SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Kuldeep & Ors. Vs.state & Ors

Kuldeep & Ors. Vs.state & Ors

SooperKanoon Citation : sooperkanoon.com/1226769

Court : Delhi

Decided On : Nov-19-2019

Appellant : Kuldeep & Ors.

Respondent : State & Ors

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI * Judgment Reserved on :

21. 10.2019 Date of Decision :

19. 11.2019 IN THE MATTER OF + CRL.A. 28/2013 KULDEEP & ORS. ..... Appellants Through: Mohd. Shamikh, Advocate. STATE CRL.A. 131/2013 DEVINDER STATE versus Through: Ms.Manjeet Arya, APP for State. ..... Respondent AND Through: Mohd. Shamikh, Advocate. ..... Appellant versus Through: Ms.Manjeet Arya, APP for State. ..... Respondent CORAM: HON'BLE MR. JUSTICE MANOJ KUMAR OHRI1 By way of the present appeals, the appellants have assailed the common judgment on conviction dated 08.10.2012 and order on sentence dated 19.12.2012 in FIR No.6
under Sections 3
IPC and Sections 25/27/
of the Arms Act, P.S. Nand Nagri whereby all the appellants were convicted under Sections 3
IPC and were sentenced to RI for four years along with fine of Rs.25,000/-, in default whereof to undergo RI for one year. It was also directed that the fine

imposed i.e., CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 1 of 18 Rs.1,00,000/- (in total) shall be payable to the injured/complainant after the expiry of the period of appeal.

2. As both appeals assail a common judgment, they are taken up together for hearing and are disposed of vide this common judgment.

3. For the sake of felicity, brief facts of the case, as noted by the trial court, are reproduced as under:-

"1. the prosecution case is that on 13.8.2007 on receipt of DD No.33 SI Rajni Kant along with Const. Rakesh reached the spot i.e. Magnum Coaching Centre, 33 ft road. Harsh Vihar where injured Vinay was found lying unconscious; that SI Ajay Negi also reached at the spot and sent the injured to GTB Hospital through PCR Van. He left Const. Rakesh at the spot and he went to GTB Hospital where he obtained the MLC of injured who was declared fit for statement. In his statement injured Vinay stated that he was working as a driver of the private vehicle of Grijesh Singh, Sub Inspector of Delhi Police. That on 12.08.07 at about 11.30 PM, he reached his house i.e C-2/76, Harsh Vihar, Delhi and after taking meals went to the terrace for sleeping. At-about 12.30 night, he received a telephone call from Bunty from his mobile No.9211544503. After some time he also received a telephone call from Kuldeep from his mobile No.9990090250 and both of them called him at Devinder's dairy at 33 foota road, Harsh Vihar. Since he knew Bunty and Kuldeep, he reached there within 10 minutes where Bunty, Kuldeep, Amit Sharma (who was Dinesh Giri's friend), Devinder and one other boy were present and were consuming liquor. They offered him liquor. He refused to take liquor as he had to go early the next morning. At this Amit (since expired), Bunty and the unknown boy started abusing and threatening him saying that "tu hamare gang mein shaamil ho ja' (you join our gang). When he refused, Devinder and Kuldeep instigated them by saying that "Iska dimag kharab ho gaya hai, oose theek kerna padega" (He has gone out of his mind, he has to be set right). At this Amit took out a CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 2 of 18 fled from country made pistol and threatened him that "Jo hamara sath nahi dega oose apni jaan se hath dhona padega" (anyone who is not with us will have to pay with his life) and

