

#2

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered On: 05.12.2019

CRL.L.P.534/2019

STATE

..... Petitioner

Versus

JAIVEER SINGH & ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Ravi Nayak, APP with Mr. Sunil Sharma, Additional Secretary
Law, Justice & LA, GNCTD and Mr. Manmeet Walia, Assistant Legal
Advisor, Law, Justice & LA, GNCTD with Inspector Jagdish, PS-
Special Cell
For the Respondents : None

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE I.S. MEHTA

J U D G M E N T

SIDDHARTH MRIDUL, J (ORAL)

CRL.M.A.36943/2019 (Condonation of Delay)

The present application under Section 5 of the Limitation Act, 1963 filed on behalf of the applicant/appellant seeks condonation of delay of 48 days' in filing the accompanying leave to appeal.

Having heard Mr. Ravi Nayak, learned APP for the applicant/State and for the reasons stated in the application, which are duly supported by an affidavit, the application is allowed. The delay of 40 days in filing the accompanying leave to appeal is condoned.

The application is disposed of accordingly.

CRL.L.P.534/2019

1. The present leave to appeal under Section 378(1) of the Code of Criminal Procedure, 1973, instituted on behalf of the State, assails the judgment and order dated 25.04.2019, rendered by Sh. Ajay Goel, Additional Sessions Judge, Special Judge (NDPS), Dwarka Courts, New Delhi, in Sessions Case No.441018/2016, arising out of FIR No.203/2010, Police Station- Chhawla, under Sections 307/506/34 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and Sections 25/27 of Arms Act, 1959, whereby the learned trial court, whilst convicting respondent No.1 Jaiveer @ Monu within the meaning of Section 323 IPC, acquitted him for the charges framed against him under Sections 307/506/34 IPC.

2. The facts as are necessary for the adjudication of the present leave to appeal are adumbrated in the words of learned trial court as follows:-

“1. Brief facts of the case of prosecution are that on 18.12.2010 at about 10.30 p.m. an information was received in PS Chhawla vide DD no. 55B. On receipt of the same, SI Akhilesh Bajpai reached the spot in front of house of Jai Prakash, Village Nanak Heri, New Delhi at about 10.45 p.m. along with Ct. Bhullan Tyagi where Sh. Hans Raj was found and his statement was recorded by SI Akhilesh Bajpai in which he stated that he was returning to his home from his office in his accent car No. DL 9CQ 8001 and when at about 10.15 p.m., he reached in front of house of Jai Prakash at Village Nanakheri, New Delhi, he found that one Maruti Swift car bearing no. 0707 was parked in the gali. Since,

there was no passage for his car to go further, he blew horn of his car and on this, the said Maruti Swift car was taken back. He also reversed his car and on finding no passage, he again blew horn. On this, accused Pradeep came out of his Maruti Swift Car, having a pistol of black colour in his hand and fired on him. Accused Jaiveer @ Monu and Sandeep @ Sonu, were also with accused Pradeep at that time when the accused Pradeep fired towards him. Accused Pradeep fired another round after putting his hand in his car on the conductor's side. Accused Pradeep caught hold of his neck as a result of which his gold chain was broken and the same was snatched by accused Pradeep. He also snatched his mobile phone having No. 9212428610. He came out from his car. Accused Sandeep @ Sonu and Jaiveer @ Monu gave beatings to him. He informed the police on telephone no. 100. After the incident, the accused had run away from the spot.”

3. Predicated on the above complaint of Hans Raj PW-2, the subject FIR came to be registered and SI Akhilesh Bajpai PW-9 prepared site plan Ex.PW8/B at the instance of the former.
4. It is the prosecution’s case that Hans Raj PW-2, the victim, produced a live cartridge before SI Akhilesh Bajpai PW-9, who prepared a sketch Ex.PW8/A of the same and subsequently seized it.
5. On 12.02.2011, co-accused Pradeep, who passed away during the pendency of the trial, was apprehended by SI Sanjeev Kumar Yadav along with another person namely, Vijay, who was not charged for the commission of the present offence. A separate case being FIR No.37/2011, under Section 25 Arms Act was registered by SI Sanjeev Kumar Yadav at Police Station - Crime Branch and the pistol and two live cartridges, allegedly recovered from the possession of the co-accused Pradeep were seized.
6. It is further the case of the prosecution that on 26.02.2011, co-accused Pradeep was arrested in the present case by SI Akhilesh Bajpai PW-9, who is

stated to have recorded his disclosure statement.

