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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 18th January, 2016

Judgment delivered on: 28th April, 2016

+ **CRL.A.1751/2014**

SANDEEP KUMAR

..... Appellant

Through : Mr.Satish Kumar with Mr. Umesh
Mishra, Advocates

versus

GOVT OF NCT DELHI

..... Respondent

Through : Ms.Aashaa Tiwari, APP

+ **CRL.A.1473/2014**

PARWINDER @ KAKE

..... Appellant

Through : Mr.Sanjay Suri, Advocate

versus

STATE(GOVT OF NCT DELHI)

..... Respondent

Through : Ms.Aashaa Tiwari, APP

+ **CRL.A.1642/2014**

MOHD AHAD @ GOPAL

..... Appellant

Through : Mr.Kunal Rawat with Mr. Karan
Anand, Advocates

versus

STATE(NCT OF DELHI)

..... Respondent

Through : Ms.Aashaa Tiwari, APP

+ **CRL.A.596/2015**

VIJAY @ VIJI

..... Appellant

Through : Mr.Chetan Lokur, Advocate

versus

STATE

..... Respondent

Through : Ms.Aashaa Tiwari, APP

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J.

1. Four appeals arise out of a common judgment dated 20.08.2014 passed by the learned Additional Sessions Judge-04(N/W), Rohini Courts, Delhi by which the appellants have been convicted for the offence under Section 302/34 IPC and sentenced to life imprisonment with fine of Rs.5,000/- each and in default of payment of fine further simple imprisonment of two months.
2. As per the prosecution, all the four appellants including one Mahesh(not arrested) in furtherance of their common intention committed the murder of Dharambir @ Dharmu (hereinafter referred to as "since deceased") on 11.02.2008 at 2:45 a.m. at plot no.BG-128, Sanjay Gandhi Transport Nagar, Delhi. Further, as per the prosecution Suresh @ Guru used a countrymade pistol to fire at the deceased thereby also committed an offence punishable under Section 27 of the Arms Act.
3. In order to prove the guilt of the accused, the prosecution examined 26 witnesses. Statement of the accused persons were recorded under Section 313 Cr.P.C. They pleaded innocence and stated that they had been falsely implicated in the present case. All the four appellants herein did not lead any defence evidence.
4. Before considering the rival submissions made by the learned counsel for the parties, we deem it appropriate to analyse the testimonies of some of the material witnesses. The prosecution has relied upon heavily on the testimonies of three eye witnesses being PW-1, Jai Bhagwan, PW-2, Deepak and PW-3, Satish Kumar.

5. PW-1, Jai Bhagwan has deposed that he was employed with the MCD, at Sanjay Gandhi Transport Nagar. He was also running a meat shop in MCD Colony, S.P. Badli, Delhi where his younger brothers, namely, Deepak and Sriom used to sit in his absence. Dharambir @ Dharmu was his cousin brother and he was also staying at MCD Lal Bagh, Civil Line Zone. He also used to run a part time business of piggery. He deposed that about 5-10 days prior to the incident, someone has stolen 10-12 pigs of his brother Dharambir. Thereafter, they started guarding their pigs. He deposed that on 11.02.2008, he along with his younger brother Deepak and Dharambir were watching their pigs at S.G.T. Nagar as the pigs used to graze in that area. At about 2:00 to 2:15 a.m. in the night intervening 10/11.02.2008, when he along with Deepak were present near the Shochalya, they heard noise of barking of dogs thereafter he along with Deepak started walking towards BG Block SGT Nagar to verify and presumed that thieves might have come over there. When they reached the BG Block of that premises, two persons whom they did not know, met them there who the witness identified in the Court. This witness correctly pointed at accused Mohd Ahad @ Gopal and Sandeep. The witness deposed that Mohd Ahad @ Gopal had a countrymade pistol in his hand while the accused Sandeep had a *gupti*. Both the accused persons told them to sit. In the meantime, Dharambir @ Dharmu also reached there. When Dharambir joined them, the accused persons gave a whistle with the help of their fingers and mouth. After hearing the whistle, all the remaining persons including accused Suresh, Vijay and Kake also reached there. This witness deposed that he knew accused Suresh and Vijay prior to the incident as they were residents of MCD Colony, SP Badli and accused Kake used to walk with accused Suresh and Vijay in that area and had

