* HIGH COURT OF DELHI : NEW DELHI

Crl. Appeal No. 484/2009, 485/09 & 487/2009

% Judgment reserved on: **2nd February, 2010**

Judgment delivered on: **10th February, 2010**

1. **Crl. Appeal No. 484/2009**

Mohd. Arafin,
S/o Sh. Mohd. Rafiq,

Old Address-
A/35-a, DDA Flats, Inder Lok,
Delhi- 110 035

Present Address-
R/o Village Seekri Khurd,
Modi Nagar, Distt. Ghaziabad, U. P.
(at present confined at Central Tihar Jail, Delhi)

…Appellant.

Through: Mohd. Nasir and Mohd. Saleem, Adv.

Versus

The State (Delhi Admn.) Delhi.

…Respondent

Through: Mr. Arvind Kumar Gupta, APP for the State

2. **Crl. Appeal No. 485/2009**

Mohd. Mukeem
S/o Sh. Mohd. Babban,

Old Address-
A/13/99-C, DDA Flats, Inder Lok,
Delhi- 110 035

Present Address-
R/o C-9/3, Gali No. 7, Chauhan Banger,
Jamalu Ki Dairy Ke Pass, New Seelampur,
Delhi.
(at present confined at Central Tihar Jail, Delhi)

…Appellant.

Through: Mohd. Nasir and Mohd. Saleem Adv.

Versus

The State (Delhi Admn.) Delhi.

…Respondent

Through: Mr. Arvind Kumar Gupta, APP for the State

3. <u>Crl. Appeal No. 487/2009</u>

(i) Mohd. Babban
S/o Sh. Mohd. Rafiq,

(ii) Mushrafeen.
S/o Sh. Mohd. Babban.

(iii) Mohd. Nadeem.
S/o Sh. Mohd. Babban.

All resident of-
C-9/3, Gali No. 7, Chauhan Banger,
Jamalu Ki Dairy Ke Pass, New Seelampur,
Delhi.
(at present confined at Central Tihar Jail, Delhi)

…Appellants

.

Through: Mohd. Nasir and Mohd. Saleem Adv.

Versus

The State (Delhi Admn.) Delhi.

…Respondent

Through: Mr. Arvind Kumar Gupta,
APP for the State

Coram:
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

V.B.Gupta, J.

By this common judgment, above three appeals are being disposed of. Above named appellants were convicted under Section 304 (1)/34 IPC by common judgment dated 27th May, 2009 passed by Additional Sessions Judge, Delhi.

2. Vide order dated 28th May, 2009, appellants were sentenced to undergo RI for seven years apart from fine of Rs. One Lakh each and in default of payment of fine to undergo further SI for six months. Out of this cumulative fine of Rs.5 lacs, a sum of Rs. 4.75 lacs were ordered to be paid to PW-2 Smt. Parveen (widow of deceased) and children as token compensation.

3. Prosecution case in nutshell is that on 21.09.04, at around 9.00 P.M. Mohd. Tasleem (complainant) was present at his house A14/109, DDA Flats, Inder Lok. Appellant Babban came outside the house and started hurling fifty abuses and called him out by shouting that his son has been beaten up by them. Complainant tried to calm him down but Babban called on his sons and they all started beating the complainant. When PW-2 Smt. Parveen (wife of complainant), PW-3 Mohd. Anees (nephew of the complainant) and PW-9 Raju (brother of complainant) came to his rescue, they were also beaten up. Appellant Mukeem was carrying a knife with which he attacked the complainant causing injury on his right hand and left thigh. Appellant Nadeem attacked PW-3 with a knife and PW-9 tried to help him but he was also injured. Appellants Mushrafeen and Babban gave fists and leg blows to PW-10 Rahisa Begum (mother of complainant). All the injured somehow tried to save themselves by running towards close by police post. Appellants exhorted that "SALOON AAJ TO BACH GAYE LAKEIN HUM TUMHEIN JINDA NAHIN CHODENGE."

