

Sanjay @ Sonesh Dass Vs. State

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Court : Delhi

Decided On : Sep-22-2008

Reported in : 153(2008)DLT379

Judge : B.N. Chaturvedi and; P.K. Bhasin, JJ.

Acts : Evidence Act - Sections 145; Indian Penal Code (IPC) - Sections 34, 109, 302, 307, 392, 394 and 412; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Crl. Appeal No. 732 of 2001

Appellant : Sanjay @ Sonesh Dass

Respondent : State

Advocate for Def. : Richa Kapoor, APP

Advocate for Pet/Ap. : Anil Soni, Adv

Disposition : Appeal dismissed

Judgement :

P.K. Bhasin, J.

1. In this appeal the appellant questions the correctness of judgment dated 9th January, 2001 and the order on sentence dated 10th January, 2001 passed by the learned Additional Sessions Judge whereby he was convicted for having

committed the offences of murder, attempt to murder and robbery and was sentenced to life imprisonment under Section 302 IPC, seven years rigorous imprisonment under Section 307 IPC and seven years rigorous imprisonment under Section 394 IPC. Fine was also imposed on each count with a default stipulation. The substantive sentences of imprisonment were ordered to run concurrently.

2. The facts of the prosecution case may first be noticed. PW-5 Dwarka Nath Khanna, aged about 73 years, was living with his wife Smt. Kamla Khanna in house number R-545, Rajinder Nagar, New Delhi. They had a son (PW-6 Vipin Khanna) who was settled in London and a daughter who was married. They had employed one domestic servant Ram @ Vishu. The appellant Sanjay, who was also working as a domestic servant in the same locality in the house of PW-4 Smt. Sneh Chopra, was known to Khannas' servant Ram @ Vishu and he used to visit Ram. It appears that Ram had left the service of Khannas some days before the incident and then they had employed one maid servant Jayanti, who was related to the maid servant of Khannas' grand daughter who was also living in the neighborhood of Khannas. Appellant Sanjay knew Jayanti. It appears that within few days of her employment in the house of Khannas Jayanti and appellant Sanjay, both of whom were new recruits in the locality, decided to make quick money. They found Khannas to be an easy and convenient prey for being robbed as they were living alone and chose the night of 17th March, 1999 for accomplishing their mission. One Mahesh also joined them in their mission. Appellant and that Mahesh were to do the actual job of robbery in the house of Khannas and their maid servant Jayanti was to facilitate their hindrance free entry into the house of Khannas. As per the case of the prosecution these persons did accomplish their mission on the night of 17th March, 1999 and committed robbery in the house of Khannas. Not only that, while committing robbery Smt. Kamla Khanna was gagged and strangulated resulting in her death and her husband Dwarka Nath Khanna was also brutally beaten.

3. It was further case of the prosecution that Khannas' maid Jayanti in order to ward off the possibility of police straightaway suspecting her involvement also in the incident acted smart after the incident. She immediately went crying to the

house of the grand-daughter of the old couple (PW-8 Suparna Malhotra) who was also living in Rajinder Nagar and informed her that somebody had killed her grand-mother(naani). PW-8 then rushed to the house of her grand-parents and saw that her grand-mother was lying on the floor and a blood stained knife near her was also noticed on the floor. Her grand-father (PW-5) was found in injured condition with blood all over his face and was breathing. House-hold articles were lying scattered. Suparna Malhotra telephoned the police and also informed her uncle PW-10 Ravi Ahuja about the incident. He came there and took Dwarka Nath Khanna to Ganga Ram Hospital. PCR Van which had also reached the spot took Smt. Kamla Khanna to RML Hospital where she was declared as brought dead. Local police on being informed of the incident swung into action. The case was initially entrusted to PW-24 Sub-Inspector Rameshwar Parsad. He went to Ganga Ram Hospital where the injured Dwarka Nath Khanna was found admitted but was not fit to make any statement. At the time of his medical examination injuries were noticed on his person which were opined to be grievous in nature.