seen them many times prior to the incident. The accused persons Suresh, Vijay and Parvinder @ Kake were correctly identified by this witness in Court. The witness also claimed that he can identify one more accomplice of the accused persons, if he was shown to him. This witness deposed that accused Vijay had an iron rod in his hand, accused Parvinder @ Kake had a knife in his hand and while accused Suresh had a countrymade pistol(*katta*) in his hand. The other accused persons, namely, Suresh, Vijay and Parvinder and their associate reached the spot from behind a building. He deposed that accused Gopal kicked him and thereafter Gopal @ Mohd Ahad exhorted '*Goli Maro, Dekhte Kya Ho*'. Accused Suresh fired towards Dharambir @ Dharmu with his *katta* and bullet hit his brother in the abdomen. Accused Vijay hit him with an iron rod and he sustained injuries on his wrist. The other accused persons grappled with him. He deposed that accused Sandeep gave a *gupti* blow to his brother Deepak on his right arm but he did not receive any external injuries. After receiving bullet injuries, his brother Dharambir @ Dharmu fell down on the ground and blood was oozing out from the bullet injuries. In the meanwhile, his cousin brother Satish and Raju also reached the spot. He deposed that after the incident, accused Vijay tried to start Vikram tempo but he failed to start it. When all the accused persons tried to escape from the spot, they overpowered accused Vijay at the spot along with the iron rod which was in his hand at that time while the remaining accused persons along with their associates managed to escape from the spot. He deposed that Deepak informed the police at number 100. A PCR van reached at the spot. Dharambir was removed by the PCR van from the spot to BJRM Hospital, Hajangir Puri. He deposed that he and Deepak also went to BJRM Hospital in the same PCR van. Dharambir

@ Dharmu was declared as brought dead by the doctor in the hospital. He deposed that he and Deepak were medically examined in the hospital. They were discharged from the hospital after giving treatment. He also deposed that Inspector Sanjeev Kumar IO of the case met them in the hospital where his statement (Ex.PW1/A) was recorded by him and which bears his signatures at point 'A'.

6. This witness has also testified that Vijay was handed over to the police along with the iron rod in his presence. Vijay was arrested vide arrest memo Ex.PW1/C.
7. During cross-examination, this witness has testified that there was a big light at a distance of 100 yds from the spot of the incidence. Two persons were known to him being Gopal, he did not know the name of the second person, but he pointed out towards Sandeep in Court. According to this witness, Sandeep had a *gupti* in his hand while Gopal had a countrymade pistol. Once Dharambir reached the spot, he and Deepak grappled with Gopal and another accused. Dharambir also grappled with other accused persons and during the said grappling, a bullet was fired from a country made pistol. Apart from the said two persons, three-four other persons from the side of the accused were also present. Accused Vijay was having a rod, accused Kake had a knife and accused Suresh and Gopal had countrymade pistol and while Sandeep had a *gupti*. Gopal did not fire from the countrymade pistol. The bullet was fired by accused Suresh. Accused Gopal had hit them from his legs. Dharambir sustained injuries on the right side of his abdomen and not in any other part of the body. The entire incident had lasted five-ten minutes. During cross-examination, he also deposed that injured Dharambir was got admitted in the hospital with PW-1 and Satish, Deepak and Raju.

8. PW-2, Deepak has also testified on the lines of PW-1. He identified Mohd. Ahad @ Gopal and Sandeep in Court as the ones who were having a countrymade pistol. Accused Sandeep had a dagger(*gupti*). Both the accused started beating them. After Dharambir reached the spot, he was beaten by Mohd. Ahad @ Gopal and Sandeep. Upon hearing a whistle, accused Kake, Suresh and Vijay, who were identified in Court reached the spot. He testified that he knew accused Suresh and Vijay prior to the incident. Suresh had a countrymade pistol in his hand while Vijay had a rod. He came to know about the name of another accused Kake subsequently. According to this witness, accused Mohd. Ahad @ Gopal told accused Suresh '*Dekhata Kya Hai, Mar Goli. To Is Par Suresh Ne Dharambir Par Katte Se Goli Chala Di*', which bullet hit Dharambir in his abdomen. All the accused tried to escape from the spot. Gopal ran away towards the vehicle Vikram no.DL-1LB-4365 and tried to start the same, but could not start it and fled away leaving behind the vehicle. He along with Jai Bhagwan, Satish and Raju apprehended the accused Vijay on the spot along with the iron rod and the remaining five persons fled away from the spot. Vijay had hit Jai Bhagwan with an iron rod and accused Sandeep gave a *gupti* blow on his left arm, but he did not receive any extreme injury. After the gun shot, he had informed the police at number 100. They were removed by the PCR van to BJRM Hospital where Dharambir was declared dead. He and Jai Bhagwan were medically examined. This witness also testified that he identified accused Gopal, Parvinder @ Kake.
9. All the four appellants have submitted that they have been falsely implicated in this case. PW-1, Jai Bhagwan, PW-2, Deepak and PW-3, Satish Kumar who claimed themselves to be eye witnesses were in fact not present at the spot.

