

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 22nd March, 2012

Decided on: 23rd April, 2012

+ CRL.Rev. P. No. 696/2010

ANITA

..... Appellant

Through: Mr. G.P. Thareja, Advocate

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Mukesh Gupta, APP for the State

AND

+ CRL. Rev. P. No. 715/2010

YASHODA DEVI & ANR

..... Appellants

Through: Mr. G.P. Thareja, Advocate

versus

STATE

..... Respondent

Through: Mr. Mukesh Gupta, APP for the State

AND

+ CRL.Rev.P No. 716/2010

HARI DUTTA SHARMA & ANR

..... Appellants

Through: Mr. G.P. Thareja, Advocate

versus

STATE

..... Respondent

Through: Mr. Mukesh Gupta, APP for the State

AND

+ **CRL.Rev. P. No. 481/2010**

ATUL SHARMA

..... Appellant

Through: Mr. Anurag Jain, Advocate

versus

STATE & ORS.

..... Respondents

Through: Mr. Mukesh Gupta, APP for the State
Mr. G.P. Thareja, Advocate for
Respondent Nos. 2, 3, 4, 5 and 7.

AND

+ **CRL.Rev. P. No. 788/2010**

ATUL SHARMA

..... Appellant

Through: Mr. Anurag Jain, Advocate

versus

STATE & ORS.

..... Respondent

Through: Mr. Mukesh Gupta, APP for the State
Mr. G.P. Thareja, Advocate for
Respondent Nos. 2 and 3.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

Crl. M.A. 18810/2010 (impleadment) in Crl.Rev.P. No. 696/2010

Crl.M.A. 18804/2010 (impleadment) in Crl. Rev.P. No. 715/2010 and

Crl.M.A. No. 18807/2010(impleadment) in Crl.Rev.P. No. 716/2010,

Vide order dated 24th January, 2011, the prayer in the applications was
allowed to the extent that learned counsel for the applicant would be heard.

Thus, no further orders are required to be passed in the present applications.

Applications stand disposed of.

Crl. Rev. P.696/2010 & Crl.M.A. 16832/2010 (stay)
Crl. Rev. P.715/2010
Crl. Rev. P.716/2010
Crl. Rev. P.481/2010 & Crl.M.A. 14621/2010 (stay)
Crl. Rev. P.788/2010 & Crl.M.A. 18785/2010 (stay)

1. By way of Crl.Rev.P. Nos. 696/2010, 715/2010 and 716/2010 the Petitioners/accused persons pray that the charges under Section 302/341/34 IPC framed qua them be quashed. However, by way of Crl. Rev. P. Nos. 788/2010 and 481/2010, the complainant prays that directions be passed for framing of additional charge under Section 149 IPC in addition to the charges already framed against the accused persons in Case FIR No. 239/2009 registered at PS Harsh Vihar, Delhi.

2. Briefly, the facts giving rise to the present petitions are that on 19th December, 2009, FIR No. 239/2009 was got registered by Complainant Atul Sharma against Ram Niwas Sharma, Saroj, Hari Dutt Sharma @ Hari Om, Brijesh Kumar, Anita, Yashoda Devi, Ashish Bardwaj and Raju. The Complainant alleged that on 19th December, 2009 at about 9:30 a.m. he along with his younger brother Sachin was carrying a gas cylinder on motorcycle bearing No. DL-13SC-7648 from his house. When they reached in front of C-1/716, Gali No. 25(house of Hari Om @ Hari Dutt) somebody threw one brick on him from the house of Hari Om, however the same hit the tank of his motorcycle. When the complainant looked upwards, Ram Niwas and his wife Saroj Sharma were stating that “tu to bach gaya, lekin teri motorcycle ka nuksan ker hi diya”. Atul Sharma further stated that due to the said instance, he got scared and ran away a short distance. His aunt (bua) Maya Devi came there and asked them as to why they were beating her

