra* 2001 (10) SCC 385 two important facts which weighed with the court in concluding that the two appellants before the Supreme Court did not share the common intention of the assailants, to kill the deceased, was that though their role in dragging him (deceased) was established, it was unclear from the evidence how they beat him, and further that they were unarmed, and could not have known that the other two accused would have inflicted fatal injuries which caused death. In *Dajya Moshya Bhil v State of Maharashtra* 1984 (Suppl) SCC 363 the Supreme Court refused to uphold a conviction of co-accused, under Section 302, by attributing common intention, and found that their presence in the scene of crime was established, but their being unarmed, and no proof having been led about the injuries inflicted upon the deceased, and lastly, the absence of motive or common intention, (because of their absence at the time, in relation to an insult, which was allegedly given to the principal accused) resulted in their diminished criminal liability. The conviction was therefore, altered from Section 302 to 326, IPC.

22. In the present case, the totality of facts proved show that the incident occurred in two stages; when one of the accused reached the spot, earlier, and objected to the asbestos being fixed, there was an altercation. The others, including the Appellants, reached the spot; Mobin had an iron rod and Mohsin had a *churra*. The question is whether or not there was an intention to

cause the death of Amir Ahmed. From the facts, it can be seen that the death was the result of an attack that was the consequence of a quarrel. From their actions, it can be gleaned that the attack was propelled by anger that took root from the quarrel. From their actions, that is, the group attack on Naeem Ahmed, his father, and later his wife, by the two accused and other family members, one cannot conclusively say that they intended to cause the death of Amir Ahmed. For the applicability of Section 302, this intention to cause death, is a prerequisite. If it cannot be established with certainty, then the provision cannot apply.

23. However, the fact remains that the two appellants Mobin and Moin, wielded two dangerous weapons – an iron rod and a *churra* (dagger). They even attacked the deceased, his son and daughter-in-law with these weapons. From the nature of the weapons they brought, and from the fact that they used them on the deceased, and from the fact that the injury caused on the deceased was sufficient, to cause death (as can be seen from the post- mortem report), it can be concluded that they had the intention to cause such bodily injury requisite knowledge that was likely to cause the death of Amir Ahmed. Therefore, the requirements of Section 304 Part I IPC are satisfied. In this context reported as *Mer Dana Sida v State of Gujarat* 1985 (1) SCC 200, where the accused gave blows on the head of the deceased with sticks, and they intended, or knew themselves to be likely to smash their victim's skull, it was held that they must be taken to have known that they were likely to cause the death of the victim, and were therefore guilty of culpable homicide not amounting to murder, and not murder, though in this case, the conviction was under Section 304 Part II.

24. In view of the above findings, we are of the opinion that appeals have to be succeeded in part. The conviction of the appellants is converted to the offences punishable under Section-304, Part-I read with Section-34, IPC. Having taken entire conspectus of circumstances, including the period of sentence undergone, the Court is of the opinion that ends of justice would be met if the sentence is also substituted to one of 8 years rigorous imprisonment in case of all the appellants. The remainder of sentence periodically to follow is left undisturbed. The appellants on bail are directed to surrender to the Trial Court and undergo remainder of their sentences. The matter

shall be listed before the Trial Court on 5th September, 2011. The Registry is directed to ensure that the records are transmitted forthwith to ensure compliance with the present directions.

25. The appeals are partly allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

G.P.MITTAL
(JUDGE)

August 18, 2011