10. Mr. Lokur, counsel appearing for appellant Vijay submits that there are material discrepancies in the testimonies of the three eye witnesses. As per Jai Bhagwan, the time of the incident was between 2:00 to 2:15 a.m., as per PW-2, Deepak, the time was between 2:00 to 2:50 a.m. and PW-3, Satish Kumar has given the time between 2:30 to 2:45 a.m. There is also contradiction to the extent that as per PWs-1, 2 and 3, the bullet fired hit the deceased in his abdomen which is not borne out from the medical evidence. According to PWs-1, 2 and 3, they were taken to BJRM Hospital in the PCR along with the deceased which fact is denied by the PCR witness PW-14, Head Constable Bhopal Singh. Further, according to Jai Bagwan (PW-1), Vijay tried to start Vikram tempo, whereas according to Deepak (PW-2), Mohd. Ahad @ Gopal tried to start the Vikram tempo while according to Satish Kumar (PW-3), both Mohd Ahad @ Gopal and Vijay tried to start the Vikram tempo. Mr. Lokur also contends that PWs-1 and 2 have both claimed that they were examined at the hospital, however, no MLC has been placed on record, while PW-3 has remained silent on the medical examination. Mr. Lokur, learned counsel also contends that Vijay was not present at the spot as time of incident was between 2:00 to 2:45 a.m. while his arrest has been shown as 10:00 a.m. It is also submitted that the recovery of the iron rod from him is also not believable since there is no medical evidence to show that the iron rod was used. He did not beat anyone, he did not exhort thus, no case even under Sections 323 and 326 IPC was made out.
11. Additionally, he contends that both PW-11, Constable Manjeet Kumar and PW-14, Head Constable Bhopal Singh failed to identify the appellant in Court. Taking into consideration his role having been ascribed, learned counsel submits that as he did not beat anyone, did not

exhort, did not use the iron rod, no common intention is established. Reliance is placed on the judgments in the case of **Kripal and Others v. State of Uttar Pradesh**, AIR 1954 SC page 706 para 6; **Raghubir Chand Others v. State of Punjab**, (2013) 12 SCC 294 paras 10 and 14 and **Ramashish Yadav and Others v. State of Bihar**, (1999) 8 SCC 555 para 3.

12. Mr. Suri, learned counsel appearing for the appellant Parvinder @ Kake, while adopting the arguments of Mr. Lokur, submits that Parvinder @ Kake was not present at the spot. There is no evidence to show that he caused any injury with the knife. If at all he came to the spot subsequently, no common intention can be attributed to this appellant. Reliance is placed on the cross-examination of PW-1, Jai Bhagwan as also PW-2, Deepak to show that even during the grappling, no role had been attributed to appellant Parvinder @ Kake. Learned counsel has also submitted that the testimonies of PWs-1, 2 and 3 are unreliable as they are not eye witnesses. PWs-1, 2, and 3 claim to have accompanied the deceased in the PCR van which is not borne out from the evidence of PW-14. As per the testimony of PW-14, Head Constable Bhopal Singh who has testified that on receiving information, he reached the spot in the PCR van and found one person lying there in an injured condition. He was removed to BJRM Hospital and was declared brought dead. Reliance is also placed on the cross-examination where this witness has testified that apart from the injured, no other public persons or relatives were taken to the Hospital in the PCR. Mr. Suri, learned counsel has further contended that the presence of PWs-1, 2 and 3 is also doubtful for the reason that as per the PCR call received that three persons were involved, one person was caught and out of the three persons, two ran away. Subsequently, the number of

accused persons was increased to six.