thereafter other four persons also pressurized him to join them. At his refusal, Amit Sharma cuffed him and other four persons caught hold of him and Amit Sharma fired a shot at his chest from the katta with an intention to kill him. Thereafter there was a power cut and it started raining also, all the accused persons caught hold of him and threw him outside the dairy on the road and the spot. When he regained consciousness, he called up at No.100 from his mobile phone. PCR van came there and rushed him to GTB hospital. He wanted that legal action be initiated against them. SI Rajni Kant seized the clothes of injured Vinay, summoned the crime team, prepared ruqqa and gave it to Const. Rakesh for registration of FIR. Thereafter further investigation was marked to SI Ajay Singh Negi. Photographs of the spot were taken, blood, earth control and bloodstained earth were lifted from the spot. Thereafter accused Kuldeep and Devinder were arrested and their disclosure statements were recorded. On 15.8.2007, accused Bunty @ Dharmender was arrested, his disclosure statement was recorded and pointing out memo was prepared at his instance. On 17.8.2007, accused Suresh surrendered before the court of Ld.M.M. and he was arrested in the present case. His TIP was got conducted. On 15.9.2007, accused Amit was arrested, his disclosure statement was recorded. One desi Katta along with two live cartridges and its cover were recovered at the instance of accused Amit and same were seized. After completing other necessary formalities charge sheet was filed u/s 3
IPC and 25/27/
Arms Act. 4. After completing the investigation, charge-sheet was filed against the present appellants and another co-accused, Amit Sharma. Charge under Sections 3
IPC was framed against all the accused persons. A separate charge for the offence under Section 25 of the Arms Act was CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 3 of 18 also framed against co-accused Amit Sharma. The accused persons pleaded not guilty and claimed trial. During the trial, accused Amit Sharma expired and the proceedings qua him stood abated.

5. The prosecution had examined twenty one witnesses. Dr. Lawish Agarwal (PW18) proved the MLC Ex. PW18/A of the injured. Dr. Devender Kumar (PW19) proved the nature of injuries of the injured as grievous. The prosecution, in support of its case, examined Vinay Kumar, the injured as PW1, Mahender Singh, father of

the injured as PW3, Rajesh Kumar, an independent witness, as PW2 and Sunil Tyagi, the dairy owner as PW5. MATERIAL WITNESSES6 Vinay Kumar (PW-1), the injured, was examined on 24.03.2008 as PW-1. He deposed that he was working as a private driver for one Grijesh Singh. On 12.08.07, after finishing his job, he had returned to his home when he received a call from Kuldeep and Dharmender @ Bunty who told him that Devinder was calling him. The said call was received by him at about 12:30 am at midnight. As he already knew Kuldeep and Dharmender @ Bunty, he went to meet them at Tyagi Dairy. At the Dairy, he met Devinder, Kuldeep, Bunty and Amit and one more person whom he did not know at that time (later identified as Suresh). He identified all the accused persons in Court. He further deposed that when he reached the Dairy, all the accused persons were consuming liquor and they asked him to join them. When he refused, the accused Bunty and Kuldeep told him "DARU PEE LEY TERA JYADA DIMAAG KHARAB HO RAHA HAI. Thereafter, the complainant was told that if he did not CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 4 of 18 drink, they would kill him. At that time, accused Amit Sharma took out a katta (country made pistol) and asked the injured to join their gang else he would be killed. While all the appellants caught hold of him, accused Amit Sharma fired a shot from his katta which hit the complainant on his chest due to which he fell down. Thereafter, the appellants threw him outside the Dairy. When the complainant regained consciousness, he called up police at 100 number from his mobile phone. The police took him to the hospital where his statement was recorded. He further deposed that as he was not in a position to sign the statement, his thumb impression was taken at point A. The statement was exhibited as Ex.PW1/1. He deposed that he remained in the hospital for

days. Thereafter he had gone for the TIP proceedings at Tihar Jail where he identified the appellant, Suresh. He also identified the recovered katta as Ex. P-1, the live cartridges as Ex. P-2, the empty shells of cartridges as Ex.P-3 and P-4 and the piece of cloth as Ex.P-5. The injured was further examined on 05.02.09. He again identified all the appellants and also identified his clothes which were seized during the investigation. The shirt and baniyan were exhibited as Ex. P-6 & P-7 respectively.