4. Since there was no eye witness of the incident the police had to wait till the injured Dwarka Nath was declared fit for statement so that it could be known how the incident occurred and who were the culprits. However, on the basis of the MLCs of the deceased and the injured D.N. Khanna obtained by the Investigating officer from the two hospitals a case under Sections 302/307 IPC was got registered on 17.3.99 itself vide FIR No. 89/99 (Ex. PW-2/B) and the dead body of the deceased Smt. Kamla Khanna was got subjected to post mortem examination by PW- 3 Dr. Anil Kumar on 18.3.99. The following external and internal injuries were noticed by the autopsy surgeon on the dead body of the deceased:

(A) External injuries

1. Contusion with swelling 6 x 5 cm over middle of forehead.
2. Contusion abrasion 3 x 2 cm over left side face present over the left naso labial fold.
3. Contusion over 3.5 x 2 cm area over the upper part of left ear.

4. Contusion abrasion 1 x .5 cm over left upper lip.
5. Abrasion 4.5 x 2 cm over left side neck starting from left angle of jaw downwards.
6. Abrasion 1 x .5 cm over left side lower jaw.
7. Abrasion .5 x .3 cm over left side lower jaw below injury No. 6.
8. Abrasion .8 x .3 cm over left side neck below and outer to injury No. 7.
9. Superficial incised wound 1.5 x .6 cm over leftside neck below the middle of lower jaw.
10. Superficial incised wound 1.5 x .6 cm over the inner angle with trailing, the wound being 4 cm outer to the mid line and 5 cm above the middle of left clavicle.
11. Superficial incised wound 1.5 x .4 cm over left side of lower jaw 1 cm in front of left ear.
12. Scratch abrasion 1.3 cm over left side neck 4 cm below left ear.
13. Stitched incised wound 9 cm long in a zig zag pattern over palmer aspect of right hand(Defence wound)
14. Contusion 2 x 1 cm over outer aspect of left knee.
15. Scratch abrasion 9.5 cm over left side abdomen.
16. Scratch abrasion 4.5 cm long .3 cm above injury No. 15.
17. Scratch abrasion .5 cm long outer and back to injury No. 16.
18. Contusion 2.5 x 1.5 cm over outer lower aspect of left arm.

(B) Internal injuries

On internal examination of the body hyoid bone were found fractured over the junction of right corner with the body of hyoid bone.

The autopsy surgeon opined that the death of the deceased lady was caused due to asphyxia as a result of strangulation (manual) as well as smothering which was a homicidal act. Injuries No. 9, 10, 11 & 13 were opined to have been caused by some sharp edged weapon and also that the same could be caused with the knife (Ex. P-8) which the police had seized from the spot and which was shown to this autopsy surgeon for his opinion. Injuries No. 12, 15, 16 & 17 were opined to have been caused by some pointed object. Injuries No. 2 to 8 were opined to have been caused by blunt force impact and were sufficient to cause death in the ordinary course of nature via pressure over mouth, nostrils and neck.

5. On 19th March, 1999 Dwarka Nath Khanna could make his statement, although he was discharged from the hospital on 21.3.99, and then the horrifying tale of robbery and the murder of his life partner was narrated by him to the police. According to Dwarka Nath Khanna on 17.3.99 at about 8.45 p.m. he and his wife(the deceased) had retired to their bedroom after having dinner. Their maid servant Jayanti was still in the house at that time. He lied down on the bed while his wife Kamla Khanna was watching television. Suddenly two boys, out of whom one boy who was known to him as he used to come to meet their earlier servant Ram was having a knife in his hand, entered their bed-room and pounced upon them and started beating them. They shouted for help but no one came to their rescue. Their maid Jayanti was present in the house at the time of incident but she also did not come to save them. Dwarka Nath further claimed that the boy who was holding the knife and was known to him made his wife fall down and gagged her mouth with the 'chunni' and also strangulated her and he himself was given so severe beatings that he became unconscious. In his statement to the police the injured D.N. Khanna also stated that his wife used to wear a gold chain, two gold karras, gold ring, ear-rings and a watch. He gave the descriptive features of the two assailants and also claimed that he could identify them on being produced before him.

