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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRIMINAL APPEAL NO.1704/2014**

Date of decision: 19th February, 2015

KARAN @ VICKY Appellant

Through Ms. Nandita Rao, Advocate.

versus

STATE Respondent

Through Mr. Varun Goswami, APP along with
Inspector Subodh Kumar, ATO, Patel Nagar.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J. (ORAL):

Appellant-Karan @ Vicky by the impugned judgment dated 11th September, 2014 stands convicted for offences under Sections 147/148 and Section 302 read with Section 149 of the Indian Penal Code, 1860 (IPC, for short) in a charge sheet arising out of FIR No.182/2007, Police Station Patel Nagar. By order on sentence dated 11th September, 2014, the appellant-Karan has been sentenced to undergo imprisonment for life and fine of Rs.5,000/- for the offence under Section 302 read with Section 149, IPC. In default of payment of fine, the appellant is required to undergo simple imprisonment for six months. The appellant has been also sentenced to undergo rigorous imprisonment for three years for the offence under Section 148, IPC.

2. Initially, the appellant had faced proceedings before the Juvenile Justice Board, but he was declared not to be a juvenile at the time of the offence and thereafter was tried in the court of the Additional Sessions Judge-02 (Central), Delhi.

3. Learned counsel for the appellant has drawn our attention to the judgment of the Delhi High Court dated 3rd September, 2014 passed in Criminal Appeal No.356/2011, titled ***Ajay Malhotra and Another versus State Govt. of Delhi***, filed by Ajay Malhotra and Rahul Kohli impugning their conviction in the charge sheet arising out of the same FIR bearing No.182/2007, Police Station Patel Nagar. The Delhi High Court in their decision dated 3rd September, 2014 partly allowed the appeal filed by Ajay Malhotra @ Lucky converting the conviction to culpable homicide not amounting to murder and sentencing him to imprisonment for the period already undergone. The conviction of Rahul Kohli under Section 302/148/149, IPC was set aside. Thus, the appeal filed by Rahul Kohli was allowed. The contention of the learned counsel for the appellant is that the appellant's case is identical, if not better than the case set up by the prosecution against Rahul Kohli. It is submitted that the primary and substantive allegations were against Ajay Malhotra and as per the findings recorded in the decision dated 3rd September, 2014, this Court has disbelieved the prosecution version on application of provisions of Section 148/149, IPC in the case of Rahul Kohli.

4. In order to appreciate the contentions, we have examined the statement of witnesses, the reasoning and finding recorded in the impugned judgment dated 11th September, 2014 and the aforesaid judgment of the Delhi High Court in Criminal Appeal No. 356/2011, titled ***Ajay Malhotra and Another versus State Govt. of Delhi***, pronounced on 3rd September, 2014. This decision dated 3rd September, 2014 was not filed or brought to the knowledge of the trial court when the impugned decision dated 11th September, 2014 was pronounced.

5. There is ample evidence and material to show that Mukesh was found lying unconscious in a street behind the Shadipur Metro Station.

Constable Anil Kumar (PW-12) had deposed to the effect that he and SI Jitender Tiwari had gone to the spot after receiving the DD entry No.37A (Exhibit PW9/A). The said DD Entry No.37A was recorded at around 10.50 P.M. on 18th March, 2007 by SI Raj Kumar (PW-9) recording that an unknown person was lying dead in the said street.

6. Thereafter, a PCR van reached at the spot and had moved Mukesh to the Deen Dayal Upadhyay Hospital where he was declared 'brought dead' and his MLC (Exhibit PW-23/A), has been proved by Dr Shaifali (PW-25).

7. Rajnish Kumar who has deposed as PW-3 is the complainant. Statement of Rajnish Kumar (Exhibit PW-3/A) was recorded and, thereafter, the FIR (Exhibit PW-3/C) was registered. Consequent thereto, HC Amir Singh (PW-1) who was present in the Police Station Patel Nagar recorded the aforesaid FIR No.182/2007 (Exhibit PW-3/C) at 1:10 hours on 19th March, 2007.

