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

**DECIDED ON : 26<sup>th</sup> March, 2012**

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**CRL.L.P. 22/2012**

**CRL.M.A. 462/2012**

STATE

..... Petitioner

Through : Mr.Dayan Krishnan, ASC with  
Mr.Nikhil A.Menon, Advocate.

versus

TRILOK & ORS.

..... Respondents

Through : Mr.Vijay Rajoura, Advocate for  
Trilok (R-1).  
Mr.Rakesh Vatsa, Advocate with  
Ms.Reenila Jhala, Advocate for R-3.

**CORAM:**

**MR. JUSTICE S. RAVINDRA BHAT**

**MR. JUSTICE S.P.GARG**

**S.RAVINDRA BHAT J. (Open Court)**

1. The present petition filed by the State seeks leave to appeal against the judgment and order of the Ld.Addl.Sessions Judge in SC No.119/2009 dated 18.05.2011. The impugned judgment convicted two accused i.e. Vijay Pal and Samir and acquitted three co-accused i.e. Pradeep, Trilok and Arjun.

2. The prosecution's allegation was that the main accused-Samir had a relationship with a girl in Munirka. This was a source of

conflict between him and his friends on the one hand, and Aman (deceased) and his friends such as Kishan and PW-8 on the other hand. It was alleged that some time prior to the incident Samir had been beaten up by Aman and his associates.

3. Aman's body was found in a pool of blood in the morning of 05.10.2004; the body had several injuries, including a stab wound on the chest. It was found in Sector 12, R.K.Puram. On being informed, the police reached the spot. It was alleged that eye witness, Mukesh (PW-8) also reached the spot; his narration was the basis for lodging of the FIR.

4. The prosecution alleged that on the previous evening on 04.10.2004 sometime around 7.00 P.M., Samir and his associates, i.e., the co-accused, sought and finally found Aman and his friends. It was alleged that Samir and his friends were armed with iron chain, rod and such other articles. PW-7 and PW-8 were the main witnesses for the prosecution. According to the prosecution case, Samir and his associates started beating the deceased Aman and his friends. PW-7 and PW-8 apparently left the spot. This circumstance was recorded; the body was sent for post-mortem examination and after conclusion of the investigation (during the course of which the five accused were arrested) the charge-sheet was filed in Court. Upon being arrayed for the offences punishable under Sections 302/34, the accused denied their guilt and claimed trial. The prosecution relied on the testimonies of twenty seven witnesses. The eye witness testimonies of PW-7 and PW-8 being most crucial. After considering all the evidence, the Trial Court acquitted A-3, A-4 and A-5, i.e., Pradeep, Trilok and Arjun.

5. The Ld.ASC urged that the Trial Court's findings in the impugned judgment to the extent that it acquitted the Respondents, require a closer look and there are substantial reasons that this Court should grant leave to appeal. It is submitted that PW-8 had identified (without naming) all three acquitted Respondents and had specifically pointed to their role i.e. being associated with the main accused Samir and also to their being armed. The fact that PW-8 did not name them while he named the others prove that he was not lying and therefore, Court ought to have been more careful before rejecting his testimony. The learned counsel emphasized that the Trial Court had believed this witness and proceeded to convict the other accused. In these circumstances, he urged, that there was sufficient material on record to establish the guilt of the acquitted Respondents.

6. The Trial Court records were requisitioned. We have considered the same and also carefully considered the submissions on behalf of the prosecution. The Trial Court's reasoning acquitted the Respondent Nos.3, 4 and 5 found in the following extracts :

*"9.5 If we appreciate the testimonies of PW2 Bhupender, PW3 Kishan, PW5 Anil and PW8 Mukesh, certain facts have duly been proved by the prosecution beyond reasonable doubt which can be enumerated as follows :*

- a) Accused Samir and deceased Aman had strain relation over Girl X;*
- b) The cause of Samira and Aman was espoused by their friends on respective side. Aman had his friends PW2, PW3, PW5 and PW8 on one side and similarly, Samir had also accused Vijay Pal and other persons on other side;*
- c) On this issue, in an earlier incident, accused Samir was beaten up by Aman, Kishan and others and Samir had threatened Aman to take revenge;*

- d) *On the day of Janmashtami, Samir, Vijay Pal and some other persons had come to the area of complainant party, but no incident could take place as the complainant party ran here and there;*
- e) *On 02.10.2004, PW3 Kishan was beaten up by Samir, Vijay Pal and others in the Sunday Bazaar on the same issue and on that day, threat was conveyed to Aman through Kishan;*
- f) *On 04.10.2004, Samir and Vijay Pal along with their accomplices came to the spot duly armed with iron rod, knife, chain and pipe, they were in look out for Aman and exhorted their accomplices to catch hold of him, Aman was caught and beaten by the accused persons;*
- g) *Samir was apprehended by certain public persons on the spot and he was handed over to Police and was taken to Safdarjung Hospital;*
- h) *On the next day, the dead body of Aman was found in a close proximity to the place from where accused Samir was apprehended.*

*10.0 the story of the prosecution in fact for a moment, stops at a point when the assailants heavily armed reaches to the Park and exhorts to catch Aman. Though, PW8 Mukesh in his testimony had stated that accused persons had caught Aman and started beating him with rod and cycle chain.*