7. Pursuant thereto on 21.06.2011, accused Jaiveer @ Monu and co-accused Sandeep@ Sonu were arrested by SI Akhilesh Bajpai PW-9; their arrest memos are exhibited as Ex.PW9/D and Ex PW9/E, respectively.

8. During further investigation, SI Akhilesh Bajpai PW-9 is stated to have seized the photocopies of the relevant documents in case FIR No.37/2011, Police Station – Crime Branch, which were *inter alia* forwarded to the Forensic Science Laboratory for examination.

9. Eventually, the subject charge sheet was filed against accused Pradeep, Sandeep *alias* Sonu and Jaiveer *alias* Monu. On 20.09.2013 charges for the offence under Sections 307/506/34 IPC was framed against the accused Pradeep Kumar, Sandeep *alias* Sonu and Jaiveer *alias* Monu and against accused Pradeep Kumar alone for the offence under Section 27 of Arms Act.

10. It is observed that Pradeep Kumar, the accused No.1, passed away during the pendency of trial, as aforementioned, and Sandeep *alias* Sonu respondent No.2 herein has absconded and been declared as a Proclaimed Offender by the court of competent jurisdiction. In other words, the present leave to appeal is limited to a challenge to the conviction of Jaiveer *alias* Monu, only under the provisions of Section 323 IPC; and particularly and specifically to his acquittal by the trial court, for the charges framed against, him under the provisions of Section 307/506/34 IPC.

11. Having heard learned counsel appearing on behalf of the parties and examined the evidence on record, the learned trial court proceeded to determine the question as to whether Jaiveer *alias* Monu could be said to have shared a common intention in the commission of the offences under

Section 307/506 IPC, along with other accused.

12. A perusal of the evidence on record reveals that the testimony of Hans Raj PW-2 was that Pradeep Kumar had fired two bullet shots, directed at him from close quarters; but surprisingly both of them completely missed the victim. Further, the testimony of Hans Raj PW-2 reflects that he located the live cartridges, allegedly discharged from the weapon seized in other FIR No.37/2011 from the spot where the present offence was allegedly committed, whereas SI Akhilesh Bajpai PW-9, who reached at the place where the offence was committed on the same day, did not spot or recover the live or used cartridges discharged from the subject weapon, contemporaneously with the time of commission of the offence.

13. It is also pertinent to observe that SI Akhilesh Bajpai PW-9 categorically deposed that he had made efforts to trace the used cartridges at the spot on 18.12.2010, but the same could not be recovered owing to darkness. In this behalf, the learned trial court returned a finding that it is an admitted position, as apparent from the testimony of Hans Raj PW-2, that there was street light at the spot and further that there was no fog on the date of the incident. There is further no explanation on behalf of the prosecution as to why, when Hans Raj PW-2 was able to recover the subject cartridges from the spot in question on 18.12.2010 itself, he did not hand them over to SI Akhilesh Bajpai PW-9, when the latter visited at the spot along with Constable Bhullan Tyagi on the same day and waited till the next date i.e. 19.12.2010, so to do.

14. Insofar as, Jaiveer *alias* Monu is concerned, the prosecution failed to establish that he shared any common intention with the accused Pradeep Kumar, who is alleged to have discharged the subject weapon, allegedly in

the direction of Hans Raj PW-2. The learned trial court dealt with this question of fact and law in the following words:-

“33. To apply section 34 IPC apart from the fact that there should be two or more accused, two factors must be established;

- 1) Common intention and;
- 2) Participation of accused in the commission of an offence.

34. If common intention is proved but no overt act is attributed to the individual accused, section 34 will be attracted as essentially it involves the vicarious liability but if the participation of the accused in the crime is proved, and common intention is absent, section 34 IPC cannot be invoked. It requires a prearranged plan and per-supposed prior concert. Therefore, there must be prior meeting of mind. It can also be developed at the spur of moment but there must be per-arrangement or premeditated concert.

In **Mahboob Shah Vs. Emperor, AIR 1945 PC 118** it was observed that the participation in a criminal act of a group is a condition precedent in order to fix joint liability.

“Common intention implies a prearranged programme or plan, previous meeting of minds and discussion in between all the persons forming the group.”

In **Ramachander v. State of Rajasthan, 1970 Cr.L.J. 653** it was specifically observed that in absence of any cogent evidence, the common intention cannot be established. It was observed that,

“Where there is no indication of premeditation or of a prearranged plan, the mere fact that the two accused were seen at the spot scene or that the two accused fired as a result of which one of the person died and two others received simple injuries could not be held sufficient to assume common intention.”