6. On the day of the incident itself the son of the Khannas was informed in London about the incident and he reached Delhi on 18th March. He informed the police that on checking he had found cash of about eight or nine thousand rupees which his mother used to keep with her missing. Besides the cash he had also informed

the police about his mother's missing jewellery items and some other things belonging to him including one Casio calculator, one wrist watch (GUY LAROCHE with golden dial) and a briefcase (SUNPURI make) containing some visiting cards and some other papers.

7. The police had started interrogating the domestic servants in the locality as well as their employers and came to know that accused Sanjay was employed by PW-4 Sneh Chopra as a domestic servant in her house in Rajinder Nagar. That lady had claimed that one Mahesh used to visit her servant Sanjay. She further claimed that Sanjay had reported for duty in the morning on 17.3.99 but had not reported in the evening that day and then in the early morning of 18th March he came and when she was in the bathroom he left the house with his bag and baggage and did not come back thereafter. The police also came to know from Sri Chand PW-9, who those days was doing the job of white wash in the house of Khannas that on 17.3.99 one boy who had disclosed his name as Sanjay had come at about 3.30 p.m. and had enquired from him about Khannas maid servant Jayanti and when he had told that boy that he could go inside and find out himself he left without going inside the house of Khannas requesting him to tell Jayanti that Sanjay had come. On 25.3.99 the police arrested the appellant-accused Sanjay on the pointing out of PW-9 Sri Chand from a park. On conducting personal search of the accused-appellant one gold kara(Ex. P-1) and wrist watch(Ex. P-4) were recovered. On being interrogated Sanjay made a disclosure statement (Ex PW-9/D) pursuant to which he got recovered a SUNPURI brief-case (Ex.P-2). The appellant also disclosed the involvement of one Mahesh and Jayanti, maid servant in the house of Khannas in the commission of crime. The police then arrested Jayanti at the instance of Sanjay on 25.3.99. She also made a disclosure statement (Ex. PW-9/E) pursuant to which she led the police to a room on first floor of house No. J-367 from where she got recovered an amount of Rs. 1000 and one gold ring (Ex. P-3) on which the initials of 'K.K.' were engraved. Mahesh, however, could not be traced.

8. The Test Identification Parade (TIP) of the gold ring got recovered by the accused Jayanti and the gold kara recovered from the possession of the appellant Sanjay was got conducted before the Metropolitan Magistrate (PW-22) and PW-6

Vipin Khanna, son of the deceased identified the same to be belonging to his mother Smt. Kamla Khanna. It appears that since the injured Dwarka Nath had not named accused Sanjay in his statement to the police but had simply claimed that one of the two boys involved in the incident was known to him as he used to visit their domestic servant Ram the investigating agency after arresting accused Sanjay got arranged a Test Identification Parade to be conducted by a Magistrate on 01.04.1999 but accused Sanjay declined to participate in the Test Identification Parade on the ground that he was known to Khanna family as he often used to visit their servant Ramu who was his friend. The Magistrate (PW-25) recorded the refusal statement of accused Sanjay (Ex. PW-25/B) in the TIP proceedings (Ex. PW-25/C).

9. After the completion of the investigation challan was filed in the Court against the appellant Sanjay and Jayanti. Charges under Sections 302/307/394 IPC were framed against the appellant in which it was stated that at the time of the incident there was another boy also with him. Jayanti was charged under Section 392 read with Section 109 IPC and also under Section 412 IPC. To prove its case the prosecution examined 28 witnesses. Appellant in his statement under Section 313 Cr.P.C. denied all the allegations levelled against him and pleaded his innocence. He asserted that he had been falsely implicated by the police and the actual culprit Mahesh was let off. Jayanti also pleaded innocence and stated that she was arrested by the police on 17.3.99 itself and was made to sit in the police station and all the recoveries were planted upon her.