8. Post-mortem on the dead body of Mukesh was conducted by Dr. B.N. Mishra (PW-10), who prepared post-mortem report (Exhibit PW-10/A). External injuries as found and elucidated in the post-mortem report (Exhibit PW-10/A) read:-

“(i) One spindle shaped stab wound (2 cm x 1 cm x cavity deep) present at lower part of chest at mid clavicular line with located 13 cm from left nipple 17.5 cm from left iliac crest with sharp edge with oozing of blood present. Directed obliquely upwards-backwards.

(ii) One stab wound (1.2 cm x 0.7 cm x 0.5 cm) present on lateral aspect of back at the line of posterior axillary fold with sharp margins.

(iii) One stab wound (0.1 cm x 0.7 cm x 0.5 cm) present on the lateral 1/3 part of left thigh with sharp margins.”

9. As per the post-mortem report, the deceased had died due to

hemorrhagic shock consequent upon laceration of pancreas and left lobe of lung as a result of the stab wound, i.e. Injury No.1. The said injury No.1, it was opined, was sufficient to cause death in the ordinary course of nature. Thus, it is a case of single fatal injury.

10. On the question of involvement of the appellant-Karan, the prosecution version relies upon testimonies of Rajnish Kumar (PW-3) and Sanjit Kumar (PW-22) (examined and referred to as PW-20 in the CrI.A.356/2011).

11. Rajnish Kumar (PW-3) in his statement (Exhibit PW-3/A), which was recorded in Hindi, had stated as under:-

“I reside at the house bearing Municipal No. J-503, Gali No. 3, Prem Nagar, Patel Nagar with my parents. Presently, I am working at RJ Credits, 8/47, first floor, South Patel Nagar, New Delhi-8 and assigned the task of distribution of pamphlets. The deceased and two others persons viz. Sanju and Sanjeet work with me at RJ Credits. One month ago my friend Jona introduced us (he, Sanju, Sanjeet and deceased) to Ajay Malhotra @ Lucky in connection with some work. We worked with Lucky in connection with a marathon race organised by Hangama TV which was held at Nehru Stadium, New Delhi and for which we boys were to be paid wages including conveyance expenses in sum of Rs.2,200/-. We repeatedly asked Ajay @ Lucky to pay our wages but he did not do so. Two days ago we four boys again asked Lucky to pay our wages whereupon he (Ajay) along with some of his associates started abusing and threatening us. We objected to the aforesaid conduct of Ajay and asked him to pay our wages. Yesterday i.e. March 18, 2007 at about 06.00 P.M. I meet Lucky and again asked him to make payment upon which Lucky told me that all the boys wanting payment of their wages should come at a park near Satyam cinema at about 8.30-09.00 P.M., which information was given by me to my associates Sanju, Sanjeet, deceased and we went to the park near Satyam cinema. At around 09.00 P.M. Ajay @ Lucky along with his six friends came in the park. Ajay asked us about our remaining associates upon which I told him that I have

not been able to meet his other associates. For about ten-fifteen minutes Ajay engaged us in some casual conversation and told us that he has informed our remaining associates and they have some in the street behind Shadipur Metro Station. He further told us that we (he, Sanju, Sanjeet and deceased) should go there, he (Ajay) and his associates are also coming there and he would pay them their wages there. The four of us went to the street behind metro station. In the meantime, Ajay and his six associates namely, Sagar @ Chubu, Rajesh @ Ramka, Rahul Kumar, Karan @ Vicky, Ravi and Rahul Kohli who are residents of Shadi Khampur and New Ranjeet Nagar also came there. I have seen the aforesaid six associates of Ajay along with him on previous occasions and have also met them. On reaching the street Ajay and his associates surrounded them from all four sides and suddenly attacked them. Sagar @ Chubu had an open knife in his hand and Rajesh @ Ramka had an iron punch in his right hand. Ajay exhorted his associates to the effect that four of us should not be able to leave alive today and that we should be finished upon which all of them (Ajay and his six associates) started beating them. Rajesh @ Ramka caused injuries to me and Sanju with iron punch. Karan, Ravi and Rahul Kohli one by one gave beatings to me, Sanju and Sanjeet. While we were trying to run to save our lives Rahul Kohli snatched my mobile phone having number 9213189021 from his pocket. Rahul Kumar and Ajay @ Lucky caught hold of the deceased from right and left sides respectively and Sagar stabbed him (deceased) in his stomach with the open knife held by him whereupon the deceased fell on the ground. I, Sanju and Sanjeet fled from there. At about 2300 hours we again went to the street behind metro station and the police was present there at that time. Sanjeet Kumar went to the hospital in the vehicle of police. We (he and Sanju) also went to DDU Hospital where the doctors declared my friend deceased as brought dead. Ajay @ Lucky, Rahul Kumar, Sagar @ Chubu, Rahul Kohli, Ravi, Karan @ Bundy and Rajesh @ Ramka together with the intention of causing his death. We have also sustained injuries. A legal action be taken against them.”