nephew. On this Hari Om said that her nephew was saved but she should be taught a lesson. During this time, Hari Om's wife Yashoda along with her niece, the daughters of Brijesh, came there and caught hold of Maya Devi. Brijesh, Hari Dutt and Ram Niwas started hitting Maya Devi with bricks. Their sons Ashish and Raju started abusing and hitting Maya Devi with slaps and fists. Maya Devi started bleeding from her head and became unconscious. Somebody called the PCR, which took Maya Devi to GTB hospital. On this statement of Complaint Atul Sharma, case under Section 341/427/308/341 IPC was registered. On 22nd December, 2009 Maya Devi expired. Thereafter, Sections 302/149 IPC were added in the FIR. Learned Additional Sessions Judge after hearing counsels for the parties at length framed charges under Sections 341/302/34 IPC against all the accused persons. A separate charge for offences punishable under Sections 307/34 IPC was framed against accused Ram Niwas and Saroj.

3. Learned counsel for the Petitioner/Complainant contends that the accused persons in furtherance of their common intention and object formed unlawful assembly and committed murder of his aunt Maya Devi. Pursuant to exhortation by Hari Om @ Hari Dutt, the accused persons gave beatings to Maya Devi and hit her with bricks due to which Maya Devi sustained injuries and succumbed to death. It is stated that the common intention and object of the accused persons can be inferred from the facts of the present case. Learned counsel has placed reliance on *Jai Narain vs. Ziley Singh & Ors*, ILR (1981) II Delhi 792 to contend that 'pre-concert' is not necessary for the existence of an unlawful assembly. 'An assembly', which was not unlawful when it assembled, can subsequently become an 'unlawful assembly' all of a sudden and without previous concert amongst its

members. Further the object is entertained in the human mind and the same being a mental attitude , no direct evidence can be available . Reliance is placed on *Masalti vs State of U.P.*, AIR 1965 SC 202 to contend that where a crowd of assailants, who as members of an unlawful assembly, proceed to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for the witnesses to describe the part played by each one of the assailants accurately. Thus grave prejudice would be caused if the relief sought is not granted. Under Section 105 of Evidence Act, the burden of proving that the case of the accused persons comes under the exception is on the accused person. At the stage of charge, the Court only has to look for a prima facie case against the accused. In the present case, the doctor has opined that the injuries caused to the deceased were sufficient to cause death in the ordinary course of nature. The present case is based upon the evidence of two eye witnesses and its veracity would be adjudged during the trial and not at this stage.

4. On the other hand learned counsel for the Petitioners/accused persons contends that even on the allegations as set out in the charge sheet, the present incident occurred all of a sudden and the same was not a pre-planned attack. The weapons of offence are the bricks which shows that the accused persons were not having the requisite intention which would make them guilty of offence punishable under Section 302 IPC. The petitioners/accused persons were not armed with any deadly weapons so as to cause death of Maya Devi. The role ascribed to the ladies is only of catching hold of the deceased. Thus, at best, a charge under Section 304 part II is made out against them. No one intended to kill the deceased. The complainant in the FIR has also stated that the accused persons exhorted “Bhatija toh bach gaya

ab isko sabak sikhado” which clearly shows that the intention was not to kill but only to teach a lesson to the deceased. Moreover, the complainant in his statement has ascribed specific role to each one of the accused persons. Thus, the inference of common object or formation of an unlawful assembly cannot be drawn.

5. Learned APP for the State contends that the petitions filed by both the complainant and the accused persons are liable to be dismissed. It is sated that the complainant in his complaint has clearly stated and defined the role of each of the accused person. Accused Anita along with accused Yashoda caught hold of the deceased Maya Devi while Brijesh along with Ram Niwas attacked her with bricks. Learned APP further states that the order on charge is an elaborate order wherein learned Additional Sessions Judge has clearly dealt with each and every argument raised by both the accused persons and the Complainant. The present case is at the stage of evidence and no interference of this court is called for as there is no illegality in the impugned order. The contention of learned counsel for complainant that the learned Additional Sessions Judge has erred in invoking Section 34 IPC instead of Section 149 IPC is meritless as though common intention can be inferred, there is no evidence of common object. Thus, the present petitions are liable to be dismissed.

