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

\+ **CRIMINAL APPEAL No. 218/2012**

Reserved on: 7th August, 2012
% **Date of Decision: 19th November, 2012**

ASHOK @ RAMU ....Appellant
Through Mr. Ajay Verma, Advocate.

Versus

STATE OF THE NCT OF DELHI ...Respondent
Through Ms. Richa Kapoor, APP for the State.

CRIMINAL APPEAL No. 385/2012

BALRAJ ....Appellant
Through Mr. S.K. Tiwary, Advocate.

Versus

STATE GOVT. OF NCT OF DELHI ...Respondent
Through Ms. Richa Kapoor, APP for the State.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE S.P. GARG

SANJIV KHANNA, J.:

For detailed order see Criminal Appeal No. 1490/2011 titled *Naresh @ Kalu Vs. State* pronounced today.

(SANJIV KHANNA)
JUDGE

(S. P. GARG)
JUDGE

NOVEMBER 19th, 2012

Signature Not Verified
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By:AMULYA

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

\+ **CRIMINAL APPEAL No. 1490/2011**

Reserved on: 7th August, 2012
% **Date of Decision: 9th November, 2012**

NARESH @ KALU ....Appellant
Through Mr. Ramesh Gupta, Sr. Advocate with Mr. Jitender Tyagi, Advocate.

Versus

THE STATE ...Respondent
Through Ms. Richa Kapoor, APP for the State.

CRIMINAL APPEAL No. 218/2012

ASHOK @ RAMU ....Appellant
Through Mr. Ajay Verma, Advocate.

Versus

STATE OF THE NCT OF DELHI ...Respondent
Through Ms. Richa Kapoor, APP for the State.

CRIMINAL APPEAL No. 385/2012

BALRAJ ....Appellant
Through Mr. S.K. Tiwary, Advocate.

Versus

STATE GOVT. OF NCT OF DELHI ...Respondent
Through Ms. Richa Kapoor, APP for the State.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE S.P. GARG

SANJIV KHANNA, J.:

Naresh @ Kalu, Ashok and Balraj by the impugned judgment dated 20th July, 2011 have been convicted under Section 302 read with Section 149 of the Indian Penal Code, 1860 (IPC, for short) for murder of Dushyant Sharma. By the order of sentence dated 17th September, 2011 they have been sentenced to imprisonment for life and fine of Rs.10,000/- each and, in default of payment of fine, rigorous imprisonment for three months. For the offence under Section 307 read with Section 149 IPC, they have been sentenced to rigorous imprisonment for eight years and fine of Rs.4,000/- each and, in default of payment of fine, rigorous imprisonment for four weeks. The appellants have also been convicted under Section 148 IPC and sentenced to rigorous imprisonment of three years and fine of Rs.1,000/- each and, in default of payment of fine, they shall undergo rigorous imprisonment for one week. All the sentences are to run concurrently. The aforesaid case arises out of FIR No.869/2006, Police Station Okhla Industrial Area, Delhi. It became a subject matter of the charge sheet in Session Case No. 23/2007.

2. DD No.44A, dated 30th September, 2006, (Exhibit PW-15/DA) was recorded at 6.41 A.M. and DD No. 43A was recorded at 6.45 A.M. on the basis of information from the Police Control Room that an accident had been reported near Okhla, Phase-I, Indira Kalyan Camp ahead of drain by Constable Mahipal. Another DD entry No. 46A dated 30th September, 2006 was recorded at 7.55 A.M. (Exhibit PW-23/B) by the duty Constable Vinod that an unknown person had been admitted in an unconscious condition, by Head Constable Makhanlal. The said person was taken to the hospital from Okhla Road Airtel office. By DD entry No. 41B dated 30th September, 2006, Section 302 IPC was added after it was medically known that the patient had died.

3. During the course of investigation, the deceased was identified as Dushyant, by identification memos Exhibit PW-5/A, (PW-15/C1-C2) and PW-6/A (PW-15/C-3).

4. The Post Mortem Report of Dushyant (Exhibit PW-17/A) and Death Report (Exhibit PW-15/C1) establish that the deceased had a homicidal death. The Post-Mortem Report (Exhibit PW-17/A) states that the deceased had the following 7 ante mortem injuries.

i. A lacerated wound, 2x1 cm and bone deep, vertically placed over the occipital region between two ears on midline.

ii. Abrasion of size 1.5 x 0.5 cm present over back and between two scapular region at upper portion, lies 1 cm left lateral from midline. Vertically placed and reddish in colour.

iii. Rail road type contusion of size 10 x 2 cm, with 0.5 cm gap between two lines, was present over left scapular region directed downward and lateral from medical size. Contusion medial end is 11 cm from midline and 13 cm below from tip of left shoulder. Bluish in colour.

iv. Contusion of size 8 x 3.5 cm present left scapular region, rail road type and 1.00 cm gap between two contusion line. Obliquely placed, medial end is 14 cm from midline and 10 cm from tip of shoulder. Bluish in colour.

v. A lacerated wound of size 3 x 0.5 cm was on superior surface of the left shoulder, autero-posterity directed. Lies 10 cm from neck.

vi. Abrasion of size 1.5 x 1 cm present over right knee, reddish in colour.

vii. Left hand deformed and contused over dorsal aspect, cut section showed extravasation of blood overall dorsal aspect of hand. Also showing fracture of IVth onetacarpel bone and fracture of proximal phalanyx of left ring finger and associated utrueniatoma.

5. Post Mortem Report details that, on examination of the skull, it was noticed that there was extravasation of blood seen under the scalp. The skull showed linear crack fracture expanding from midline front area cranial fossa to upwards. There was subdural hemorrhage over the posterior part of left parietal temporal and occipital region. The spleen showed rupture on lateral border. The fourth metacarpel bone and proximal phalanyx of the left finger were fractured with associated haematoma, in addition to two abrasions including one present over the

back. The first two injuries, individually and jointly, were sufficient to cause death in ordinary course of nature.