*Before proceeding further, I would like to mention here that the facts of this case are very peculiar in nature. Complainant party and assailants group, both consists of teen age boys. Some of whom were school going at the time of incident. With great hesitation, it may not be out of place to mention here that all of them seem to have deviated from the path in one way or the other. They seem to have involved themselves in petty quarrels over the irrelevant issue. In such kind of incidents, the appreciation of evidence is very difficult. The witnesses may have a tendency of implicating the persons falsely or may even tend to exclude the culprits on account of being some fear or may be group realignment or may be for some extraneous reasons. In Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614, it has been inter alia held as under*

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*“Generally speaking oral testimony in this context may be classified into three categories, namely (1) **wholly reliable** (2) **wholly unreliable** (3) **neither wholly reliable nor wholly unreliable**. In the first category of proof, the Court should have no difficulty in coming to its conclusion either way- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. **It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial**. There is another danger in insisting on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The Court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. There are exceptions to this rule, for example, in case of sexual offences or of the testimony of an approver, both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the Court to convict, if it is satisfied that the testimony of a single witness is entirely reliable.”*

*The court while appreciating the evidence in such case has to read between the lines. Here the court is required to assess whether the witnesses are wholly reliable, wholly unreliable or neither wholly reliable nor wholly unreliable. I consider that witnesses in present case falls in third category. Thus, the court is required to appreciate their evidence with great caution and has to look for corroboration in material particulars from direct or circumstantial evidence.*

*10.5 Accused persons have been charged for having committed the murder of Aman in furtherance of common intention.*

*Section 34 IPC recognizes principle of vicarious liability in criminal jurisprudence. In order to attract section 34 IPC, two postulates are indispensable; (i) the criminal act should have been done by more than one person, (ii) every such act even done individually should have been done in furtherance of common intention of all such persons.*

*It is worthwhile to note that it is a rule of evidence and does not create a substantive evidence. It is not necessary to attract section 34 IPC that each of the accused must assault the deceased. It is enough if it is shown that the accused persons shared a common intention to commit the offence and in furtherance thereof, each one played his assigned role by doing separate act. The common intention can be proved either from conduct or from circumstances or from incriminating facts. In the catena of judgments, it has been held that common intention is different from similar intention. Mere presence of two persons on spot is not sufficient to hold that they shared the common intention. Two persons may be having similar intention but may not have the common intention. In order to attract section 34 IPC, the prosecution is bound to prove that accused persons acted in concert and in furtherance of the common intention.*

*105 In the present case, the prosecution has specifically proved by ample evidence that on the day of incident, a group led by Samir and Vijay Pal along with some other persons went to the spot with common intention to teach a lesson to Aman. PW2 Bhupender, PW5 Anil and PW8 Mukesh in their testimonies have made a consistent, cogent and credit-worthy statement that Samir and Vijay Pal was exhorting the other members of their team to catch hold of Aman and to beat him. Their testimony have found support from the direct and circumstantial evidence on material particulars. PW24 and PW25 have turned hostile for the obvious reason. However, the motive has been proved beyond reasonable doubt by the other witnesses.”*

7. The Trial Court therefore, proceeded to segregate the role of the two accused, i.e., Vijay and Samir from that of the actions attributed to

the Respondents. Consequently, it acquitted the three Respondents arrayed as parties in the present leave petition.

8. We have independently considered the testimony of PW-8. Besides the infirmities noticed by the Trial Court, we are also alive to the fact that the incident took place in the evening, under the cover of darkness. It is unclear as to whether there was sufficient light; the prosecution witness has not been cross-examined on this question. Another salient aspect, after the arrest of the accused is that no TIP was conducted. Had such a procedure been conducted identification of the accused or at least those who are acquitted would have been further assured to the Court. The testimony of PW-8 even if accepted at its face value, only established that the acquitted Respondents were present-apparently armed- however, no role or act of co-operation with the main accused had been attributed to them. Possibly, this is the case since the witness claimed to have fled the spot after being beaten up. The witness PW-8 or for that matter PW-7 did not spell out how many assailants were at the spot attacking the deceased and his friends. Interestingly, PW-8 also mentioned that some of the assailants had tied handkerchief and some were wearing helmets. Having regard to these and the fact that PW-8's positive identification of one of the Respondents was not corroborated by PW-7, and the further doubt which arose on account of PW-8's evidence *vis a vis* the person's identification, and role played by the acquitted Respondents, the Court held that their guilt could not be established beyond reasonable doubt.

9. We are of the opinion that having regard to the standard which is applicable in such cases, i.e., the existence of compelling or

substantial reasons to compel the High Court to granting the leave to appeal against the acquittal, the prosecution has not been able to show that any of such elements is present. We are of the opinion that the Trial Court's reasoning is sound and over all analysis of the facts and evidence present before it are reasonable. In this Court's opinion there is no mis-appreciation of evidence or mis-appreciation of law. The prosecution has failed; Criminal Leave Petition is accordingly dismissed.

**(S. RAVINDRA BHAT)**  
**JUDGE**

**(S.P.GARG)**  
**JUDGE**

**March 26, 2012**  
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