10. The trial Court convicted the appellant Sanjay for the offences for which he was charged relying upon the evidence of the injured Shri Dwarka Nath Khanna (PW-5) and the recovery of the gold kara belonging to the deceased from the possession of the appellant. However, the trial Court rejected the evidence led against the co-accused Jayanti regarding her involvement in the commission of crime as an abettor and gave the benefit of doubt to her. The appellant Sanjay has challenged his conviction and the sentences awarded to him by filing this appeal.

11. That the deceased died a homicidal death and PW-5 Dwarka Nath Khanna received grievous injuries on his forehead was not disputed by Mr. Anil Soni,

learned Counsel for the appellant. This part of the prosecution case is even otherwise fully established from the medical evidence adduced by the prosecution. The injuries found on the body of the deceased at the time of post-mortem examination have already been noticed by us. The injuries sustained by PW-5 Dwarka Nath Khanna, as have been noticed, in the MLC (Ex. PW-1/A) prepared by PW-1 Dr. Sanjay Rohatgi of Ganga Ram Hospital who had examined him are as under:

1. Multiple haematoma on forehead both sides.
2. Both eyes swollen.
3. CLW on right side forehead above eye-brow size 1 1/4 x 1/4 cm.
4. CLW on left temporal area 1 1/2 x 1/4 cm.

12. As noticed already, the conviction of the appellant is primarily based on the ocular version of the incident given by PW-5 Dwarka Nath Khanna before the trial Court. The relevant portions from his examination chief are being reproduced below:

I and my wife Kamla Khanna were living in the house No. R-545, New Rajinder Nagar, New Delhi. My son Vipin Khanna resides in London. Accused Jaynti, present in court, was employed by us as domestic help four or five days before the occurrence. She had been referred to us by the Ayah of my daughter's daughter Suparna Malhotra.

On 19.3.91 I took meals shortly before 8.00 p.m. I took meals in the bedroom and after taking meals I lay on the double bed in the bedroom. My wife was also lying on the double bed and watching T.V. At about 8.45 p.m. two young boys entered the bedroom. Accused, present in court (the witness points to accused Sanjay) was one of them. This accused was known to me because he used to visit our servant Ram who was working with us prior to Jayanti. I asked them as to why they had come. They suddenly jumped upon my wife. One of the boys gagged the mouth of my wife with her chunni. They stabbed her also. When I raised alarm, one of the boys stabbed me also. Probably it was the companion of accused Sanjay who

stabbed me. Then I became unconscious. I regained consciousness in the hospital. Later on I came to know that my wife had expired.

On 9th April, 1999 I was passing in front of the police station along with my son. I went inside the police station to make enquiry about the progress of the case. There I saw that accused Sanjay was present there in handcuffs and he was being interrogated by Insp. Ramesh Chand. I identified the accused and told Insp. Ramesh Chand that he was one of the two boys.

Since this witness had deviated from his police version on some points the public prosecutor had cross-examined him with the permission of the trial Court. During that cross-examination PW-5 clarified that the incident had taken place on 17.3.99. He also claimed that accused Jayanti (since acquitted by the trial Court) was present in the house at the time of occurrence but she had not come on hearing the noise.

During his cross-examination on behalf of the accused PW-5 stated that accused Jayanti was still in the kitchen when the two boys had entered their bedroom. He denied the suggestion that it was his earlier domestic servant Ram who had committed the robbery and had assaulted them and further that he had identified Sanjay at the instance of the police. This witness refuted both these suggestions as being not correct.