13. Mr.Suri also contends that the testimonies of PWs-1, 2 and 3 cannot be relied upon as they did not accompany the injured to the hospital and in case they were in the PCR van along with the injured, their clothes would have been smeared with blood and also according to PWs-1, 2 and 3, the injured was fired upon at the abdomen. Thus, making their presence highly doubtful.
14. Mr. Satish Kumar, learned counsel appearing for the appellant Sandeep Kumar submits that similar role has been ascribed to this appellant as to Parvinder @ Kake. Neither it is alleged that he fired at anyone, nor did he cause any injury. Counsel submits that it has been alleged that this appellant was carrying a *gupti*. No recovery has been made at his instance. He also contends that the testimonies of the eye witnesses cannot be believed as according to Jai Bhagwan (PW-1), Sandeep had hit him with the *gupti*, but no MLC has been placed on record. Counsel contends that that appellant was arrested on the disclosure made by Mohd Ahad @ Gopal on 26.06.2008 and thereafter he had made an application for surrender. The counsel relies on the judgment in the case of **Narender & Anr. v. State**, 208 (2014) DLT 790 para 19 in support of his contention that there was no meeting of mind, neither the appellant had agreed to commit an offence. Reliance is also placed on the judgment in the case of **Veeran & Ors. v. State of M.P.**, AIR 2011 SC 1655 para 8.
15. Mr. Rawat, learned counsel appearing for the appellant Mohd Ahad @ Gopal submits that the testimony of PW-1, Jai Bhagwan would show that during grappling a gun shot was fired and thus, the appellant cannot be convicted under Section 302 IPC as the gun shot was not fired by this appellant. Counsel further contends that no motive has been proved

by the prosecution. He submits that this appellant has also been falsely implicated.

16. It has also been contended by the counsel for the parties that according to the prosecution, the deceased as also PWs-1 and 2 were present in the middle of the night as there was a theft of pigs and no complaint was made by the deceased or his family members. It has also been contended that testimonies of PWs-1, 2 and 3 cannot be relied upon as they were close relations of the deceased.
17. Ms. Aashaa Tiwari, learned counsel for the State submits that the prosecution has been able to prove its case beyond any shadow of doubt. The three eye witnesses have identified all the appellants. In fact, appellant Vijay was caught on the spot with the weapon of offence which is an iron rod. PW-1, Jai Bhagwan and PW-2, Deepak were also injured. As per the MLC, there was no fresh injury, but Jai Bhagwan had complained of pain on his arm. It is further contended that it is wrong to suggest that appellant Sandeep did not surrender but only after a *kalandara* was prepared on 26.06.2008 he was arrested. Ms. Tiwari further submits that all the appellants were armed and the presence was not incidental. It was in the early hours of the morning between 2:00 to 2:15 a.m. First two persons reached upon whistling, other accused persons also reached the spot. They had come in a tempo and upon exhortation of one of the appellants, namely, Mohd Ahad @ Gopal, a gun shot was fired by Suresh. All the persons had come to the spot with intention to kill which is evident from the fact they were armed with *katta* and *gupti* and iron rod. Resultantly, there is no infirmity in the judgment of the Trial Court.
18. We have heard learned counsel for the parties and considered their rival submissions. The main thrust of the arguments of learned counsel for

the appellants are as under:

- (i) The appellants were not present at the spot and they were falsely implicated in this case;
- (ii) Testimonies of PW-1, PW-2 and PW-3 are unreliable and they were not the eye-witnesses;
- (iii) There are material contradictions in the testimonies of PW-1, PW-2 and PW-3;
- (iv) Even assuming that the appellants were present at the spot, they had no role to play;
- (v) The deceased died due to gunshot injury, which admittedly was not fired by any of the appellants;
- (vi) Even if the witnesses are to be believed that the appellant, Vijay, was armed with an iron rod, as per the MLC there is no injury caused by the iron rod;
- (vii) The appellant, Parwinder @ Kake, was holding a knife but there was no evidence to show any knife injury nor any knife was recovered;
- (viii) Even as per the prosecution the appellant, Sandeep, was carrying a gupti, neither the gupti was recovered nor there was any injury caused by gupti;
- (ix) Further as per the prosecution the appellant, Mohd.Ahad @ Gopal, was armed with a gun but even as per the case of the prosecution this appellant did not use the gun;

19. Additionally counsel for the appellants submit that there was no meeting of mind; there was no common intention; all the appellants were masters of their own individual acts; there was no intention to murder and also except for the iron rod, which is shown to be recovered from the appellant Vijay, no other weapon of offence has been recovered at the instance of any of the appellants.