7. On the same day i.e., on 05.02.2009, the witness was cross- examined. During cross-examination, he stated that when he reached Tyagi Dairy, the appellants were present but it was dark as there was no electricity. He deposed that even prior to the incident, he and the appellants were known to each other. However, he turned hostile on the point of identification of the appellant Suresh and giving any statement to the police or the doctor at the time of MLC. He also stated that prior to CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 5 of 18 the TIP proceedings, the police officials had shown the photograph of appellant- Suresh to him. He further stated that his statement (Ex. PW1/1) was not read over to him and his thumb impression on it was taken by the police officials while he was still unconscious. He further stated that he had identified the appellants on the previous date at the asking of the police officials. He was cross-examined by the learned prosecutor however, he denied all the suggestions.

8. Rajesh Kumar, an independent witness, was examined as PW2. He was a public witness and joined the investigation at the time of recovery of katta at the instance of Amit Sharma.

9. Mahender Singh, father of the injured, was examined as PW3. He deposed that in the midnight of 12/13.08.2007, he received an information that mere ladke Vinay ko kuchh ladkon ne 33 Foota Road, Harsh Vihar, mein goli maar di. On receiving this information he reached GTB Hospital. He deposed that in his presence, the statement of his son was recorded by SI Rajni Kant, whereafter his son put his thumb impression on the same and he also signed it. He identified the statement which was already exhibited as Ex. PW1/1. He also identified his signatures at point B and thumb impression of his son at point A on the said statement. During cross-examination, he denied the suggestion that the statement of his son was not recorded in his presence and that he signed the statement in the police station later on.

10. Sunil Tyagi, the dairy owner, was examined as PW5. He initially did not support the prosecution case, however, on being cross-examined by the learned prosecutor, he admitted that the appellant Devinder was CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 6 of 18 working in his dairy which was situated at 33

foota road, Gali No.12, Harsh Vihar. He admitted that Devinder often used to stay and sleep in his dairy. He also admitted that on 12.08.2007 i.e., the night of the incident, Devinder telephonically informed him that since it was raining, he would be staying at the dairy instead of going to his village. He admitted that on the night of the incident, Devinder had stayed at the dairy. POLICE AND OTHER WITNESSES11 The prosecution had also examined SI E.S. Yadav (member of the crime team) as PW9. He stated that on receiving a call from the PCR, he reached the spot i.e., House No.C-2/371, Gali No.12, Harsh Vihar where he met SI Rajni Kant, the Investigating Officer. He also saw the blood which was lying on the floor of the room.

12. Const. Mahavir Singh (PW7) had accompanied SI E.S. Yadav to the spot. He took the photographs of the crime scene and the same were exhibited as Ex. PW7/A to PW7/K and negatives thereof as Ex. PW7/L to Ex. PW7/U.

13. HC Rakesh Kumar (PW11) had accompanied SI Rajni Kant to the spot where he met the injured. He deposed that the injured had sustained an injury on the right side of his chest. The PCR van took the injured to the hospital. He had witnessed the proceedings conducted at the spot. He further deposed that at about 03:15 am, he took the rukka and got the FIR registered. CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 7 of 18 14. SI Rajni Kant was examined as PW-20. He deposed that after the injured was declared fit by the doctor, the statement of the injured was recorded in the presence of his father. The statement of the injured was read over to the injured and his thumb impression was taken at point A and signature of his father was taken at point B on it. He also deposed that seizure memos were prepared and the crime team was called at the spot. He further deposed that rukka (Ex. PW20/A) was prepared in his handwriting.

15. To prove the mobile phone and call detail records, the prosecution examined Manish Kumar Singh, Assistant Nodal Officer, Tata Tele Services as PW-16. He proved the call detail records (Ex. PW16/A) with regard to mobile number 9211544503 which belonged to the appellant, Dharmender. He also placed on record the certificate (Ex. PW16/B) in compliance of Section 65B of the Indian Evidence Act. In his cross-examination, the witness stated that the aforesaid

mobile connection was issued in the name of Naresh Sharma. He also exhibited the copy of CAF (Customer Application Form) along with photocopy of the identity proof of the customer as Ex. PW16/DA. The aforesaid mobile number was in the name of Naresh Sharma S/o Mahesh Sharma.