13. Mr. Anil Soni, learned Counsel for the appellant challenged the testimony of PW-5 Dwarka Nath Khanna on the ground that he was an interested witness being the husband of the deceased and so based on his testimony alone the appellant could not have been convicted without any corroboration since the prosecution itself had not considered him to be a wholly reliable witness as he was cross-examined by the Public Prosecutor because of his having not supported the prosecution case on material aspects. It was further submitted that this witness had not claimed that accused Sanjay was having a knife in his hand at the time of the incident as had been claimed by him before the police and even in his cross-examination by the Public Prosecutor he did not claim so and that showed that he was not consistent in his version which fact renders his testimony unreliable. It was also contended that PW-5 Dwarka Nath had not claimed before the police that

the two boys who had entered into his bed room had stabbed either him or his wife and, therefore, his statement in Court to the effect that the two boys, which included the appellant also, had stabbed him as well as his wife was clearly an improved statement and that too in respect of a very material aspect of the prosecution case and so for this reason also his evidence should not be relied upon. We, however, do not find any merit in these submissions of the learned Counsel for the appellant. There is no doubt that PW-5, the only eye-witness of the occurrence, is the husband of the deceased but that relationship would not make him an interested witness. He himself was injured in the incident having received grievous injuries and it is now well settled that the testimony of an injured witness and that too a seriously injured witness cannot be discarded lightly. There has to be a strong foundation laid from the side of the accused for disbelieving an injured witness. No such foundation was laid in the present case against the testimony of the injured Dwarka Nath Khanna. The fact that a witness of an occurrence had sustained serious injuries on his body would show that he was not only present at the scene of crime but had also seen the occurrence with his own eyes and is also not expected to spare the real culprit and implicate an innocent person falsely. In the present case, nothing could be elicited from PW-5 Dwarka Nath during his cross-examination which could discredit him. It is not the case of the appellant that PW-5 Dwarka Nath had any reason to falsely involve him in the incident of robbery and murder which took place inside his house at a time when he was in normal course expected to be present in the house alongwith his old wife. No contradictions or improvements, whatsoever, with reference to his statement made before the police during investigation stage could be brought on record on behalf of the appellant during his cross-examination. The testimony of this witness, in our view, is straightforward, trustworthy and inspires full confidence and has been rightly relied upon by the learned trial Court.

14. We are also of the view that the testimony of PW-5 cannot be disbelieved just because he was cross-examined on behalf of the prosecution. He had claimed in his chief examination that he and his wife were stabbed by the intruders and in cross-examination by the Public Prosecutor he had claimed that he was not in a position to recollect if accused Sanjay was having the knife in his hand. The witness was not confronted with his police statement when he was cross-

examined by the prosecutor and also on behalf of the accused and so it cannot be said that any discrepancy or contradiction had been brought on record or that this witness had made improvement to his version of the incident given before the police which could discredit this reliable witness. The legal position in this regard is to be found in Section 145 of the Evidence Act which reads as under:

145. Cross-examination as to previous statements in writing A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

This provision of law makes it clear that if a witness is sought to be contradicted with reference to any statement which he might have made on some earlier occasion and which had been reduced into writing then the witness has to be confronted with the relevant portions of that statement with reference to which he is sought to be contradicted. The object is to give a chance to the witness to explain discrepancy or inconsistency, if any, in the statement made before the police and the one made before the Court. That was not done in the present case on behalf of the accused when PW-5 was being cross-examined on his behalf. So, his evidence cannot be ignored for this reason also as is urged by Mr. Soni.