12. A reading of the said statement would indicate that the primary grievance was against Ajay Malhotra @ Lucky, who had engaged the

deceased Mukesh, Sanju and Sanjit to work for him in connection to a marathon race organised by 'Hungama TV' and had promised to pay them wages of Rs.2,200/-, inclusive of conveyance expenses. Apparently, the wages had not been paid by Ajay Malhotra and grievance on the said account was raised by the deceased and other persons. This issue, as per the statement made by Rajnish Kumar (PW-3) had got aggravated to abuses and threats being extended by Ajay Malhotra and his companions. On 18th March, 2007 at 6 P.M., Ajay Malhotra had asked the deceased Mukesh, Sanju and Sanjit to come to a park near Satyam Cinema by about 8.30/9 P.M. As agreed, the deceased Mukesh, Sanju and Sanjit went to the said park and at about 9 P.M. Ajay Malhotra along with his six friends came to the park. There was a casual conversation for about fifteen minutes. Thereupon, Ajay Malhotra @ Lucky asked them to come to the street behind the Shadipur Metro Station. As per Exhibit PW-3/A, Ajay Malhotra and his six associates, which included the present appellant, i.e. Karan @ Vicky, came there and surrounded the deceased Mukesh, Sanju and Sanjit and suddenly attacked them. The allegation was that one Sagar @ Chubu had a knife and Rajesh an iron punch in his right hand. The present appellant-Karan and others, Rahul Kohli and Ravi had given beating to Rajnish Kumar, Sanju and Sanjeet. Rahul Kumar and Ajay Malhotra had caught hold of the deceased Mukesh and thereafter Sagar had stabbed him in his stomach. As per Exhibit PW-3/A, Rajnish Kumar claimed that he knew the present appellant from before as he had seen him along with Ajay Malhotra.

13. It may be noted that Rajnish Kumar was examined as PW-4 in the trial proceedings in the case of Ajay Malhotra and Rahul Kohli, whereas in the present trial Rajnish Kumar was examined as PW-3. Referring to the court deposition of Rajnish Kumar (PW-3), the Division Bench of this Court in *Ajay Malhotra and Another* (supra), has observed as under:-

“13. Rajnish PW-4, deposed on the lines of his earlier statement Ex.PW-4/A with variations which we shall be highlighting a little later, but at this stage would note that he could not state with clarity as to which accused gave an exhortation to kill the deceased along with Rajnish, Sanju and Sanjeet. It would be relevant to note that as per him after the deceased was stabbed Sanju, Sanjeet and he fled and went to their respective houses. He deposed that after sometime Sanjeet came to his house and informed him that the deceased had not returned to his house whereupon they again went to the place of occurrence (street behind Shadipur metro station) where the deceased was still lying unconscious. He deposed that Sanjeet Kumar went to the police station at Patel Nagar and informed the police about the murder of the deceased. He stated that he was got medically examined by the police after his statement was recorded. (Pertinently, neither MLC of Rajnish is on the record nor has any police officer deposed of Rajnish being medically examined).”

14. We have examined the deposition of Rajnish Kumar (PW-3), which was recorded on 19th May, 2011 in the present trial and find that it is more or less on identical lines as mentioned and recorded in the decision dated 3rd September, 2014, titled *Ajay Malhotra and Another* (supra). He has stated that Karan, the appellant herein, was present and had surrounded them and they started beating them. Ajay Malhotra and another boy had caught hold of Mukesh and Sagar stabbed Mukesh in his abdomen and thighs. Rajesh @ Ramka hit him with iron punch on his hip. No specific role was attributed to the present appellant-Karan, except that he had given them beating. However, in his cross-examination, Rajnish Kumar (PW-3) accepted that he had seen the appellant-Karan for the first time on the date of occurrence and came to know his name only at the police station after he had been apprehended. The quarrel had lasted for about 10-20 minutes. He deposed to the effect that he had gone to the Deen Dayal Upadhyay Hospital for medical examination, but the MLC of Rajnish Kumar (PW-3) is not placed or brought on record.