16. I have heard Mohd. Shamikh, learned counsel for the appellants and Ms. Manjeet Arya, learned APP for the State. I have also gone through the entire case record. ANALYSIS17 The injured, Vinay Kumar during his examination in chief completely supported the prosecution case. He not only identified all the CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 8 of 18 appellants but also described the specific roles played by them. A perusal of the record shows that the injured was initially examined on 24.03.2008 and was recalled for further examination on 05.02.2009. He was cross examined on that day, when he turned hostile on the point of identification of the appellant Suresh and disclosing the names of the appellants to the Investigating Officer and the Doctor. It is apparent that the cross examination took place after about 10 months and 11 days. When a witness turns hostile in the cross examination which takes place after a lapse of considerable time from the examination-in-chief, an inference arises that the witness has been won over. The testimony of a hostile witness does not get completely wiped out. If a part of the testimony of such a witness is reliable, the same can be used in the aid of the prosecution case. In Khujji @ Surendra Tiwari vs The State of Madhya Pradesh reported as (1991) 3 SCC627 Supreme Court held as under:-

"6..But counsel for the State is right when he submits that the evidence of a witness, declared hostile, is not wholly effaced from the record and that part of the evidence which is otherwise acceptable can be acted upon. It seems to be well settled by the decisions of this Court - Bhagwan Singh v. State of Haryana, (1976) 1 SCC389 Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC233and Syad Akbar v. State of Karnataka (1980) 1 SCC30that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof. CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 9 of 18 7The examination-in-

chief of this witness was recorded on November 16, 1976 when he identified all the assailants by name. He stated that he knew the six accused persons in court. His cross examination commenced on December 15, 1978.. The High Court came to the conclusion and, in our opinion rightly, that during the one month period that elapsed since the recording of his examination-in-chief something transpired which made him shift his evidence on the question of identity to help the appellant. We are satisfied on a reading of his entire evidence that his statement in cross-examination on the question of identity of the appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. 18. As noted above, the injured was cross-examined after nearly 10 months. His testimony so far as identification of the appellants and disclosure of their names and roles finds support from the testimony of Sunil Tyagi, the Dairy owner. Mahender Singh, father of the injured testified that the statement of the injured where names and roles of all the appellants were given was recorded by SI Rajni Kant. As such, the version given by the injured during his cross-examination is unbelievable. In view of the testimony recorded in the examination-in- chief of the injured, the positive identification of the appellants by the injured in court during his examination-in-chief, the testimony of Mahender Singh and Sunil Tyagi, it stands proved that all the appellants were present at Tyagi Dairy at the time of the incident. The injury suffered by Vinay Kumar is duly corroborated by the MLC as well as the FSL report.

19. Learned counsel for the appellants has contended that the first information of the crime was recorded in the form of DD No.33 CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 10 of 18 (Ex.PW5/A). He contended that as per the said DD entry, the following information was recorded "motor cycle wale goli maar ker bhag gaye". The said information was received from mobile number 9971450915 which belonged to the injured. He contended that though the initial information was about being shot by people who were on a motorcycle but the case set up by the prosecution was not in line with the above information. I do not find any merit in the contention of learned counsel for the appellants that the information recorded vide DD No.33 and the subsequent prosecution case were different. Merely non-mentioning of the motorcycle in the rukka or in the deposition will not erode the credibility of the testimony of the injured. The testimony of the injured that he