20. It has also been argued by learned counsel appearing on behalf of the appellant Vijay, that the iron rod was in fact planted upon this appellant.

21. In this backdrop, the first question, which arises for consideration is

whether the testimonies of PW-1, PW-2 and PW-3 are trustworthy, reliable and can they form the basis of conviction of the appellants. It is also to be considered whether the discrepancies, which have been pointed out, are material discrepancies or not; do they go to the root of the matter and are they of such a nature, which would discredit their testimonies.

22. It would be useful to examine the testimonies of PW-1 and PW-3, who have testified to the effect that the deceased was running a part-time business of piggery. About 5-10 days prior to the incident someone had stolen 10-12 pigs and thereafter they started guarding their pigs. On the day of the incident i.e. in the intervening night of 10-11.02.2008 PW-1 along with PW-2 and the deceased were guarding their pigs at SGT Nagar as the pigs used to graze in that area. At about 2-2.15 a.m. in the intervening night of 10-11.02.2008 i.e. on 11.02.2008 when PW-1 along with PW-2 were present near Shochalya, they heard the noise of barking of dogs and thereafter both PW-1 and PW-2 started walking towards BG Block, SGT Nagar, to verify the fact of barking of dogs presuming that the thieves must have come there. When they reached the BG-Block then appellant, Mohd.Ahad @ Gopal and Sandeep Kumar, who were having a country made pistol and gupti respectively in their hands, were present at the spot. The said appellants directed PW-1 and PW-2 to sit down and in the meanwhile the deceased also followed them and reached there. After reaching of the deceased at that place i.e. the place where PW-1 and PW-2 were made to sit by the appellants, MohdAhad @ Gopal and Sandeep Kumar, the said appellants whistled with their fingers and mouth upon which the remaining accused persons i.e. Suresh @ Guru (since PO), Vijay @ Viji, Parwinder @ Kake and their one associate reached at the spot.

Appellant, Vijay @ Vijji was having an iron rod in his hand; appellant Parwinder @ Kake was having a knife in his hand; whereas accused Suresh @ Guru, was having a country made pistol (katta) in his hand. Thereafter, accused Mohd.Ahad @ Gopal kicked PW-1 and exhorted 'goli maro dekhte kya ho', upon which accused, Suresh @ Guru (since PO), fired towards the deceased with his katta. The bullet hit the deceased. Accused Vijay @ Vijji hit PW-1 with an iron rod and remaining accused persons also grappled with PW-1. Accused Sandeep gave a gupti blow to PW-2 on his right arm but as he was wearing clothes, he did not receive any external injuries. In the meantime, PW-3 and one Raju also reached at the spot.

23. PW-1 and PW-2 have also testified that Mohd.Ahad @ Gopal and Sandeep had directed that they too sit down. Although this aspect is not mentioned in the testimony of PW-3, we are of the view it was rightly so because PW-3 was not present at that point of time.
24. On examination of testimonies of PW-1, PW-2 and PW-3, the date and approximate time of the incident stand established. In this case, there was an incident where pigs, belonging to the deceased, had been stolen and on the date of the incident, PW-1, PW-2 and the deceased were keeping a watch at SGT Nagar where the pigs used to graze. Both PW-1 and PW-2 are consistent in their testimonies that when they were present near *Sauchalya* they heard barking of dogs. PW-1 and PW-2 started walking towards BG Block, SGT Nagar, and found Mohd. Ahad @ Gopal and Sandeep Kumar, who had a country made pistol and gupti, respectively, in their hands, at the spot.
25. It may be noticed that counsel for the appellants have pointed out the following discrepancies in the testimonies of PW-1, PW-2 and PW-3:

S.NO.	STATEMENT OF PW-1, JAI BHAGWAN	STATEMENT OF PW-2, DEEPAK	STATEMENT OF PW3 SATISH
(i)	At 2-2.15 AM, pw 1 & 2 went to BG Block, SGT Nagar, and met Mohd. Ahad @ Gopal and Sandeep	Time given as 2-250 a.m.	Time given as 2.30-2.45 a.m.
(ii)	Mohd.Ahad @ Gopal and Sandeep directed PW-1 and PW-2 to sit down (before the other accused arrived)	Mohd.Ahad @ Gopal and Sandeep beat PW-1 and PW-2 (before the other accused arrived)	PW3 does not mention the beating of PWs 1 and 2 by Mohd.Ahad @ Gopal and Sandeep (Therefore contradicting PW-2).
(iii)	Thereafter Suresh, Vijay, Kake and Mahesh arrived at the spot.	Does not mention arrival of Mahesh	States of four persons arrived at the spot (Contradicts PW-2 who says only 3 arrived)
(iv)	Thereafter firing incident took place. PW-3 and Raju arrived after incident of firing.	PW-3 and Raju arrived at the spot and thereafter firing incident took place.	PW-3 and Raju already at the spot when firing incident took place. (Therefore contradicts PW-1).
(v)	Mohd.Ahad @ Gopal exhorted Suresh to fire at Dharambir.	Mohd. Ahad @ Gopal exhorted Suresh to fire at Dharambir.	Mohd.Ahad @ Gopal exhorted Suresh to fire at Dharambir.

(vi)	Bullet hit the deceased in the abdomen. (Incorrect, contradicted by medical evidence)	Bullet hit the deceased in the abdomen. (Incorrect, contradicted by medical evidence)	Bullet hit the deceased in the abdomen. (Incorrect, contradicted by medical evidence.)
(vii)	PW-2 called 100. PCR Van arrived. PW-1, 2, 3, Raju and deceased were taken to BJRM Hospital in PCR Van. (Denied by PCR Witness PW-14)	PW-2 called 100. PCR Van arrived. PW-1, 2, 3, Raju and deceased were taken to BJRM Hospital in PCR Van. (Denied by PCR Witness PW-14)	States he did not accompany the deceased, PW-1 and PW-2 in PCR Van.
(viii)	Vijay tried to start the Vikram Tempo. (However, in cross-examination says same started by Gopal, not Vijay)	Mohd. Ahad @ Gopal tried to start the Vikram Tempo	Mohd. Ahad @ Gopal and Vijay tried to start the Vikram Tempo. (Therefore contradicts both PW-1 and PW-2)
(ix)	PW-1 and PW-2 were medically examined at Hospital. (However, no MLC on record).	PW-1 and PW-2 were medically examined at Hospital. (However, no MLC on record).	Silent on his medical examination. No MLC on record.

26. As far as the aforestated discrepancies in the testimonies of of PW-1 and PW-2 and PW-3, which have been pointed out, are concerned, we are of the view that these discrepancies are not material, they do not go

to the root of the matter and they are extremely minor.

27. To say that the incident took place at 2.15 a.m. or between 2.00 a.m. to 2.15 a.m. or between 2.30 a.m. to 2.45 a.m., would show that particularly the time of the incident was early hours of the morning and this by itself cannot discredit the witness. Similarly to say that as per PW-1, PW-2 and PW-3, the bullet hit the deceased in the abdomen, which is not supported by the medical evidence also, cannot be of any help to the appellants.
28. The testimonies of PW-1, PW-2 and PW-3 would show that since there were at least seven people at the place of the incident and Mohd.Ahad @ Gopal kicked PW-1 had exhorted '*goli maro dekhte kya hai*' to accused, Suresh (PO), who fired towards the deceased with his katta, PW-1 was hit with an iron rod and remaining accused persons were grappling with PW-1 a little variation, as to where the gun shot injury was received, cannot be considered fatal to the case of the prosecution more particularly when the bullet actually hit the right thigh.
29. Having regard to the background of the witnesses, they did not describe the lower part of the abdomen, which would lead to the upper end of the femur of the right thigh. It is not expected that each witness would be able to meticulously testify. It cannot be considered to be fatal. It is also sought to be highlighted that according to PW-1, Vijay tried to start Vikram tempo while PW-2 deposed that Mohd.Ahad @ Gopal tried to start the said tempo. This is again not a material discrepancy as in the cross-examination PW-1 clarified that it was Gopal and not Vijay, who tried to start the tempo and PW-3 had stated that first Mohd.Ahad @ Gopal tried to start the tempo and then Vijay. The Court can not lose track of the fact that all the three witnesses have referred to Vikram Tempo and either of the appellants tried to start the tempo but the

tempo did not start.