15. Sanju (PW-6) had turned hostile and had not supported the prosecution version. He had claimed that he ran away from the place after the quarrel and someone had hit him on the back. He had received injuries on the back of his neck. The deceased Mukesh, he claimed, was lying in the street in an injured condition but he had not seen as to who had caused the said injuries. In the cross-examination, he had denied that the appellant Karan was also present near Satyam Cinema, Patel Nagar and that he had assaulted and caused the injuries.

16. Sanjit Kumar (PW-22), the other eye witness had identified the present appellant as being present along with others and the one who had given beating to them. He had claimed that the appellant-Karan was one who had caught hold of his hands and had given beatings with the iron punch along with the other accused Ravi. In the cross-examination, he accepted that he did not know the appellant-Karan and had come to know about his name only on the date of the occurrence as he was being addressed as such. His statement was recorded on 10th June, 2007, i.e., three months after the occurrence. He claimed that he had also received injuries but was not medically examined.

17. When we refer to the testimony of Rajnish Kumar (PW-3), it is evident and clear that the only role attributed to the appellant-Karan was that he was present with Ajay Malhotra and several others and was one of the persons, who had given beatings to them. No other act or role has been attributed to him. Noticeably, he had stated that Rajesh @ Ramka and one another person had slapped him. PW-3 had indicated and specified particular roles to other persons with reference to the injuries by knife or iron punch. Exhibit PW-3/A also specifically records that there was a conversation between the two sides for about 10-15 minutes. Sanjit Kumar (PW-22) no doubt had tried to expand the scope and attribute aggravated

acts by the appellant-Karan by stating that he had caught hold of his hands and had given them beatings with iron punch along with accused Ravi. But this fact is not mentioned either in Exhibit PW-3/A or by Rajnish Kumar (PW-3) in his deposition. It is also noticed that the statement of Sanjit Kumar (PW-22) under Section 161 of the Code of Criminal Procedure, 1973 was recorded three months after the occurrence, i.e. on 10th June, 2007. There is no evidence in the form of MLC, etc. with regard to injuries suffered by Sanjit Kumar (PW-22). Thus, we are primarily left with the testimony of Rajnish Kumar (PW-3) that the appellant-Karan had given beating.

18. The next question, which arises for consideration is whether the appellant-Karan should be convicted with the aid of Section 149 read with Section 141, IPC. On the said aspect, we find that the issue was examined in the decision dated 3rd September, 2014 in *Ajay Malhotra and Another* (supra) and the answer given is as under:-

“21. It is apparent that under Section 149 IPC the emphasis is on common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141 IPC. The crucial question to be determined would be whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified in Section 141 IPC. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of the unlawful assembly, it cannot be said that he is not a member of the unlawful assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word ‘object’ means the purpose or design and in order to make it ‘common’ it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be

aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' appearing in Section 149 IPC has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to particular stage and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command but also according to the extent to which he/she shares the community of objects and as a consequence of this, the effect of Section 149 IPC may be different on different members of the same assembly.

22. The common object of an assembly is to be ascertained from the acts and language used by the members composing the assembly; taking into account all surrounding circumstances. The conduct adopted by the members of the assembly is an important circumstance to be kept in mind. Similarly, the arms carried by the members of the assembly and their behavior at or near the scene of incident are also important circumstances to be kept in mind. The time of forming an unlawful intent is not material. An assembly of persons may be an innocuous gathering initially but may subsequently become unlawful. In other words common object can develop during the course of an incident at the spot constanti.

23. Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part the offence must be connected immediately with the common object of the unlawful assembly of which the accused was

a member of. Even if the offence committed is not in direct prosecution of the common object of the assembly it may yet fall under Section 149 IPC if it can be shown that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is that object. If the object desired by all the members is the same the knowledge that the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind and it being merely a mental attitude no direct evidence can be available and like intention, has to be gathered from the acts which the person commits and the result thereof. The word 'knew' used in the second part of Section 149 means something more than a possibility and it cannot be made to bear the sense of 'might have been known'.