6. The aforesaid Post Mortem Report was proved by Dr. B.L. Chaudhary (PW-17), who had conducted the deceased's post-mortem, on 1st October 2006. In his cross-examination, it was purported by the appellants counsel, that the MLC Report (Exhibit PW-11/A) mentions only two injuries and that the Death Report (Exhibit PW-15/C1) mentions just one injury, on the back side of the head. However, we are inclined to accept the Post Mortem Report because the MLC Report of the deceased (Exhibit PW-11/A) was a local examination and the patient was further advised to get an X- ray report, of both hands and the skull. In the MLC Report, the patient was reported to be disoriented, laden with faeces all over body and responding to painful stimuli. The X ray Report (Exhibit PW-9/A) does show fracture of the parietal bone and, in the MLC Report (Ex PW 11/A), the cause of death is delineated as shock, as a result of multiple injuries consequent upon blunt force impact.

7. Ashok, who has appeared as PW-3, was admitted to All India Institute of Medical Sciences and was examined, in the casualty ward, by Dr. Jyoti, who had recorded MLC Exhibit PW-12/A. The said MLC was recorded at 10.00 A.M. and, it is mentioned under the

heading "Particulars of Injuries or Symptoms", that "Not (sic No) proper history available" and the alleged history was of road traffic accident at 4.00 P.M. The patient, it is apparent, was brought to the Hospital by Prem Singh, a relative, who appeared as PW-7. Statement of Prem Singh that he had not brought PW-3 Ashok to the hospital is disbelieved by us, as MLC (Ex. PW12/A) records his presence and states that the patient Ashok was brought by a relative. As per the MLC, the patient was given stitches. PW-3 was primarily treated from outside (i.e no internal examination) and had a black left eye. The nature and type of injuries suffered by Ashok readwith statements of the witnesses establish that he had suffered simple injuries and it is not a case of attempt to murder.

8. The primary question raised, in the present appeals, relates to the involvement of the appellants in the said offence and the nature of offence committed by them. We may note that proceedings, under the same FIR, have been initiated against Sanni and Yashpal @ Ludku but they, being juvenile, are being tried before the Juvenile Justice Board.

9. Prosecution evidence primarily relies upon the statements of Praveen Bhandana (PW-1), Parmod (PW-2) and Ashok (PW-3) who was injured. Praveen Bhandana (PW-1) has stated that he had gone to Kalkaji Mandir with Ashok Bhandana, Pramod Bhandna, Parvesh

Bhandana and Dushyant, in the year 2007. After having 'darshan', from Kalkaji Mandir, they had taken a lift in one Canter truck. He did not recollect the full registration number of the Canter but stated that it was DL 1L 3483. Kalu was the driver of the Canter and there were some 10 people, at the back of the Canter. After covering some distance, the Canter had taken a turn towards Nathu Sweets. They asked the driver to stop the vehicle as they had to go straight. Kalu, however, did not stop the Canter, in spite of several protests and thumping from the back. The Canter finally stopped at a distance of about 1 ½ kilometers from Nathu Sweets. After getting down, they enquired from the driver as to why he had not stopped the Canter, near Nathu Sweets corner. In the driver's cabin, 3-4 boys were also sitting and they were under the influence of alcohol. They misbehaved and struck the gate, of the Canter, at PW-1's chest. The driver and his associates, sitting at the front and back of the vehicle, came down. They started beating PW-1 and gave him some slaps. The deceased and his friends started scurrying in the direction of their houses but Kalu and his associates chased with wooden sticks. Thereafter, the deceased and his friends ran towards their houses and got a lift from an auto till Tehkhand Nala. In the meantime, Kalu reached there, in his Canter, along with about 16-17 people. He, along with Pravesh, ran

towards Tuglakabad forest and Ashok ran towards Tehkhand. Dushyant ran towards the Nala but it was a dead end, as there was nala in front, and he had no escape. He could not run away and save himself. Then Kalu inflicted a blow on the back side of the head of Dushyant, using a rod. Ashok was also apprehended by Kalu's associates. PW-1 too was given 2-3 lathi blows on his back side, by Kalu's associates, when he was crossing the wires in the jungle. PW-1 stated, in the Court, that Dushyant was killed by Kalu, who had come along with 15 boys. He identified accused Ashok, Balraj and Naresh @ Kalu. He affirmed that Naresh @ Kalu and his associates were armed with rods and danda. Next morning PW-1 came to know that Dushyant had died. He filed a complaint in the Police (Exhibit PW-1/A). Accused Naresh @ Kalu was apprehended by the police and he made disclosure (Exhibit PW-1/B). Disclosure statement was also made by Balraj (Exhibit PW-1/C). The Canter was recovered vide seizure memo Exhibit PW-1/F. Danda and an iron rod were recovered by the police vide seizure memo Exhibit PW-1/G and PW-1/H. In the court, PW-1 identified the rod recovered from Naresh as Exhibit P-1. The rod was about four feet long and quite heavy in weight. A danda was recovered from the possession of Balraj, which was marked Exhibit P-2. PW-1 identified Balraj and Ashok present in the Court.

He further stated that Ashok also had a rod in his hand. In his cross-examination, he was confronted with his statement Exhibit PW-1/A, where he had not stated that 3 or 4 persons and the driver Kalu were sitting in the cabin and they were under the influence of liquor or that the associates had come down from the cabin, to back portion, and beaten him. PW-1 had not given names of Ashok, Balraj and Naresh, next day, when the FIR was registered. He voluntarily stated that he did not know the name of the accused, i.e. Ashok, when the FIR was registered. Statement (Exhibit PW-1/A) was confronted as therein it was stated by PW-1 that some persons had called one of the associates as Vinod and the said associate had apprehended Ashok. Some other minor discrepancies have also been pointed out and mentioned in the cross-examination, but this at best, are immaterial and do not negate or, in any manner, cause difference in credibility and truthfulness of the testimony and statement made by PW-1. PW-1 categorically denied that Dushyant had died in a road accident or had received any injuries due to a road accident. He accepted that he had not taken Dushyant or Ashok to the hospital. He did not visit Ashok, in the hospital, because his family members were angry with him. However, his family members had visited Ashok in the hospital. Certain other aspects of the statement, including why and how PW-1 and others had left

Dushyant behind and questions relating to arrest of Naresh@ kalu, have been discussed separately.