15. In our view the evidence of the grievously injured witness Dwarka Nath Khanna (PW-5) being wholly reliable can be accepted without any corroboration. However, the prosecution has also adduced sufficient corroborative evidence for strengthening the testimony of PW-5 Dwarka Nath Khanna. As noticed already, the investigating agency had made a request to the Metropolitan Magistrate for holding a Test Identification Parade but accused Sanjay had refused to participate in the TIP. The reason given by him was that he was known to Khannas as he used to visit their servant who happened to be his friend. In our view, this reason given by accused Sanjay was not justified. Even if he was known to Dwarka Nath Khanna he could have participated in the Test Identification Parade if he actually was innocent and Dwarka Nath would not have claimed him to be one of the two

culprits falsely and in case he was really not involved in the incident Dwarka Nath Khanna would have told the Magistrate that none of the persons participating in the TIP was involved in the incident which took place in his house. We are, therefore, of the view that unjustified refusal of accused Sanjay to participate in the TIP lends due corroboration to the evidence of PW-5 Dwarka Nath.

16. The other corroborative piece of evidence is the recovery of one gold kara (Ex. P-1) and one wrist watch (Ex. P-4)-make GUY LAROCHE from the possession of accused Sanjay at the time of his arrest and one brief case (Ex. P-2)- make SUNPURI which this accused had got recovered pursuant to his disclosure statement made after his arrest. All these articles were identified by the son of the deceased, PW-6 Vipin Khanna. He claimed the Kara (Ex. P-1) to be belonging to his mother and the wrist watch (Ex. P-4) and the brief case (Ex. P-2) to be belonging to him. He also claimed during his evidence that these articles were found missing when he had checked up on being asked by the police if anything was missing from the house of his parents. PW-6 had identified the kara Ex. P-1 during the test identification parade conducted by PW-22 Shri Harish Dudani, Metropolitan Magistrate. He had also identified one ring which had allegedly been got recovered by the acquitted accused Jayanti. However, the learned Trial Court did not consider the evidence in respect of the recovery of that ring to be reliable and so, as noticed already, benefit of doubt was given to Jayanti. As far as the recovery of the gold kara and the wrist watch from accused Sanjay is concerned the submission of the learned Counsel for the appellant was that the three witnesses who had deposed about the said recovery were police officials and the only public witness examined by the prosecution did not support the prosecution case in respect of the said recovery and, therefore, the evidence of recovery given by the police witnesses alone should not have been accepted by the trial Court. There is no doubt that the only public witness examined by the prosecution, namely, PW-9 Sri Chand to establish the said recovery did not support the prosecution during the trial but the recovery of these two incriminating articles is fully established through the evidence of PW-28 Insp. Ramesh Chander who had arrested the accused Sanjay and PW-24 S.I. Rameshwar Prasad, the initial Investigating Officer and PW-15 Head constable Babu Ram who was also a member of the police team at that time. There is no reason to reject their

testimonies. They had no axe to grind against accused Sanjay. PW-9 Sri Chand had admitted his signatures on the seizure memo (Ex. PW-9/A) whereby the kara(Ex. P-1) and wrist watch(Ex. P-4) recovered from the possession of Sanjay at the time of his arrest were seized by the police. He had also admitted his signature on seizure memo (Ex PW-9/C) whereby the brief case (Ex. P-2) recovered at his instance pursuant to his disclosure statement by the police was seized. In these circumstances it is clear that he was not accepting the recovery of these articles to help accused Sanjay.

17. We are, therefore, of the view that the learned trial Court has rightly come to the conclusion that appellant Sanjay was involved in the incident of robbery cum murder alongwith one other boy.

18. It had also been argued by learned Counsel for the appellant that the appellant had been charged under Section 302 IPC simpliciter and has been convicted accordingly which was, however, not correct since the injured eye-witness Dwarka Nath Khanna had not categorically claimed that it was the appellant who alone had stabbed and strangled his wife and so the appellant's conviction under Section 302 IPC needs to be set aside. Learned Additional Public Prosecutor, on the other hand, had submitted in this regard that the appellant's conviction can even now be converted into one under Section 302 IPC read with Section 34 IPC even in the absence of Section 34 IPC having been invoked against him by the trial Court while framing the charge against him since in the charge framed it had been clearly stated that at the time of the incident one other boy was also present with him and robbery had been committed by both of them and even during evidence also Dwarka Nath Khanna had claimed the participation of two persons in the incident. It was also contended that all these facts clearly show that the appellant was fully aware of the prosecution case that the incident had taken place in furtherance of the common intention of two persons including himself. In support of this submission learned APP placed reliance upon two decisions of the Hon'ble Supreme Court which are reported as : 2005 CriLJ126 'Gurpreet Singh v. State of Punjab' and : 2001 CriLJ4740 'Ramji Singh and Anr. v. State of Bihar'.