35. From the evidence brought forward by the prosecution, it has not come on record that the offence in this case was

committed after any prearranged programme or preplanned manner. PW- 2 Sh. Hansraj had assigned the role of beating only on the part of accused Jaiveer @ Monu and Sandeep @ Sonu and it was only accused Pradeep Kumar who had fired on him. No evidence has come on record on the basis of which it can be said that there was some prearranged programme or preplan between the accused persons and the facts constitute that the incident had happened all of sudden on the accused being annoyed due to blowing horn of his car by complainant. The prosecution has not been successfully able to prove the prior meeting of mind between the accused persons to commit the offence charged. It has also not come on record on the basis of which it can be said that accused Jaiveer was having knowledge that accused Pradeep Kumar was in possession of pistol. It has also not come on record that accused Jaiveer had asked accused Pradeep Kumar to fire on complainant Sh. Hansraj. In these circumstances, and the law discussed above, it can not safely be held that accused Jaiveer @ Monu was sharing the common intention with the accused Pradeep Kumar for firing on the complainant. Therefore, in absence of attraction of section 34 IPC, accused Jaiveer @ Monu is acquitted for the offence punishable under section 307 IPC.

36. As far as the offence punishable under section 506 IPC is concerned, the only eye-witness of the incident i.e. PW-2 Sh. Hansraj has nowhere deposed about any threat extended to him by accused Jaiveer @ Monu. So, accused Jaiveer @ Monu is acquitted also for the offence punishable under section 506 IPC.”

15. Having heard learned APP appearing on behalf of the State and perused the record, we find ourselves in agreement with the finding returned on behalf of the trial court in this regard.

16. The Hon'ble Supreme Court of India, in the case of **Abdul Sayeed vs State of Madhya Pradesh**, reported as (2010) 10 SCC 256, in regard to the scope and ambit of section 34 IPC observed, as follows:-

“

49. Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the "common intention" to commit the offence. The phrase "common intention" implies a pre-arranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34 IPC is to be understood in a different sense from the "same intention" or "similar intention" or "common object". The persons having similar intention which is not the result of the pre- arranged plan cannot be held guilty of the criminal act with the aid of Section 34 IPC. (See Mohan Singh & Anr. v. State of Punjab, AIR 1963 SC 174).
50. The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this Section gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the concerned persons had shared a common intention. (vide : Krishnan & Anr. v. State of Kerala, (1996) 10 SCC 508; and Harbans Kaur & Anr. v. State of Haryana, (2005) 9 SCC 195).
51. Undoubtedly, the ingredients of Section 34, i.e., that the accused had acted in furtherance of their common intention is required to be proved specifically or by inference, in the facts and circumstances of the case. (Vide: Hamlet alias Sasi & Ors. v. State of Kerala, (2003) 10 SCC 108; Pichai alias Pichandi & Ors. v. State of Tamil Nadu, (2005) 10 SCC 505; and Bishna alias Bhiswadeb Mahato & Ors. v. State of West Bengal, (2005) 12 SCC 657).
52. In Gopi Nath @ Jhallar v. State of U.P., (2001) 6 SCC 620, this court observed as under:
- "8.....Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself,

for the whole of the criminal action -- be it that it was not overt or was only a covert act or merely an omission constituting an illegal omission. The section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a pre- concerted or pre-arranged plan or one manifested or developed at the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case."

53. In *Krishnan and Anr. v. State represented by Inspector of Police*, (2003) 7 SCC 56, this court observed that applicability of Section 34 is dependent on the facts and circumstances of each case. No hard and fast rule can be made out regarding applicability or non-applicability of Section 34.
54. In *Girija Shankar v. State of U.P.*, (2004) 3 SCC 793, it is observed that Section 34 has been enacted to elucidate the principle of joint liability of a criminal act:
"Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances." [Emphasis added] (Emphasis added)
55. In *Virendra Singh v. State of Madhya Pradesh*, JT 2010 (8) SC 319, this Court observed that:

"Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a pre-arranged and pre-meditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the pre-meditation and though the plan may be formed suddenly. In order that section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Section 34."

- 56. Section 34 can be invoked even in those cases where some of the co-accused may be acquitted provided, it can be proved either by direct evidence or inference that the accused and the others have committed an offence in pursuance of the common intention of the group. (vide: *Prabhu Babaji v. State of Bombay*, AIR 1956 SC 51).
- 57. Section 34 intends to meet a case in which it is not possible to distinguish between the criminal acts of the individual members of a party, who act in furtherance of the common intention of all the members of the party or it is not possible to prove exactly what part was played by each of them. In the absence of common intention, the criminal liability of a member of the group might differ according to the mode of the individual's participation in the act. Common intention means that each member of the group is aware of the act to be committed."