10. Parmod (PW-2) has stated that he, along with the friends- the deceased Dushyant, Praveen, Ashok and Parvesh, had gone to Kalkaji Mandir and, thereafter, had taken a lift from the driver of an Eicher Canter. The driver had allowed them to stand on the back side of the Canter. However, instead of going straight, the Canter driver took a left turn. PW-2 and his friends raised hue and cry and started beating the body of the Canter but the driver stopped only after covering ½ or 1 kilometer. The driver Kalu, who was present in the court, was questioned as to why he did not stop the Canter. In the court, PW-2 identified Kalu but stated that he could not identify others, who were present in the Canter when they had taken the lift. After having a tiff, PW-2 and his friends started walking back home. They managed to stop a CNG auto and travelled for about 2 and ½ kilometers. They were dropped at Okhla, Phase-I. Meanwhile, the Eicher Canter, in which they had earlier taken a lift, came back and there were about 10-12 persons who were holding rods and dandas. He identified Naresh (Kalu), Ashok and Balraj as persons, who had given blows to Dushyant. Kalu had inflicted rod blow on Dushyant's backside. Balraj had given blow, with a danda, on the head, foot and other body parts of

Dushyant. Accused Ashok had hit, using a rod, and had manhandled Dushyant. They started running to save their lives. PW'2's friend Ashok had also received injuries. He identified the rod (Exhibit P-1) and the danda (Exhibit P-2). In the cross-examination, he was confronted with the statement under Section 161 Cr.P.C. (Exhibit PW-2/DA) wherein it was not recorded that the injured Ashok had received injuries from accused Ashok. He accepted that the danda (Exhibit P-2) was not recovered in his presence and he had not identified the said danda in any TIP. He made statement, under Section 161 Cr.P.C. to the effect that, after the Canter stopped, there was 'Battamiji and hathapai', abusive talks and fight. He was confronted with the statement (Exhibit P-2/A) wherein it was not mentioned that appellants Naresh (Kalu), Ashok and Balraj, along with others, had caused injuries, using a rod, but it was recorded that Kalu, along with his associates, had caused injuries on Dushyant using lathis and dandas. He had informed the police, at about 12/12.30 P.M., next day when he had gone to the police station, along with his parents. He had not visited Ashok and Dushyant in the hospital but his family members went to the hospital, next morning, after 10 A.M. He identified the Canter and stated that, at the time of the accident, Singhla Transport was written on the head of the Canter and on the side but these words

were missing when the Canter was shown to him. When he appeared as a witness, he also gave the registration number of the Canter as DL 1 LE 3483. He denied the fact that he was not aware of the number of the Canter and that is why he had not mentioned the number of the Canter in his statement recorded earlier. He had mentioned the registration number of the Canter in his examination-in-chief.

11. Ashok (PW-3) is one of the injured. His deposition is similar to PW-1 and PW-2, that he along with his friends Dushyant, the deceased, Parmod , Pravesh and Praveen had gone to Kalkaji Mandir, at night intervening 29/30 September, 2006. Appellant Kalu had inflicted a rod blow on the back of the head of Dushyant. Other two accused gave danda blows. He was beaten by Kalu and two other accused, present in the court, at about 3.00/3.30 A.M. After darshan, at about 2 A.M., they were going, by foot, towards their house and had asked for lift, from Kalu, in his Canter. They had to go straight but the driver Kalu had turned the vehicles towards Nathu Sweets shop. He started misbehaving and abusing them, after they alighted. The matter was pacified and they started towards their house. They took a lift in a CNG auto. Appellant Kalu again reached there in his Eicher Canter, with six persons along with him or some more. Six persons alighted from the Canter and gheraoed them. Kalu possessed rod and his

associates were carrying dandas and rods. He was beaten by the appellant Kalu, and his associates, which included the two accused present in the court. His friends Parvesh, Praveen and Pramod succeeded in running away from the spot. He received injuries and became unconscious and only regained consciousness in the hospital. He could not identify the exact weapon but there were rods and dandas. He identified the Canter (Exhibit P-3) and noted that, at the time of the incident, Singhla Transport was written at the head of the Canter and on the side. The words 'Singhla Transport' were missing, when the Canter was shown to the witness. He stated that he was seriously injured and did not remember when his statement was recorded by the police. He volunteered that he had given description of the accused in his statement, under Section 161 Cr.P.C. He was confronted with the statement under Section 161 Cr.P.C. (Exhibit PW-3/DA) wherein it was recorded that Kalu had beaten him and that three other boys attacked him, with rod and wooden dandas. It was pointed out that, in the statement (Exhibit PW-3/DA), the witness had not stated that the matter was pacified after the initial quarrel. He averred that he had seen six boys but there could be more than that. In the statement (Exhibit PW-3/DA), it was recorded that the said driver reached in the same Canter (Exhibit P-3), along with some boys, at 3.15 or 3.30 A.M.

at night. Further in the said statement it was mentioned that the driver asked his associates to attack them "Maaro Salo Ko". In the statement, (Exhibit PW-3/DA) it was not recorded that appellant Kalu was carrying a rod and that Kalu, with his two associates, apprehended Dushyant, after chasing him to the other side of the road, hit him on the head and other body parts, with iron rod and dandas. Pravesh, Praveen and Pramod succeeded in running away but this fact was not mentioned in Exhibit PW-3/DA. As he was unconscious, he could not tell who took him to the hospital and at what time. He was with his family members when he became conscious. As noted above it is apparent from the MLC of Ashok (Ex. PW 12/A) that he was brought to the hospital by a relative as recorded therein. Prem Singh (PW-7) in spite of his denial, it appears, had brought (PW-3) Ashok to the hospital, as PW-7's name is mentioned in the MLC.