reached at the spot after receiving a call from Dharmender is duly corroborated by the call detail records which have been proved on record by Manish Kumar Singh, the Nodal Officer. As per the call detail records, an outgoing call was made on 13.08.2007 for about 48 seconds from mobile number 9211544503 to mobile number 9971450915. The appellants have not denied that the mobile number 9971450915 belonged to the injured. The mobile number 9211544503 belonged to one Naresh Sharma. The trial court noted that Naresh Sharma is the real brother of appellant, Dharmender Sharma S/o Mahesh Sharma. The presence of Devinder at the Dairy on the night of the incident was duly corroborated by the statement of Sunil Tyagi, the Dairy owner. He had deposed that on the date of the incident, he received a call from Devinder informing him that he would be staying at the Dairy itself. The presence of the other appellants was duly stated by the injured in his examination-in- chief. The prosecution has been able to prove that the incident took place CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 11 of 18 at 33 foota road, Harsh Vihar. The first information recorded vide DD No.33 also mentioned that the occurrence of the incident took place at 33 foota road, Harsh Vihar.

20. Learned counsel for the appellants further contented that though the injured was stated to be conscious and the appellants were already known to him, yet their names were neither mentioned in DD No.33 nor in the MLC. He, thus, contended that the appellants have been falsely implicated. The injured had suffered a gunshot injury on his chest because of which he remained hospitalized for

days. Even otherwise, the primary duty of the doctor is to treat the patient and not to find out as to who had caused the injury. This Court in Kamaljeet Singh vs. State reported as 2019 SCC OnLine Del 8282 referred to the following observations of the Supreme Court in Pattipati Venkaiah vs. State of A.P. reported as (1985) 4 SCC80which were also relied in Bhargavan and Ors. vs. State of Kerala reported as (2004) 12 SCC414and Pardeep Khatri vs. State reported as (2014) SCC Online Del 2373:-

"32. a doctor is not concerned as to who committed the offence because his primary effort is to save the life of the injured and thus it is irrelevant that the person who claims to be an eye witness and has brought the injured to the

hospital has not disclosed the name of the assailant to the doctor.

21. Learned counsel for the appellants next contended that the injury suffered by the injured was caused by the gunshot fired by the accused, Amit Sharma who is no more. He submitted that the present appellants did not share common intention with Amit Sharma. In support of his submission he has relied upon the decisions rendered in Balwantbhai B. CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 12 of 18 Patel vs. State of Gujarat and Anr. reported as AIR 2010 SC1158 Inderjit vs. The State. reported as 1986 CRI. L.J.

966 and Raj Kumar vs. State reported as 89 (2001) DLT237(DB).

22. A common intention can develop on the spot or during the commission of the offence. It can develop even at the spur of the moment. It has been proved by the testimony of the injured that when the appellants and accused Amit Sharma were consuming liquor, he was asked to join them. On his refusal to do so, appellants Kuldeep and Dharmender @ Bunty got annoyed and persisted. All the accused persons threatened the injured to join their gang, else they would kill him. When accused Amit Sharma took out the katta and asked the injured to join their gang failing which he would be killed, the appellants, even after seeing the katta in the hands of accused Amit Sharma, caught hold of the injured, thus, prevented him from escaping. Accused Amit Sharma, thereafter, fired a shot which hit on the chest of the injured. The appellants thereafter caught hold of the injured and threw him outside the Dairy. The above sequence of events show that the present appellants shared the common intention with their co-accused Amit Sharma. Even after seeing the katta in the hands of accused Amit Sharma, the appellants caught hold of the injured.

23. In Suresh vs. State of U.P. reported as (2001) 3 SCC673 it was held as under:-

"37. However, in view of the importance of the matter, in so far as the interpretation of Section 34 of the Indian Penal Code is concerned, we have chosen to express our views in the light of consistent legal approach on the subject throughout CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 13 of 18 the period

of judicial pronouncements. For the applicability of Section 34 to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that no overt act is necessary to attract the applicability of Section 34 for a co- accused who is otherwise proved to be sharing common intention with the ultimate act done by any one of the accused sharing such intention.

38. Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

39. The dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as the Code) is the element of participation in absence resulting in the ultimate criminal act. The act referred to in later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The Section does not envisage the CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 14 of 18 separate act by all the accused persons for becoming responsible the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous. for 40. Participation in the crime in furtherance of

the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word act used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown to not have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold the accused must have preconceived result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in Satrughan Patar & Ors. v. Emperor: AIR1919 Pat 111 held that it is only when a court with some certainty hold that a particular accused must have pre-conceived or pre-meditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.