4. Meanwhile Police staff at Police Post Inder Lok also received a PCR call qua this fight. While they were in the process of leaving the spot, they found complainant and PW-3 outside the chowki who were drenched in blood. They were bleeding and were writhing in pain. Both of them were removed to Hindu Rao Hospital. Statement of complaint which is Ex. PW

27/A was recorded by PW-27 (H. C Madan Lal). MLC's of injured were collected. Appellant Babban and two other persons namely Shabnam and Rani from their side, also received injury.

5. On the basis of statement of the complainant, FIR under section 324/323/506/34 IPC was registered.

6. On 23.09.04, at around 10.30 am, complainant died due to the injuries received by him. The FIR was converted under Section 302 IPC. Death Summary was collected and body was got post mortemed. Blood sample of deceased was collected. As per post mortem report, deceased died of anti mortem sharp injuries.

7. On the same day, Mukeem and Nadeem were arrested. Their disclosure statements were recorded. On their pointing out, weapon of offence i.e. two knives were recovered. MLC of other injured were collected. Scaled site plan was prepared and seized exhibits were sent for forensic science lab. Appellant Arafin who is brother of Babban and whose involvement was later on disclosed in the supplementary statements was also made as on accused. After conclusion of investigation charge sheet was filed.

8. It is contended by learned counsel for the appellants that there are material contradictions and serious infirmities in the prosecution case. The

evidence of prosecution witnesses i.e. PW-2, PW-3, PW-9, PW-10 and PW-13 clearly shows that appellants have been falsely implicated in this case by the family of the deceased. All the eye witnesses belonged to one family. No independent witness has been examined by the prosecution in this case with regard to the main incident or with regard to the alleged recovery of knife, though as per prosecution case public witnesses were available at that time. MLC of the appellants has not been placed on record by the prosecution, though it has been mentioned in the report under Section 173 Cr. P. C.

9. Other contention is that, name of Arafin is not mentioned in the FIR Ex. PW 1/A. This clearly shows that the genesis of the prosecution case is not true and is based upon falsehood. Entire story of prosecution is concocted one, as from the very beginning if the statement of the deceased as per prosecution case is to be believed, there is no mention of the name of Arafin. There is no exhortation in the entire statement of the deceased, who died next day after giving his statement. If the statement of deceased is admissible as per law and his statement is read in its entirety, then no case is made out against the appellants. As per his statement, there is no common intention or prior meeting of mind. There has been improvement by the witnesses in the court on the point of exhortation and introducing of

a new story that, Arafin overpowered the deceased from his back. Thus Section 34 IPC is not at all attracted in this case.

10. Lastly, it is contended that from the facts and circumstances of the case, no case is made out under Section 304 (1) of IPC against the appellants. Trial court in the impugned judgment also held that;

> "There was no knowledge and intention to inflict the said injury, which resulted into death of the deceased."

11. This clearly shows that no case is made out under Section 304 (1) IPC.

12. On the other hand, it is contended by learned counsel for the State that a fight has taken place on the day of incident. Appellants in their statement under Section 313 Cr. P. C. have admitted that there was a fight between the deceased/prosecution witnesses and a group of Madrasis and injuries have been sustained by deceased in the fight which took place with some Madrasis. But, appellants have not produced any evidence to show that there was a fight between the injured and the Madrasis.

13. As far as eye witnesses are concerned, it is contended by learned counsel for the State that though eye witnesses are relatives of the deceased but there is no bar that relatives of victim cannot appear as a witness. All the eye witnesses have fully supported the prosecution case.

14. Another contention is that though the name of Arafin has come in the supplementary statement later on, but all the prosecution witnesses have clearly mentioned about his role in causing injuries to the injured. Since, all the appellants were present at the spot, the common intention was there and as such offence under Section 34 IPC is clearly made out.

15. As far as ingredient of Section 304 (1) IPC are concerned, it is contended by learned APP that as per statement of Doctor, these injuries were sufficient enough to cause death. Hence, there is no ambiguity and infirmity in the impugned judgment.