12. As far as presence of appellant Kalu is concerned, it is established beyond doubt. He is the only person who was called and referred by his name, in the FIR. Presence of Kalu is also established through his Eicher Canter bearing registration No. DL 1LE 3483, owned by his father.

13. The other question relates to recognition of appellants Ashok and Balraj, who were members or associates of Kalu and had come

back with him to beat up the other group. Ashok (PW-3) is the injured witness in the said incident and presence of PW-1 and PW-2 is also established. Therefore, we are inclined to accept the statements of PW-1, PW-2 and PW-3 that Ashok and Balraj had joined Kalu and had beaten Dushyant and injured Ashok. Statements of PW-1, PW-2 and PW-3 to this extent are reliable, truthful and credible.

14. The registration number of the Canter was DL 1L 3483, as recorded and mentioned in the statement of Praveen Bhandana (PW-1) which was recorded by Inspector K.S. Rawat (PW-15). He has stated that he, along with Praveen Bhandana and police party, were searching the accused person and the Eicher Canter, as per the description given by Praveen Bhandana. The said Eicher Canter DL ILE 3483 was found outside Singhla Transport, Shakur Basti, Okhla, Phase-II and was identified by Praveen Bhandana. The number of the Canter substantially matched the description -Eicher Canter DL 1L 3483- which was mentioned and stated before. The short summary recorded by Insp. K.S. Rawat (PW-15) on 1st October, 2006 and produced before the Metropolitan Magistrate mentions that driver of Eicher Canter DL 1L 3483 and his associates were involved in a scuffle with deceased Dushyant and his associates. The said incident occurred at 3.15-3.20 A.M., when Kalu and other boys came and attacked the other

group. The FIR, registered at Okhla Police Station records the time to be 11.58 P.M., which can only be a typographical error, since rukka was registered at 11.58 A.M.

15. Insp. K.S. Rawat (PW-15) started the search, with the given details. The mentioned Eicher Canter was found outside Singhla Transport, Sanjay Colony, Okhla, Phase-II, New Delhi and was identified by Praveen Bhandana (PW-1). PW-15 has stated that, on entering the office of Singhla Transport, Praveen Bhandana (PW-1) identified the driver Kalu, who was present there and was apprehended. He voluntarily made a disclosure statement (Ex.PW-1/B) and, pursuant to the disclosure statement, an iron rod (Exhibit P-1) was seized. Thereafter, on the pointing out of Kalu, accused Balraj was arrested. Balraj also made voluntary disclosure statement (Exhibit PW-1/C) and from his house one danda was recovered. However, other accused could not be traced. Appellant Ashok was arrested later and supplementary charge sheet was filed. ASI Suresh Kumar (PW-23) has narrated similar facts in his court statement.

16. There is discrepancy as to how Kalu was arrested. The police officers PW-15 and others have stated that Kalu was arrested from his house/office after being identified by Praveen Bhadana (PW-1). Praveen Bhadana has, however, stated that when they visited the house

of Kalu, he was not there. Father and brother of Kalu were taken to police station. Thereafter Kalu was brought to the police station by someone. This discrepancy, however, does not materially affect the prosecution case or version and the identification of the appellants by PW-1, PW-2 and PW-3.

17. It was contented by the defence counsel that identification by PW-1, PW-2 and PW-3, in the court, cannot be relied upon. They argued that the appellants must have been paraded and shown to the witnesses and possibility of photographs being shown to PW-1, PW-2 and PW-3 should not be ruled out. The accused Balraj, in TIP proceedings record (Exhibit PW-26/B), has alleged that, while in police custody, the police had taken his photographs and shown this to the opposite party. He further alleged that he was taken to Patiala House Court, in a Maruti car by the opposite party. We do not agree with the said contentions. The appellants refused to participate in the TIP proceedings. Manoj Kumar (PW-26), Chief Metropolitan Magistrate, who was asked to conduct TIP of accused Kalu and Balraj, and M.M. Ajay Goel (PW-27), who was asked to conduct the TIP of accused Ashok, have stated that the three appellants refused to participate in the TIP in spite of warning by PW-26 & PW-27. PW-3, in his statement, recognized that Balraj who had a beard but was clean

shaven at the time of occurrence. Accused Balraj was arrested on 1st November 2006, the same day as Kalu. Accused Ashok was absconding at that time and was declared a proclaimed offender. He was subsequently arrested on 13th December 2007. Identification of the three appellants by PW-1, PW-2 and PW-3, in the court, carries its own sanctity and should be accepted. In ***Munshi Singh Gautam v. State of M.P.*** (2005) 9 SCC 631 it has been held that:

> "The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is, accordingly, considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad* v. *Delhi Admn.* [AIR 1958 SC 350 : 1958 Cri LJ 698] , *Vaikuntam Chandrappa* v. *State of A.P.* [AIR

> 1960 SC 1340 : 1960 Cri LJ 1681] , *Budhsen* v. *State of U.P.* [(1970) 2 SCC 128 : 1970 SCC (Cri) 343] and *Rameshwar Singh* v. *State of J&K* [(1971) 2 SCC 715 : 1971 SCC (Cri) 638] .)"

18. Age of accused Balraj may be 45 years and not 19-20 years, the general description of the assailants' indicated by PW-3 in his statement under section 161 Cr.P.C. , but this by itself does not merit that we should disown the court identification. PW-1 to PW-3 had given general description and approximate age of the assailants. The assailants, including those facing trial under the Juvenile Justice Act, are mostly young. The identification of the appellant Balraj cannot be disregarded because of the general description of the assailants given by PW-1 to PW-3. Neither do we agree with the appellants' contention that statements of PW-1 to PW-3 should be disregarded, since Parvesh, who was also present with PWs 1 to 3, was not examined as a witness. The court examines the credibility of a witness and the evidence produced. It does not require a number of witnesses to substantiate the same point. Statements of PWs 1 to 3 cannot be discarded because Parvesh Bhadana has not been examined.