30. It has also been urged before us that PW-1 and PW-2 cannot be believed as according to them they also received injuries but no MLC has been placed on record. Both PW-1 and PW-2 in their testimonies have testified that they did not receive any grievous injuries. The appellant, Vijay, had hit PW-1 with an iron rod and appellant, Sandeep, had given a gupti blow to PW-2 on his right arm but as PW-2 was wearing clothes, he did not receive any external injuries.
31. Barring the minor discrepancies, which have been pointed out, we find the testimonies of PW-1, PW-2 and PW-3 to be reliable and trustworthy. On all material issues, PW-1, PW-2 and PW-3 have supported the case of the prosecution and despite lengthy cross-examination, the appellants have not been able to discredit the testimonies of these witnesses on all the material aspects.
32. The only other issue, which requires examination, is the submission made by learned counsel for the appellants that even if it is to be believed that the appellants were present at the spot and were armed, the prosecution has failed to show that any injury was caused by any of the appellants with the weapons, no role has been ascribed to appellants Sandeep Kumar, Parvinder @ Kake and Vijay @ Viji and in the absence thereof the appellants are liable to be acquitted.
33. Additionally, it is also submitted that the prosecution has failed to prove any meeting of minds. Further, neither the prosecution has been able to show that there was any common intention on the part of the appellants nor there was pre-arranged plan to murder the deceased.
34. Whereas, learned counsel for the State, has submitted that Mohd.Ahad @ Gopal was armed with a gun; Appellant, Vijay @ Vijji was having an iron rod; appellant Parwinder @ Kake was having a knife; accused

Suresh @ Guru, was having a country made pistol (katta); and appellant Sandeep, was carrying a gupti.

35. Ms.Tiwari also contends that it is not a case where there was a sudden fight and a person died in the heat of passion. Presence of all the appellants with weapons in the wee-hours of the morning can lead only to one inference and that is they all had a common intention.
36. Learned counsel for the appellants have relied upon ***Kirpal And Others v. State of Uttar Pradesh***, reported at AIR 1954 SC 706; ***Raghubir Chand And Others v. State of Punjab***, reported at (2013) 2 SCC 294; ***Ramashish Yadav And Others v. State of Bihar***, reported at (1998) 8 SCC 555; and ***Veeran And Ors. v. State of M.P.***, reported at AIR 2011 Sumreme Court 1655; and ***Narender & Another v. State***, reported at 208 (2014) DLT 790 (DB) to show that there was no common intention; the appellants had not acted in furtherance of any common intention; and there was no element of participation.
37. In the case of ***Kirpal And Others*** (supra), the Supreme Court of India has noticed that there was no evidence of any pre-concerted or pre-determined plan to kill, blows were inflicted by the appellants in the course of sudden fight in the heat of passion without having taken undue advantage or acted in a cruel or unusual manner. In our view, this judgment, sought to be relied upon, is not applicable to the facts of the present case as the testimonies of PW-1 and PW-2 would show that the time of the incident was between 2.00 a.m. to 2.15 a.m. There was no occasion for the appellants to be present at the place of the incident, which would only point that there was a pre-determined plan and, thus, it cannot be said that the fight had erupted suddenly and in the heat of passion.
38. Another factor is that each of the appellants was armed with a weapon.

One appellant was armed with a katta, one accused (PO) was armed with a katta, one appellant was armed with a gupti, one appellant had a knife and one appellant had an iron rod. In this backdrop, can it be said that the fight was in the heat of passion and there was no pre-concerted or pre-determined plan. The answer has to be in the negative. In fact, the testimonies of PW-1, PW-2 and PW-3 would show that Mohd.Ahad @ Gopal had exhorted Suresh to fire at Dharambir, which would show that Mohd.Ahad @ Gopal, besides being armed with pistol, was also aware that Suresh was armed with a pistol.