24. On a first blush, the two eye-witnesses : Rajnish PW-4 and Sanjeet Kumar PW-20 have supported each other. It is for this reason that the learned Trial Judge has accepted their version.

25. But, the learned Trial Judge has glossed over a very important circumstance. From the charge sheet as also the testimonies of the two eye-witnesses : Rajnish PW-4 and Sanjeet Kumar PW-20, it is apparent that there was tension between the deceased, Rajnish, Sanju and Sanjeet Kumar on one hand and the appellant Ajay Malhotra on the other, regarding the payment of wages. In such a situation, as held in the decisions reported as 1981 Cri. L.J. 1034 State of U.P. v. Sahai & Ors, 2003 Cri. L.J. 401 Raghunath & Ors. v. State of Haryana and JT 2010 (1) SC 24 Bodella Babul Reddy v. Public Prosecutor, HC of AP, it is not unusual for a factionist to take advantage of the occurrence and there is an incurable tendency in the factionists to rope in the innocent members of the opposite faction along with the guilty and twist and manipulate the facts with regard to the mode and manner of the occurrence so as to make their case appear true with the innocent members of the opposite faction also as participants in the occurrence. In such situations, it is the duty of the Court to microscopically scrutinize the evidence of the eye-witnesses.

26. The incident in question happened at about 09.30 P.M. on March 18, 2007. The first information regarding the incident was received by the police at around 10.50 P.M. on March 18, 2007 when an unknown person gave information about the death of the deceased upon which DD No.37A was recorded at PS Patel Nagar.

27. Rajnish PW-4 and Sanjeet Kumar PW-20 had deposed that they had fled from the place of occurrence when the deceased was stabbed by the accused. After fleeing from the place of occurrence, Rajnish and Sanjeet Kumar did not inform the police about the incident. They remained mum. (Though Rajnish and Sanjeet Kumar have claimed that Sanjeet Kumar had gone to the police station and informed about the incident the same is palpably false in view of the recording contained in DD No.37A that an unknown person has given information about the death of the deceased). The narratives noted by us hereinabove clearly show that Rajnish and Sanjeet Kumar reappeared at the place of occurrence much later at about 11.00 P.M. by which time the police had already arrived there.

28. The conduct of Rajnish and Sanjeet Kumar of not informing the police about the incident in question after fleeing from the place of occurrence, despite their friend bleeding to death, is most unnatural.

29. Why did Rajnish and Sanjeet Kumar chose to remain silent? What were they hiding?

30. There is something more than what meets the eye.

31. In the decision reported as AIR 2001 SC 2902 Kashi Ram & Ors. Vs. State of M.P., in paragraph 24 it was observed that notwithstanding that at neither three stages : (i) when witnesses of the prosecution are cross examined; (ii) when examined under Section 313 Cr.P.C.; and (iii) entitled to lead defence evidence, an accused introduces a plea, it can still be raised during the course of submissions by relying on the probabilities and circumstances emerging in the case. It may be true that as opined in the decision reported as AIR 1990 SC 1459 Vijayee Singh Vs. State of U.P. the Supreme Court cautioned the Courts by emphasizing the difference between a flimsy or fantastic plea taken by the defence which is to be rejected all together, but a reasonable plea which casts a doubt on

the prosecution version has to be taken note of. The doubt has to be that of a reasonable, astute and alert mind, arrived at after due application of mind to every relevant circumstance of the case appearing from the evidence which is reasonable.

32. Rajnish and Sanjeet Kumar have claimed that they also suffered injuries when they were attacked by the accused. Rajnish and Sanjeet Kumar were got medically examined by the police. No MLC of the two has been filed by the investigating officer. We have already noted hereinabove in a tabular form the difference in the version qua role played by different accused in the deposition of the two witnesses. We are conscious of the fact when the number of accused are large, different witnesses do tend to assign a different role to the accused, which would be natural when two persons deposed the same fact concerning various accused after a couple of months of the incident. But at the same time, in the instant case conduct of Rajnish and Sanjeet coupled with the fact that there was an issue of receiving money from Ajay Malhotra requires this Court to find out that elusive nugget of truth which the Court has to find in every criminal trial.