19. Appellants contend that PWs 1 to 3 were not present when Dushyant and all the accused had gone to Kalkaji Mandir and neither had they taken lift in the Canter but this cannot be accepted. Contention that the conduct of PW-1, PW-2 and PW-3 is unnatural since they did not, on returning to their houses, inform the relatives or the police that the deceased has been injured or take him to the hospital, has also to be rejected. It is apparent that PW-1 and PW-2 ran to their respective houses, from the crime spot, and only realized the next day that Dushyant had expired. Even PW-3 received injuries (MLC Ex. PW-12/A) though they were not grievous in nature. PW-3 was taken to the hospital only next morning, at about 10 A.M. It is apparent that PWs 1 to 3 did not realise the seriousness of the injuries, caused upon Dushyant, till the next day. The noting on the MLC(Ex. PW12/A); "alleged history of road accident at 4 P.M." and "no proper history available" suggests that injured Ashok (PW-3) did not want to reveal, to the doctors, that he was involved in a brawl. Hence the said contradiction in the MLC as the injured PW-3 wanted to avoid registration of a criminal case and involve police. This is endorsed by the statement of Prem (Singh) Bhandana (PW-7), who had taken PW-3 to the hospital. He has stated that, on 30th September, 2006, he came to know that his nephew had received injuries and was taken to AIIMS by

someone. On reaching the hospital, he found PW-3 in the casualty ward. PW-7 admitted that he was not a witness to the occurrence, in which Ashok (PW-3) had got injured.

20. It was highlighted before us that PW-7 had stated that Praveen Bhadana, Ashok Bhadana and Pramod Bhadana were present at AIIMS when his nephew Ashok got admitted. There is a contradiction to this extent because earlier PW-7 had stated that his nephew was taken to the hospital by someone else but later he admits that the three witnesses were there when he got his nephew admitted. PWs 1 and 2 have disputed and denied their presence. This contradiction, however, does not create a dent in the prosecution case and does not help appellants in any way. In Ashok's MLC (Exhibit PW-12/A), name of the person who had brought him to the hospital was mentioned as Prem Singh S/o Candgi Ram. PW-7 is Prem Bhadana S/o Chandgiram Bhadana. It is clearly mentioned that the injured was brought by a relative, i.e., Prem Singh S/o Chandgi Ram Bhadana. PW 7 however did not want to accept and admit that he had brought PW3 Ashok to the hospital. This discrepancy in the statement of PW-7 does not materially affect the clear and categorical statement of PW-1, PW-2 and PW-3. PW-1 and PW-2 agreed that they had not taken Dushyant or PW-3 to the hospital. PW-1, PW-2 and PW-3, it is apparent, were

stating the truth as far as the occurrence is concerned. In fact, it is clear that PW-1 and PW-2 could not have taken Dushyant to the hospital as he was taken to the hospital by Head Constable Makhanlal. The MLC (Exhibit PW-11/A) described him as unknown person aged, about 20 years, and MLC was recorded at 7.22 A.M. The MLC of Ashok (Exhibit PW-12/A) was at 10 A.M. The two MLCs are of the same hospital, i.e., AIIMS. Further, the aforesaid facts stated by PW-1, PW-2 and PW-3, alleging involvement of the three appellants, are also proved from the recovery of the Eicher Canter.

21. This brings us to the appellants' contention that the deceased had died in a road accident. It was submitted that, even if injuries were given by rods and dandas, the cause of death was road accident and not the said injuries, if any. Reliance is placed upon the initial DD entry No. 44 A (Exhibit PW-15/DA), recorded at 6.45 A.M. on 30th September, 2006, when accident was reported. After some time, at 7.55 A.M., another entry DD No. 46A (Exhibit PW-23/B) was recorded that an unconscious person, lying in front of Okhla Road Airtel Office, has been admitted through Constable Makhanlal to a hospital. Constable Makhanlal had appeared as PW-22. After receiving the wireless message at 6.41 A.M. vide DD No. 44A (Exhibit PW-15/DA) he had rushed to the spot and saw an injured person being

removed to the hospital. He did not know the name of the injured up to his admission in the AIIMS Hospital. No other person, apart from Dushyant, was lying there at the spot. Public persons had gathered there but they did not know the cause of injury. Since no one had seen the accident, therefore, there is no eye witness to support the allegation. Statements of PWs 1 to 3 on the other hand are clear, categorical and lucid where they implicate the appellants. Injuries on Ashok, though not of serious nature, can only be explained by the events narrated by PWs 1 to 3. Ashok (PW-3) was extensively cross-examined by counsel for accused Naresh and Balraj, wherein the counsel suggested that PW-3 and the deceased Dushyant had jumped from the running Canter and this had caused them injuries. Thus, the said appellants have accepted the position that the Canter was used that night and was connected with the injuries/incident. The appellant Kalu, in his statement under Section 313 Cr.P.C had stated that the injured person had sustained injuries after jumping from the Canter as they could not judge the speed due to darkness. He, however, claimed that the Canter was not being driven by him but someone else. Though, he did not name the said person but claimed that the driver was set free and he was implicated falsely.

22. Thus, we do not agree with the appellants counsel that there are major discrepancies in the statements of PW-1, PW-2 and PW-3 which materially dent and cast reasonable doubt on the prosecution case.

23. From the statement of PW-1, PW-2 and PW-3, the following facts emerge and stand established beyond doubt:

(i) PWs 1 to 3, along with deceased Dushyant and Pravesh Bhadana, had gone to Kalkaji Mandir and after having 'darshan' had taken lift in an Eicher Canter.

(ii) There was exchange of swear words, and the driver and other occupants of the Canter had scuffle with PWs 1 to 3, deceased Dushyant and Pravesh Bhadana, as the driver had taken a turn and gone in a direction which was not as per the desire or understanding of PWs 1 to 3, the deceased and Pravesh Bhadana.