41. In Barendra Kumar Ghosh vs. King Emperor: AIR 1925 PC1the Judicial Committee dealt with the scope of Section 34 dealing with the acts done in furtherance of the common intention, making all equally liable for the results of all the acts of others. It was observed: that .....The words of S.34 are not to be eviscerated by reading them in this exceedingly limited sense. By S.33 a criminal act in S. 34 includes a series of acts and, further, act includes omissions to act, for example, an omission to interfere in order to prevent CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 15 of 18 a murder being done before ones very eyes. By S. 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things they also serve who only stand and wait. By S. 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. S. 34 deals with the doing of separate acts, similar of diverse, by several persons; if all are done in furtherance of a common intention,

each person is liable for the result of them all, as if he had done them himself, for that act and the act in the latter part of the section must include the whole action covered by a criminal act in the first part, because they refer to it. S. 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. S. 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other. 24. Learned counsel for the appellants reliance on the decision in Balwantbhai B. Patel (Supra) is misplaced. In the captioned case, the statement of the injured was not brought on record which led the Court to doubt the presence of the injured at the spot. The reliance on the decision CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 16 of 18 in Inderjit (Supra) is also misplaced. In the captioned case, the Court came to the conclusion that the appellant had no knowledge that his co- accused was carrying a dagger and he was going to attack the deceased with knife and inflict fatal blows. In the present case, as per the deposition of the injured, firstly all the accused persons threatened to kill him if he did not consume liquor with them and thereafter, the accused Amit Sharma took out the katta and asked the injured to join their gang else he would be killed. Thereafter, the appellants caught hold of the injured. Thus, the appellants shared the common intention with their co-accused Amit Sharma. Similarly, reliance placed on the decision in Raj Kumar (Supra) is also misplaced as the said decision was rendered in the case of exhortation.

25. Lastly, the reliance placed on the decision in Rajesh @ Vimal Kumar & Anr. vs. State (Delhi Admn.) reported as 1995 JCC148to urge that the doctor, who had examined the injured and gave the opinion on the nature of the injuries, was not examined. The reliance on the captioned case is misplaced as in the present case, the prosecution has examined Dr. Lawish Agarwal and Dr. Devender Kumar to prove the MLC as well as the nature of injuries and both the doctors had identified the signatures of the concerned doctors on the MLC and have stated that they had seen the concerned doctors sign during the course of their duty. CONCLUSION26

In view of the above discussions, the presence of the appellants at the spot has been duly proved by the testimony of the injured. Additionally, the presence of Devinder and Dharmender at the spot is CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 17 of 18 corroborated by the testimony of Sunil Tyagi and the Call Detail Records respectively. There is no dispute about the identity of the appellants, Kuldeep, Devinder and Dharmender as they were already known to the injured prior to the incident. The appellant Suresh was identified not only in the TIP proceedings but also in the Court. The injured had identified the appellants twice during his examination-in-chief on 24.03.2008 and 05.02.2009. The injuries suffered by the injured were duly proved by the MLC and FSL report. The fact that one of the accused namely, Amit Sharma had expired during the trial does not absolve the appellants of their involvements in the offence punishable under Section 3
IPC.

27. In view of the above discussion, I find no infirmity in the conclusion reached by the trial court. The appeals filed by the appellants are dismissed. Consequently, the conviction as well as sentences of the appellants as handed down by the trial court are upheld. The appellants, who are on bail, shall surrender before the Jail Superintendent within a period of two weeks from the date of passing of this order. Bail bonds and surety bonds are cancelled.

28. Copy of this judgment be communicated to the trial court as well as to the Jail Superintendent for information and necessary compliance. (MANOJ KUMAR OHRI) JUDGE NOVEMBER19 2019 ga CRL.A. 28/2013 & CRL.A. 131/2013 P a g e 18 of 18

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com