16. Present case was registered on the statement of Mohd. Tasleem (since deceased). His statement is Ex. PW 27/A which was given to PW-27 on 21st September, 2004. This statement was given within couple of hours of the incident. Complainant died on 23rd September, 2004 in the hospital. Thus, statement Ex. PW 27/A is admissible by virtue of Section 32 of the Indian Evidence Act, 1872 and is to be treated as a dying declaration. Relevant portion of this Section read as under;

> **"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.-**Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an

> amount of delay or expenses which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases;-
>
> **(1)When it relates to cause of death-** When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case in which the cause of that person's death comes into question.
>
> Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.
>
> **x x xx x x x x x x x x**

17. As per averment made in the dying declaration Ex. PW 27/A, the initiation of quarrel was a verbal duel between Babban and the complainant. It was on the issue that, complainant and his family had beaten up son of Appellant Babban. When the passions rose, Babban called on his sons and that verbal duel turned into a physical assault and all of them started beating the complainant. PW-2, PW-3 and PW-9 tried to intervene but appellants even started beating them. Mukeem was having a knife in his hand with which he attacked the complainant. The complainant received injuries on his right hand and left thigh. Beside this, Nadeem attacked PW-3 at his back with knife. In order to save his brother, PW-9

came and in the process he sustained injuries on his right elbow. Mushrafeen and Babban gave fists and leg blows to complainant's mother-PW-10. All the injured somehow tried to save themselves by running towards close by police post and appellants exhorted that "SALOON AAJ TO BACH GAYE LAKEIN HUM TUMHEIN JINDA NAHIN CHODENGE.". This version of the complainant mentioned in his dying declaration Ex. PW 27/A, has been corroborated by other eye witnesses i.e. PW-2, PW-3, PW-9, PW-10 and PW-13.

18. Though there are certain contradictions in the statements of the prosecution witnesses but the question to be seen is as to what is the affect of these contradictions and whether these go to the root of the prosecution case or not and how appraisal of evidence is to be done. In ***State of U. P. Vs. M. K. Anthony*** **AIR 1985 SC 48-** the court observed;

> "While appreciating the evidence of a witness the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, draw backs and infirmities, pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matter not touching the core of the case,

> hyper technical approach by taking sentence torn out of context here and there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter, would not ordinarily permit rejection of evidence as a whole. In the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor or evidence given by the witness, the appellate court which had not this benefit will attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witness may differ in some details unrelated to the main incident because power of observation, retention, and reproduction differ with individuals. Cross-examination is an unequal dual between the rustic and refined lawyer."

19. In ***Bharuda Broginbhai Harjibhai Vs. State of Gujrat,*** **AIR 1983, S.C. 753-** it was observed that over much importance cannot be attached to minor discrepancies and the reasons are obvious;

> 1. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video type is replayed on the mental screen.
> 2. Ordinarily it so happens that a witness is over taken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. Thus mental faculties, therefore, cannot be expected to be attuned to absorb the details.
> 3. The powers or observations differ from person to person, what one may notice another may not. An

object or movement might emboss image of one person's mind, whereas it might go unnoticed on the part of another.

4. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

5. In regard to exact time of an incident or the time duration of an occurrence, usually, people make their estimates by guess work on spur of moment at the time of interrogation and one cannot expect peoples make very precise or reliable estimates in such matters. Again, it depends upon the time-sense of individuals which varies from person to person.

6. Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

7. A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details of imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him perhaps it is a sort of psychological moment."

20. In the present case, the contradictions are of minor nature and on all the material points there is corroboration by the prosecution witnesses Though all eye witnesses in this case are related to each other, but the mere

fact that they are relatives of the deceased, will not mean that their evidence should be discarded. In ***State of U. P. Vs. Atul Singh etc. AIR 2009 SC 2713,*** it was observed;

> **"**Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is an allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person".