(iii) Praveen Bhadana (PW-1) has given the number of the said Eicher truck as DL 1 L 3483. The said number is also mentioned in the FIR (Ex. PW-4/A) which was registered on 30th September 2009 at 11.58 P.M. (sic A.M.). The registration number was a vital clue and became the primary source for the investigation and subsequent arrest of the appellants-accused.

(iv) PWs 1 to 3 had identified the said Eicher Canter which was seized and subsequently released on *superdari*. PW-2 and PW-3 have stated that at the time when they had taken lift words "Singla Transport" were written on the said Eicher Canter but subsequently, when it was produced in the court at the time of recording of evidence, the said words were obliterated.

(v) Name of the driver of the Eicher was Kalu. The name was given by Praveen Bhadana (PW-1) and finds mention in the FIR (Ex. PW-4/A). The said name was also stated by PW-2 and PW-3.

(vi) One of the appellants herein Naresh @ Kalu is the son of the registered owner of Eicher Canter No. DL 1LE 3843.

(vii) PW-1 to PW-3 stated that, after the altercation, PW-1 to PW-3 and the deceased walked for some distance and then had taken a lift from a CNG three wheeler and were dropped off at Tehkhand Nala.

(viii) Kalu and his associates drove back to Tehkhand Nala, with iron rods and dandas, and attacked PW-1 to PW-3, the deceased Dushyant and Pravesh Bhadana. There is some discrepancy about the number of persons/associates who had

come with Kalu. PW-1 has stated that there were 15-16 persons; PW-2 has given the number as 10 to 12; and PW-3 has stated that there were at least 6 boys. As noticed below, the exact number of assailants cannot be determined but the appellants, who were caught, have been clearly identified and it has been established that number of people were more than five.

(ix) PW-1 to PW-3 identified accused Kalu, Balraj and Ashok as the persons who had beaten Dushyant and Ashok and were a part of the assembly which had attached them. The appellants had refused to participate in the TIP proceedings, fearing that they would be identified.

(x) PW-1 to PW-3 had affirmed that Kalu was having an iron rod in his hand and had given a rod blow to Dushyant, on the back side. Appellant Balraj was having a danda. Similarly, appellant Ashok it appears was having a danda. We accept the contention on behalf of the appellant Ashok that there is no material to conclusively establish that he was having a rod and had used the same.

24. We are not inclined to rely upon statement of Santosh Kumar Singhla (DW-2), father of accused Kalu who has claimed that, on 29th

September, 2006, his driver Vinod was driving the Canter which was used for 'kar seva', from Kalkaji to Tehkhand Village. The alleged driver Vinod was not produced before the court. PW-1, in his statement under Section 161, has stated that one of the assailants was being addressed as Vinod but PWs 1- 3 have been categorical that Canter was being driven by accused Kalu. His name resonates in their statements under Section 161 Cr.P.C. and even in the First Information Report. This leaves us with no scope of doubt that Kalu was the driver. PW-1, PW-2 and PW-3 could not have known, at least till the arrest of Kalu, that Kalu is the name of the Canter owner's son. As per DW-2, on 30th September, 2006, the police had visited his residence and made inquiries. DW-2 propels that Kalu was attending a party in Maharani Bagh, the night of the alleged incident but no proof has been put forth for the same. In DW-2's cross-examination, he could not name this friend of Kalu's whose party was allegedly attended. It is noted that DW-2 did not take action or protest to the higher authorities against the alleged 'wrongful' arrest of the accused. Similarly, Jagan Singh (DW-1) claimed that he knew Kalu as he lived in the same locality. According to his recollection, he had gone to Kalkaji and then had taken lift in the tempo. Some boys were travelling in the tempo and there was dispute between them and the

driver of the tempo, on the route. Two passengers jumped off the tempo which was running at a fast speed. During the travel, he came to know that name of the driver was Vinod. He remained present in the tempo till they reached the tempo owner's house, at Sanjay Colony. When cross-examined, he could not describe the driver but stated that driver's physique was like his. DW-1 claimed that he did not know Kalu personally but had generally seen him in Sanjay Colony. Later on, he had come to know that Kalu was arrested. This is contrary to his opening statement, in examination in chief that he knew accused well as they resided in the same colony. Statement of DW-1 does not inspire confidence and the narrative seems improbable. If two co-passengers were seen jumping from a running tempo and sustaining injuries then the driver would have been asked to stop. The deceased Dushyant had suffered several grievous injuries all over the body which does not suggest that it was a road accident or because he jumped from a truck.

25. Gopi Ram (DW-3) has stated that Balraj was his neighbour and Director of Ram Leela Committee. He claims that accused Balraj was playing role of Ram, at the Ram Leela, when he was arrested, due to which the show was stopped. However, DW-3 has not stated the whereabouts of the accused at the time or day of the incident. He also admits that he did not know in which case Balraj was arrested.

26. Ram Singh (DW-4) has claimed that appellant Ashok used to reside in his neighbourhood, at the time of incident. He had stated that the accused Ashok was lifted, by the police, on the pretext of some inquiry. Later on DW-4 came to know that accused Ashok was implicated in a false case. In the cross-examination, he accepted that no complaint was made to the higher officers regarding arrest of Ashok. As noticed above, Ashok was declared proclaimed offender during initial investigation. He was subsequently arrested.

27. Regarding the conviction of the appellants, under Section 307 IPC, for the injuries sustained by Ashok, it is noticed that no grievous injuries were sustained. MLC Report (Ex. PW-12/A) reflects that injuries were simple in nature. It indicates that he had a black eye. He had wounds and stitches. X-rays were recommended but no X-ray Report is on record. It is not indicated whether he had suffered any fracture. There is no evidence to suggest that the appellants or the unlawful assembly had targeted PW3 with the intention to cause death. As per PW3 he became unconscious. We have rejected the said statement of PW3 but if he had become unconscious, the appellants/unlawful assembly had sufficient opportunity to cause serious injuries. Conviction of the appellants for the simple injuries on Ashok (PW3) under section 307 IPC therefore cannot be sustained.