39. The presence of the appellants, in our view, stands duly established as per the testimonies of PWs-1, 2 and 3. The case of the prosecution is that 10-15 days prior to the incident, pigs belonging to the deceased were stolen. To keep a vigil the deceased and PWs-1, 2 and 3 were awake, present and keeping guard. Their objective was to catch the thieves while the object of the appellants was to steal the pigs.
40. In this case, according to the prosecution, the gunshot injury was caused by Suresh, who is a Proclaimed Offender (PO). The testimonies of PW-1 and PW-2, in our view, is reliable and trustworthy, and would show that the appellant, Mohd.Ahad @ Gopal, had exhorted '*goli maro dekhte kya ho*', upon which the accused Suresh @ Kallu (since PO) fired towards the deceased with his katta.
41. Reverting back to the testimonies of PW-1, PW-2 and PW-3. PWs-1, 2 and 3 have deposed that the deceased was running a part-time business of piggery. Five or ten days prior to the incident someone had stolen 10-12 pigs and thereafter they started keeping a watch on the pigs. The date of the incident was no different. On the intervening night of 10-11.02.2008, PW-1 and PW-2 and the deceased were keeping a vigil on the pigs at SGT Nagar, an area where the pigs used to graze. The intent

of the appellants from this testimony can be gathered that according to the prosecution the objective of the appellants was in fact to steal the pigs. To this extent, the intention of the appellants was common.

42. From the testimony of the prosecution, we may, however, hasten to add that it is settled law that the common intention to carry out a particular act may well-develop on the spot between a number of persons. In this case, whether there was a simultaneous consensus of minds is a question, which requires to be considered.
43. While in the case of the appellant, Mohd.Ahad @ Gopal the testimonies of PW-1 and PW-2 would show that this intention to kill developed on the spot when Mohd.Ahad @ Gopal exhorted '*goli maro dekhte kya ho*', upon which the accused, Suresh (PO) fired towards the deceased with his katta. Did this common intention developed with the other three appellants? In our view, the answer is in the negative for the reason that despite the fact that they were armed with a knife, gupti and an iron rod, none of the three weapons were used nor did they attack the deceased with the said weapons. If the intention was to kill, being armed they could have used the weapons to attack the deceased but they did not do so. To say that the appellants had reached the spot with a pre-determined mind and there was pre-mediation, as argued by learned counsel for the State to kill is not borne out from the evidence. The intention was only with regard to stealing of the pigs. No doubt, there was participation in the action, but that participation in action was in furtherance of the intention to steal the pigs. The meeting of minds was also with the intention of stealing the pigs. But on the spur of the moment at the scene of the crime, the common intention developed between Suresh (PO) and Mohd.Ahad @ Gopal, which is evident from the fact that Mohd.Ahad @Gopal exhorted and Suresh fired.

44. As far as the other appellants are concerned, it cannot be said that the intention to kill was pre-arranged or developed on the spur of the moment. It cannot be said that barring Suresh and Mohd.Ahad @ Gopal, the other appellants had any common intention, which would make them liable to be punished under Section 34 of the Indian Penal Code.
45. Another reason, why we are of the view that there was no common intention to commit murder of the deceased, Dharambir, was that when PW-1 and PW-2 reached BG Block then Mohd.Ahad @ Gopal and Sandeep Kumar, who were having a country made pistol and gupti in their hands respectively were present at the spot, but they did not attack either PW-1 or PW-2 but they whistled when remaining accused persons i.e. Suresh, Vijay, Parvinder and one other associate reached the spot and it is only thereafter that the scuffle took place between the parties.
46. The prosecution has not been able to establish that barring the deceased any other person received injuries i.e. grave, serious or minor. To say that on account of the fact that PW-2 was wearing clothes, he did not receive external injuries despite having been attacked by Sandeep with a gupti is not believable. To say that since all the appellants fled from the place of the incident barring Vijay, who was caught at the spot, that would show common intention is not acceptable.
47. Thus, the appeal is partly allowed. Appellants Sandeep Kumar in CrI.A.1751/2014, Parwinder @ Kake in CrI.A.1473/2014 and Vijay @ Viji in CrI.A.596/2015 stand acquitted. The judgment and order on conviction with regard to appellant Mohd Ahad @ Gopal in CrI.A.1642/2014 is upheld.
48. The appellants Sandeep Kumar, Parwinder @ Kake and Vijay @ Viji

shall be released, if not wanted in any other case. Their bail bonds to be discharged.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

APRIL 28, 2016

pst/msr