21. Hence, there is no reason to discard the statement of the eye witnesses with regard to alleged incident which has taken place as per the FIR. As per defence of the Appellants also, they admits that on the given date and time, a fight has taken place. But the case of the appellants is that fight took place between complainant/injured and a group of Madrasis. All the appellants in their statement under Section 313 Cr. P. C, have taken a common defence that they are innocent. Their version is,

> "that actually it was Tasleem who worked as washerman at Dhobighat situated at M Block Shastri

Nagar, Delhi, where Madrasis reside on the other side of Dhobighat at JJ Colony. On 21.9.04 Madrasis attacked Tasleem and his companions to take revenge as Tasleem and his companion had given beatings to Madrasis about one week prior to 21.9.2004 and Tasleem, Parveen, Raju, Anees, Ilyas, Hameed and others had attacked on Babban and his family members under the impression that Babban and his family members had instigated the Madrasis to beat Tasleem and his companions. Babban, Mushafreen, Fidos, Rani, Shabnam, Mukeem etc. received injuries at the hand of Tasleem and his companions in this incident. Babban and his family members went to PP Inderlok from where they were removed to hospital and treated there, but later on they were falsely implicated in this case".

22. However, to PW-13, different defence was put as a suggestion was given,

"that his father and other family members entered in the house of Babban and gave beating to inmates including ladies".

23. This version is entirely different from the defence taken in statements under Section 313 Cr. P. C.

24. Appellants have not led any defence evidence in support of their version that on the day of incident Madrasis had attacked the complainant and his companions to take revenge, as they had given beatings to Madrasis about one week prior to 21.9.2004. Appellants have not produced any evidence nor examined any witnesses of the locality to prove their defence about the incident which took place one week prior to 21st September, 2009, in which complainant and his companions gave beating to Madrasis. Had such an incident taken place as alleged by the appellants, then they could have summoned the police records to prove their version. There is nothing on record to show that any such incident between the complainant/his companions and Madrasis ever took place.

25. Thus, from the entire evidence on record it is stand proved beyond any shadow of doubt that on 21st September, 2004 the incident as reported by complainant in his complaint Ex. PW 27/A has taken place, in which he sustained fatal injuries.

26. As far as role of Arafin is concerned, though the complainant was severely injured but he narrated the entire incident to PW-27. Complainant specifically attributed the role of each of the appellant in his statement Ex. PW 27/A. There is no mention of the name of Arafin in Ex. PW 27/A nor any role has been attributed to him. Name of Arafin was introduced later on in the statement under Section 161 Cr. P. C. of the other witnesses. Since complainant was in his full senses when he gave statement Ex. PW 27/A and has specifically mentioned the role of other appellants, there was no reason why he should have omitted the name and role of Arafin. This shows that name of Arafin was introduced later on. Under these circumstances, no reliance can be placed on the statement of other eye witnesses, qua appellant Arafin.

27. Now coming to the question as to whether appellants have been rightly convicted under section 304 (1) IPC, or not. This Section read as under:

> **"Section 304 . Punishment of culpable homicide not amounting to murder:**
>
> Whoever commits culpable homicide not amounting murder shall be punished with (imprisonment of life), or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of

> causing such bodily injury as is likely to cause death;
>
> or with imprisonment of either description for a term which may extend to ten years, or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death."

28. The first paragraph of this section is normally referred to as Part I whereas the second paragraph as Part II. Part I applies where the accused causes bodily injury with intention to cause death; or with intention to cause such bodily injury as is likely to cause death. Part II, on the other hand, comes into play when death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death."

29. In ***Afrhim Sheikh and Others Vs. State of West Bengal; (AIR 1964, Supreme Court, 1263)*** Supreme Court considered the question of legality and validity of a conviction under section 304, Part II read with section 34. It observed:

> **"**The second part no doubt speaks of knowledge and does not refer to intention which has been segregated in the first part. But knowledge is the knowledge of the likelihood of death. Can it be said that when three or four persons start beating a man with heavy lathis each hitting his blow with the common intention of severely

> beating him and each possessing the knowledge that death was the likely result of the beating, that the requirements of section 304, Part II are not satisfied in the case of each of them? If it could be said that knowledge of this type was possible in the case of each one of the assailants, there is no reason why section 304, Part II cannot be read with section 34. The common intention is with regard to the criminal act, i.e. the act of beating. If the result of the beating is the death of the victim and each of the assailants possesses the knowledge that death is the likely consequence of the criminal act, i.e. beating, there is no reason why section 34 or section 35 should not be read with the second part of section 304 to make each liable individually.