They are convicted under Section 323 IPC for the simple injuries caused to Ashok (PW-3).

28. Coming to Section 149 readwith Section 141 IPC, it has two essential ingredients:

- firstly, the offence must be committed by a member of an unlawful assembly (not necessarily by the accused himself) consisting of five or more members and,
- Secondly, the offence must be committed in prosecution of common object of the assembly or that the members of the unlawful assembly knew that the offence was likely to be committed in prosecution of the common object.

(See observations in ***Ramachandran and Ors. v. State of Kerala***, *AIR 2011 SC 3581*).

29. Mere presence in the unlawful assembly does not render a person liable unless he shares the common object which is ultimately actuated. The word "object" means "purpose" or "design". The purpose for which the members of the assembly set out or the purpose which they desired to achieve is the object. In order to make it common, it must be shared by the members prosecuted. The object of the members should be the same. This requires that there should be

proof of knowledge of the object pursued, that it was the shared object and there was a general agreement as to how it was to be achieved. The expression "in prosecution of common object" in Section 149 IPC has to be strictly construed as equivalent to "in order to achieve a common object".

30. Common object may be a result of a prior concert and common meeting of minds, but can be also formed on the spur of the moment. It may be formed at any stage by all or few members of an unlawfully assembly and the others may just join and adopt it. Once formed, it need not continue to be the same and can be modified, altered or abandoned at any stage. There must be community of object and object may exist up to a particular stage and not thereafter. A person may share a particular common object or there may be community of object, but the same may exist up to a particular stage or for a particular offence. (See ***Charan Singh v. State of U.P.*** *(2004) 4 SCC 205*).

31. Once it is established that the accused was a member of the unlawful assembly, which had common object, it is not necessary that all persons forming unlawful assembly must be shown to have committed some overt act or omission. Being part of an unlawful assembly, which shares a common object, itself is sufficient.

However, caution must be taken to ensure that the accused concerned had an active mind i.e. shared a common object before he is held liable for the acts of third parties, who were members of the unlawful assembly. Passers-by or persons who were merely present at the site or the place of the assembly with no active mind have to be excluded. Some persons may even join the assembly as a matter of idle curiosity without entertaining a common object. (See ***Masalti v. State of Uttar Pradesh*** *AIR 1965 SC 202* and ***K.M. Ravi and Ors. v. State of Karnataka*** *(2009) 16 SC 337*).

32. Common object is entertained in the human mind and, being a matter of intention, no direct evidence in the form of overt evidence may be available. Therefore, existence or non-existence of common object has to be gathered from the circumstances. (See ***Lalji v. State of U.P.*** *(1989) 1 SCC 437*). Specific overt acts and omissions by an accused do predicate formation of the common object and knowledge/sharing by the said accused, but contrary alone is not sufficient to hold that the accused did not share common object. Surrounding circumstances and all aspects have to be considered and it is not necessary for the prosecution to establish any specific overt action in all cases. (See ***Daya Kishan v. State of Haryana*** *(2010) 5 SCC 81*, ***State of U.P. v. Krishanpal and Ors.*** *(2008) 16 SCC 73* and

Amerika Rai and Ors. v. State of Bihar *(2011) 4 SCC 677*). It is obligatory on the part of the Court to examine the entire evidence and take a holistic and pragmatic view. Compendium of aspects like persons, who had joined the assembly, the weapons with the members of the assembly, the nature of injuries suffered, behaviour and act, before or after the scene of incident. etc. are relevant. Further, it is for the prosecution to prove against the person, who is alleged to be a member of unlawful assembly, that he was one of the persons constituting the unlawful assembly and entertained, along with other members, the common object or knowledge, as defined in Section 141, 149 IPC etc.

33. As noticed above, Section 149 readwith 141 IPC consists of two parts. The first part criminalises and mandates punishment, when an offence is committed in prosecution of the common object and when the offence is committed with view to accomplish the said object. In such cases, the offence committed must connect or have direct or immediate nexus with the common object of the unlawful assembly, of which the accused was a member. The second part of Section 149 IPC is wider and consists of offences which are such as the member knew was likely to be committed. Thus, a member of the unlawful assembly shall be held liable if he knew that an offence, which he may not share,

was likely to be committed in prosecution of the common object. The expression "knows" does not refer to a mere possibility which might or might not happen, but cases where it can be ascertained that the accused had positive knowledge that such an offence was likely to be committed. (See ***Cikkarange Gowda v. State of Mysore***, *AIR 1956 SC 731*).

34. When there are a group of assailants and offence is committed, it is difficult to accurately ascribe, with certainty, the part played by each one of the assailants. In the actual occurrence, the perpetrators act swiftly and the visions or the recollection of the witnesses of the scenes may get blurred and need not be precise or photogenic. This will be asking for the impossible. It will be impracticable. It is, therefore, necessary to analyze the evidence carefully and not reject the statements of the victims or eye-witnesses on the ground that they lack exact precision, with regard to the overt act attributed to each assailant. If a witness speaks about the occurrence well and his evidence is truthful and correct, it should not be rejected. The testimonies of the witnesses have to be viewed from a broad perspective, in a pragmatic manner, and not from a dogmatic point of view. (See observations of the Supreme Court in ***Modh. Sayeed v. State of M.P.*** *(2010) 10 SCC 259*).