5. I have heard learned counsel for the parties.

6. It may be noted that in the present case the complainant Atul Sharma has filed the revision petitions against the order on charge praying for an additional charge under Section 149 IPC to be framed against the accused persons. On the other hand, the accused persons in their petitions assailed the order on charge on the ground that the incident took place all of a sudden

and there was neither pre-concert nor any motive to kill the deceased Maya Devi. Before dealing with the contentions of the parties, it would be relevant to reproduce Sections 34 and 149 of Indian Penal Code as under:

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

149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.-- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members or that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.”

7. The Hon’ble Supreme Court in *Nanak Chand vs. State of Punjab*, AIR 1955 SC 274 observed:

“7. It was, however, urged on behalf of the Prosecution that section 149 merely provides for constructive guilt similar to section 34 of the Indian Penal Code. Section 34 reads:

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

This section is merely explanatory. Several persons must be actuated by a common intention and when in furtherance of that common intention a criminal act is done by them, each of them is liable for that act as if the act had been done by him alone. This section does not create any specific offence.

As was pointed out by 'Lord Sumner in AIR 1925 PC 1 (A).

“‘a criminal act' means that unity of criminal behavior which result in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a "criminal offence".

There is a clear distinction between the provisions of section 34 and section 149 of the Indian Penal Code. The principal element in section 34 of the IPC is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation section 34 provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone. There is no question of common intention in section 149 of IPC. An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and the other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. Thus if the offence committed by that person is in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object, every member of the unlawful assembly would be guilty of that offence, although there may have been no common intention and no participation by the other members in the actual commission of that offence.”

8. There is a material difference between common object and common intention. Though an object may be common but the intentions of the several members of an unlawful assembly may differ and indeed may be similar only in one respect namely that they are all unlawful. The element of participation in action, which is the leading feature of Section 34, is replaced

in Section 149 by membership of the assembly at the time of the committing of the offence.

9. In the present case, the complainant has defined the role of each of the accused person. He has stated that when his aunt Maya Devi tried to save him, Yashoda and daughters of Brijesh Kumar came there and caught hold of her. Brijesh, Hari Dutt and Ram Niwas started hitting Maya Devi with bricks. Ashish and Raju started abusing and hitting Maya Devi with slaps and fists. The facts clearly show that provisions of Section 34 IPC are attracted and not Section 149 IPC. The learned Additional Sessions Judge has correctly invoked the provisions of Section 34 IPC and not 149 IPC.

10. A perusal of the statement of complainant shows that he was passing through the lane when a brick was thrown at him from the house of Hari Om @ Hari Dutt, which hit his motor cycle. When the complainant he saw upwards he found Ram Niwas and his wife Saroj stating that though he escaped but his motorcycle was damaged and thereafter the fight took place. This shows that the brick was thrown with an intention to cause bodily harm to the complainant which could have even resulted in his death. An act, which is done with knowledge or intention and under such circumstances that if by that act death is caused, the accused would be guilty of murder, the offence of attempt to murder and is punishable under Section 307 IPC is attracted. Throwing of a brick from the height shows the intention of the accused persons thus, the learned Additional Sessions Judge has correctly invoked Section 307/34 IPC against the accused Ram Niwas and Saroj. The contention that the case of the accused persons fall under the exception to Section 302 IPC also does not merit consideration, as the exception has to be

proved from the evidence led during trial and the same cannot be inferred at the stage of framing of charge.

12. The learned Additional Sessions Judge after applying his mind has correctly charged all the accused persons under the relevant Sections of Indian Penal Code. I find no reason to interfere with impugned order passed by the learned Additional Sessions Judge. The petitions and applications are dismissed.

(MUKTA GUPTA)
JUDGE

APRIL 23, 2012
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