33. The facts probablize that in the instant case a fight ensued between deceased, Rajnish, Sanjeet Kumar and Sanju on one hand and Ajay Malhotra and his six associates viz. Rahul Kohli, Rahul Kumar, Rajesh @ Ramka, Sagar @ Chubu, Karan @ Vicky and Ravi over payment of wages. The deceased ended up losing his life in said fight. Rajnish and Sanjeet Kumar got scared that they may be held responsible for the death of deceased and thus fled from the place of occurrence. After sometime Rajnish and Sanjeet Kumar gathered their wits and returned to the place of occurrence and gave statements to the police stating therein that they (deceased, Rajnish, Sanjeet Kumar and Sanju) were attacked by the accused.

34. By looking at the evidence in the instant case we find it difficult to conclusively determine as to what is the origin of the fight. It could be that the deceased, Rajnish, Sanjeet Kumar and Sanju went to the place of the occurrence to fight with the appellant Ajay Malhotra and his associates and got outnumbered. It is also possible that

Ajay Malhotra and his associates triggered the fight. Whatever it may be, the fact of the matter is that no unlawful assembly was formed by appellants Ajay Malhotra and Rahul Kohli and their associates to murder the deceased. In this connection, it is important to note that save and except the deceased no other person from the side of the deceased (Rajnish, Sanju and Sanjeet Kumar) got injured. We also note that as per Rajnish and Sanjeet Kumar, the appellant Ajay Malhotra and Rahul Kumar had caught hold of the deceased and Sagar @ Chubu had stabbed him. No role is attributed to the remaining four accused viz. appellant Rahul Kohli, Karan @ Vicky, Ravi and Rajesh @ Ramka. **(Rajnish PW-4, claimed in his testimony in Court that it was appellant Rahul Kohli who had caught hold of the deceased but the same is clearly false in view of the facts that Rajnish had attributed the role of catching hold of the deceased to Rahul Kumar and not appellant Rahul Kohli in his earlier statement Ex.PW-4/A and Sanjeet Kumar had also attributed the role of catching hold of the deceased to Rahul Kumar and not to appellant Rahul Kohli in his testimony.)**

35. A somewhat analogous situation had arisen before the Supreme Court in the decision reported as 1993 (3) SCALE 899 Shikhar Behera & Ors. v. State of Orissa. In said case, a free fight had ensued between two groups over possession of a disputed land. It was held that where death is caused in a free fight between two groups, nature of participation, weapon used and injuries caused are factors relevant to infer common object of members of the alleged unlawful assembly. After noting that only two out of eight injuries found on the person of first deceased and one out of seven injuries found on the person of second deceased were serious it was held by the Court that the common object of the assembly was to indulge in a fight and resume possession of the land in dispute and not to murder anyone. Being relevant, we note the following observations made by the Court:-

“In such a free fight, the question of one party being aggressor may not arise. However, the members of each party would be members of the unlawful assembly with the common object to fight. But the nature of participation, the weapons used and injuries caused would also be relevant to infer the

nature of the common object. In the instant case, it is not safe to hold that the common object of the unlawful assembly was to commit murder and that everyone knew that the same would attract Section 302 IPC.”

36. In view thereof, we set aside the conviction of appellant Rahul Kohli under Section 302/148/149 IPC.”

19. We have extensively quoted from the aforesaid decision in view of the *extenso* examination of the said aspects. The evidence in the present case is identical and similar and there is no distinguishing feature, which could be pointed out by the Additional Public Prosecutor.

20. For the reasons set out in the decision dated 3rd September, 2014 in CrI.A.356/2011 titled *Ajay Malhotra and Another versus State Govt of Delhi*, with which we agree, we do not think the appellant-Karan should be convicted under Section 302 read with Section 149, IPC or under Section 148, IPC. In these circumstances, we allow the present appeal and the conviction of the appellant-Karan under Section 147/148 and Section 302 read with Section 149, IPC is set aside. The appellant-Karan will be released, unless he is required to be detained in any other case, in accordance with law.

21. The appeal is disposed of. The LCR will be sent back.

(SANJIV KHANNA)
JUDGE

(ASHUTOSH KUMAR)
JUDGE

FEBRUARY 19, 2015
VKR