35. There is substantial evidence that, after the initial quarrel, Kalu along with his associates, came back, in the Canter and attacked PWs - 1 to PW-3, Dushyant and Parvesh Badana. The number of assailants was clearly more than five. Common object, therefore, was that the unlawful assembly consisting of assailants and Kalu had come to attack PW-1, 2, 3, Dushyant and Parvesh Badana. There is evidence on record to show that, at least, Kalu had an iron rod with him and had hit Dushyant with the said rod on the head and the back. The medical evidence i.e. the post mortem report Ex. PW-17/A is conclusive that Dusyant died as a result of the said injuries caused. Intention to cause the said injuries, on the part of the appellant Kalu, is established and proved beyond doubt. The fact that the iron rod was part of the truck equipment, i.e. jack, is immaterial, when we examine the conduct of the appellant Kalu. The conviction of the appellant-Kalu, under Sections 302 and 148 IPC is, therefore, justified and correct.

36. The next question is whether the appellant-Balraj and Ashok shared the common object, to commit murder or that they knew that the offence of murder was likely to be committed in prosecution of the common object. We have noticed the factual position. It cannot be said with certainty that Balraj and Ashok were in the truck, when the lift was taken by PW-1, 2, 3, Dushyant and Parvesh Badana, at Kalkaji

Temple, but they were a part of the unlawful assembly, which had attacked them subsequently. Kalu had an iron rod with him, whereas Ashok and Balraj had 'dandas' with them. Dushyant had suffered extensive injuries in the said attack and ultimately died. Injuries suffered by Ashok, however, are simple in nature. We have set aside the conviction of the appellants under Section 307 IPC on account of the injuries caused to Ashok and converted the conviction to one under Section 323 IPC. It is noticeable that PW-1 and 2 went back to their houses and did not report the matter to the police at least till 10-10.30 P.M. Both of them did not suffer injuries. Even Ashok did not go to police and was rather ambiguous when the MLC (Ex. PW12/A) was recorded. Cause of the injuries on Ashok, as recorded in the MLC, is contradictory. The possible and true explanation is that they did not perceive or think that Dushyant was brutally beaten up, injured and would lose his life. How and who had taken PW-3 to the hospital is not clear. We have held that PW-7 had taken PW-3 to the hospital. PW-3 claims that he had become unconscious, but the hospital records do not state so. MLC (Ex. PW-12/A) clearly states that the PW-3 was brought by a relative, suggesting PW-7. As per PW-3, he had become unconscious after the beating. PW-3 was certainly not beaten to death and did not suffer grievous or serious injuries. He was not attacked

and beaten up in the same brutal manner as Dushyant, though, he states that he had not managed to run away like PW-1 and 2.

37. PW-1, 2 and 3 have testified that Kalu had used the words "maro salo ko", but this does not necessarily mean "kill them". It can also mean "hit them". In ***Ajay Sharma v. State of Rajasthan***, *AIR 1998 SC 2798*, it was observed that the word "maro" does not mean to kill, but can also mean to attack or strike.

38. In these circumstances, we are of the view that the prosecution has not been able to establish that the appellants Balraj and Ashok shared the common object to commit murder. It is perceptible that Kalu was abused and possibly man handled by the deceased, and the four others, who were with him. He wanted to take revenge and teach a lesson to Dushyant, PW-1 to PW-3 and Praveen Bhadhana. He accordingly instigated and asked the other assailants to join and accordingly they traced out and confronted them. Thus, common object of the members of the unlawful assembly is established but the debate is whether the common object was to commit murder or members of the unlawful assembly knew and had positive knowledge that some other offence, which they may not share was likely to be committed, and if so then what was the nature of the said offence. It is apparent that PW-1 and PW-2 managed to escape and were not hurt.

Pravesh Bhadana was also not hurt. Ashok (PW-3) suffered minor simple injuries. Four of them did not possibly feel that the assailants wanted to murder or kill Dushyant. From the appellants Ashok and Balraj, "dandas" have been recovered. Kalu no doubt used an iron rod, which was used with the jack of the truck, but it is possible to argue that the said rod was available in the Canter truck and the two appellants Balraj and Ashok may not be aware when they became member of the assembly, that Kalu would use the iron rod and hit Dushyant on the head. From the conduct of the assailants, before, during and after the attack, it cannot be said with reasonable certainty that the unlawful assembly knew that it was likely that some of the members had the intention to cause bodily injury, which in ordinary course of nature, would have caused death or, intention to cause injuries, which could have resulted in death or murder. The next question is whether they knew that "murder" was likely. It is a borderline case, as one cannot say with certainty that "murder" was likely. Difference between culpable homicide and murder, as understood and defined in Section 300 IPC, is well recognized and accepted in the statute and legal decisions. In the facts of the present case, the appellant Balraj and Ashok cannot be attributed with the knowledge that the mob was likely to cause death or with the

knowledge that they would act in an imminently dangerous manner that the death was a must. They did not share the common object i.e. intention to commit murder or intention to cause injuries, which would in ordinary course of nature cause death or with the intention to cause death. The Appellants Balraj and Ashok are convicted under Section 304 Part II, IPC. They are sentenced to eight years of rigorous imprisonment. In addition they will be liable to pay fine of Rs.10,000/- each and in default of payment of fine they will undergo simple imprisonment for two months. Their conviction under Section 148 is maintained.

39. In view of the aforesaid findings, it is held that Kalu has been rightly convicted under Section 302 IPC and Section 148 IPC. Sentences of life imprisonment and three years and fine of Rs. 10,000/- and Rs.1,000/-, respectively are confirmed. In default of payment of fine, he shall undergo simple imprisonment for a period of 2 months and 1 week respectively.

40. Conviction of the appellants Kalu, Balraj and Ashok, for causing injuries to injured Ashok, under Section 307 IPC read with Section 149 IPC is converted to Section 323 read with Section 149 IPC. They shall be sentenced to rigorous imprisonment for a period of one year and fine of Rs.4,000/- each for the said offence and in default of

payment of fine, they shall suffer simple imprisonment for a period of four weeks. The sentences awarded shall run concurrently and the appellants shall be entitled to benefit under Section 428 Cr.P.C. The appeals are disposed of.

(SANJIV KHANNA)
JUDGE

(S. P. GARG)
JUDGE

NOVEMBER 19th, 2012
VKR/kkb/NA