17. From a plain reading of the above extracted paragraphs of the impugned judgment, in the backdrop of the decision above extracted, it is axiomatic that the prosecution failed to establish that, insofar as Jaiveer *alias* Monu is concerned, he shared any common intention with the accused

Pradeep Kumar, who allegedly fired two shots at the complainant Hans Raj PW-2. There is not even a shred of material on record that goes to show that the accused Jaiveer *alias* Monu exhorted the accused Pradeep Kumar to fire on the complainant Hans Raj PW-2. The mandatory 'prior meeting of mind' on the part of Jaiveer *alias* Monu with the accused Pradeep Kumar, who allegedly discharged the weapon at Hans Raj PW-2, is conspicuous by its absence. In the circumstances and the ratio of the decisions referred to by the learned trial court, we are in agreement with the findings returned; that the same cannot be safely relied upon to hold Jaiveer *alias* Monu as having shared the common intention with the accused Pradeep Kumar, since deceased, for firing the subject weapon upon the complainant Hans Raj PW-2.

18. Insofar as, charge framed under Section 323 IPC is concerned, the trial court returned a finding that the prosecution had been successfully able to establish that Jaiveer *alias* Monu, the solitary respondent, had inflicted beatings on the complainant Hans Raj PW-2 and, resultantly, found him guilty for the commission of offence of simple hurt.

19. We are informed at the Bar that Jaiveer *alias* Monu has already instituted an appeal, being Criminal Appeal No.1224/2019, thereby assailing his conviction for the offence of causing simple hurt and the resultant sentence imposed upon him.

20. For the purposes of the present proceedings, instituted by the state, we may only observe that the prosecution also failed to produce any MLC qua the injuries suffered by Hans Raj PW-2, the victim in the present case.

21. It is, therefore, clarified that, nothing in this order shall be construed, as this Court having expressed any opinion in relation to the trial court's

conviction of Jaiveer *alias* Monu for the commission of offence under Section 323 IPC.

22. In view of the foregoing discussion, we do not find any error or perversity in the findings returned by the trial court, insofar as, it relates to the acquittal of Jaiveer *alias* Monu for the commission of the offences under Section 307/506/34 IPC, so as to warrant interference by this Court in the present leave to appeal.

23. The parameters within which the appellate court can examine the findings arrived at by the trial court are no longer *res integra* and are elaborated as under:-

“The Apex Court in the case of **Ghurey Lal v. State of U.P.** reported in **2008 (10) SCC 450** has laid down the following principles before granting leave to appeal against an order of acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

- i) The trial court's conclusion with regard to the facts is palpably wrong;
- ii) The trial court's decision was based on an erroneous view of law;
- iii) The trial court's judgment is likely to result in "grave miscarriage of justice";
- iv) The entire approach of the trial court in dealing with the evidence was patently illegal;
- v) The trial court's judgment was manifestly unjust and unreasonable;
- vi) The trial court has ignored the evidence or misread the material evidence or has ignored

material documents like dying declarations/
report of the Ballistic expert, etc.

vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.
3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.”

24. It is trite to state that the settled legal position, is that where two views are reasonably possible from the very same evidence, the prosecution cannot said to have proved its case beyond reasonable doubt [Ref: **T. Subramanian vs. State of Tamil Nadu** reported as (2006) 1 SCC 401]. It was further held that, when two views are possible, the appellate court should not reverse a judgment of acquittal, merely because another view was possible [Ref: **K. Prakashan vs. P.K. Surenderan**, reported as (2008) 1 SCC 258].

25. It is also the well settled legal position that, the presumption of innocence that obtains in favour of an accused person, is further strengthened by the order of acquittal passed in his favour by the trial court. It is further observed that, the appellate court is generally loath to interfere with the findings of fact recorded by the trial court, *a fortiori* because the latter has had an advantage of examining in the first person the demeanor of the witnesses. Therefore, when the trial court takes a plausible view of the facts of the case, interference by the appellate court with the judgment of acquittal is neither warranted nor justified. It is only when the conclusions arrived at by the trial court are palpably wrong and against the weight of evidence or

predicated on an erroneous view of law which would result in grave injustice, that the appellate court would interfere with the findings returned.

26. We are, therefore, of the considered view that the present leave to appeal petition is devoid of merit. The same is accordingly dismissed.

SIDDHARTH MRIDUL
(JUDGE)

I.S. MEHTA
(JUDGE)

DECEMBER 05, 2019
dn/ad/rs

नित्यमेव जयते