30. In the case in hand though the injuries inflicted were on the non vital parts of the body of the complainant but as per post mortem report the cause of death was "hemorrhage and shock consequent to injuries."

31. PW-19 Dr. C. B. Dabas, who conducted the post mortem examination on the body of deceased Tasleem, has stated that injury nos. 4, 5 and 6 are collectively sufficient to cause death in ordinary course of nature and were caused by sharp edged weapon. In cross-examination, he stated that the patient could not have survived despite best treatment.

32. Since injuries were caused on the non vital part of the body, but the act of the appellants in causing the injury was done with the knowledge that

it is likely to cause death but without any intention to cause death. Thus, it squarely falls under Section 304 part II of the IPC.

33. Now coming to common intention, section 34 of IPC read 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."

34. The principal feature of this section is the element of active participation in the commission of the criminal act. In ***Devi Lal and another Vs. The State of Rajasthan; AIR 1971, Supreme Court, 144;*** the Supreme Court observed;

> "Under section 34 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. The words "in furtherance of the common intention of all" are a most essential part of section 34 of the Indian Penal Code. It is common intention to commit the crime actually committed. This common intention is anterior in time to the commission of the crime. Common intention means a pre-arranged plan. On the other hand, section 149 of the Indian Penal Code speaks of an offence being committed by any member of an unlawful assembly in prosecution of the common object of that assembly. The distinction between "common intention" under section 34 and

> "common object" under section 149 is of vital importance".

35. In the present case, Appellant Babban came outside the house of the deceased along with other Appellants. Mukeem and Nadeem were armed with knives while Babban hurled filthy abuses and called the complainant outside, after which they started bearing him up. Mukeem had struck knife on the right hand and left thigh of the complainant. Appellants did not happen to gather outside the house of the complainant by chance. Mukeem and Nadeem were already in possession of knives, which they made use of while inflicting injuries on the complainant and his family. The entire fight was a planned one and each of the appellants was aware of it and each one of them participated in the commission of offence.

36. In ***Bengai Mandal @ Bengai Mandal vs State of Bihar; JT 2010 (1) SC 49;*** the court observed;

> "The position with regard to Section 34 IPC is crystal clear. The existence of common intention is a question of fact. Since intention is a state of mind, it is therefore, very difficult, if not impossible, to get or procure direct proof of common intention. Therefore, Courts, in most cases, have to infer the intention from the act(s) or conduct of the accused or other relevant circumstances of the case."

37. In ***Vaijayanti Vs. State of Maharashtra (2005) 13 SCC 134;*** the court observed;

> "Section 34 of the Indian Penal Code envisages that "when a criminal act is done by several persons in furtherance of the common intention of, each of such persons is liable for that act, in the same manner as if it were done by him alone". The underlying principle behind the said provision is joint liability of persons in doing of a criminal act which must have found in the existence of common intention of enmity in the acts in committing the criminal act in furtherance thereof. The law in this behalf is no longer res integra. There need not be a positive overt act on the part of the persons concerned. Even an omission on his part to do something may attract the said provision. But it is beyond any cavil of doubt that the question must be answered having regard to the fact situation obtaining in each case".

38. Accordingly, case of prosecution against Appellants Mukeem, Babban, Mushrafeen and Nadeem stands proved under Section 304 (II)/34 of the Indian Penal Code and not under Section 304 (I)/34 of IPC. The impugned judgment of the trial court stand modified to that extent. The sentences as awarded by the trial court, are however maintained.

39. As far as appellant Arafin is concerned, no case is made out against him. His conviction and sentence are set aside. He stands acquitted. His surety and bail bonds stand discharged. Appellant Arafin be released forthwith, if not required in any other case.

41. All these appeals stand disposed of accordingly.

42. Trial court record be sent back.

43. Copy of this judgment be supplied to the appellants in jail.

10th February, 2010 **V.B.Gupta, J.**
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