19. We are in agreement with the submission of the learned Counsel for the appellant that conviction of the appellant under Section 302 IPC simpliciter is not proper since from the evidence of the only eye witness of the occurrence, namely, PW-5 Dwarka Nath Khanna it is clear that he had not claimed that accused Sanjay only had assaulted him and his wife. His testimony was that one of the two intruders had gagged the deceased and that 'they stabbed her also' and further that one of the boys who was probably the companion of accused Sanjay who had stabbed him. In view of this testimony of the injured witness it cannot be said that accused Sanjay alone was responsible for the death of the deceased and so his conviction under Section 302 IPC simpliciter cannot be sustained. However, appellant Sanjay cannot be acquitted of the charge of murder since from the evidence of the injured eye-witness it has clearly been established that the deceased had died because of the injuries caused to her by the two intruders including the appellant in furtherance of their common intention and so conviction of the appellant Sanjay for the offence of murder can be sustained with the aid of Section 34 IPC. We are conscious of the fact that the trial Court had not invoked Section 34 IPC while framing charge of murder against the appellant but, in our view, for that reason the appellant cannot secure his acquittal. In the charge framed against him it was clearly stated that he had committed robbery with one other boy. In the evidence of the injured eye-witness also it was clearly deposed by him that the appellant and one other boy who had entered into his bedroom had assaulted him and his wife. When the appellant's statement under Section 313 Cr.P.C. was recorded by the trial Court it was put to him at that time that he and his associate had entered the bedroom of Dwarka Nath Khanna (PW-5) and when he had asked them as to why they had come both of them had jumped upon the deceased. It is thus clear that the appellant faced the trial with full knowledge that the prosecution case was that the incident of robbery and murder was committed by him and his associate together and was a pre-planned affair. In the two decisions of the Supreme Court cited by the learned Additional Public Prosecutor on the point of conversion of the conviction of the accused from Section 302 IPC simpliciter to one under Section 302 read with Section 34 IPC in the absence of a charge to that effect it has been clearly laid down that such a course is permissible. We may make a special reference to para Nos. 13 and 14 of the

judgment in 'Gurpreet Singh (supra) which are as under:

13. Further, it has been reiterated by this Court in the case of Ramji Singh and Anr. v. State of Bihar : 2001 CriLJ4740 wherein also charge was framed under Section 302 simpliciter but conviction was under Section 302 read with Section 34 IPC and it was laid down that conviction under Section 302 read with Section 34 IPC was warranted as the accused person shared the common intention to cause death of the victim and no prejudice was caused to them because of non-framing of charge under Section 302 read with Section 34 IPC.

14. In the present case, it cannot be said that the accused persons were prejudiced merely because charge was framed under Section 302 IPC simpliciter and no charge was framed under Section 302 read with Section 34 IPC. From the evidence of two eyewitnesses, namely, PWs 2 and 3 it would appear that the accused persons shared the common intention to cause death of the victim. They were cross-examined at length from all possible angles and from the suggestions that were put forth to the eyewitnesses, we are fully satisfied that the accused persons were not in any manner prejudiced in their defence. That apart, in their examination under Section 313 of the Code, the appellants were specifically told that they along with other accused persons armed with kirpan came to the place of occurrence and assaulted the deceased whereafter they fled away which shows that appellants shared the common intention to cause death of the deceased.

We, therefore, alter the conviction of the appellant to Section 302 IPC simpliciter to one under Section 302 read with Section 34 IPC.

20. It is evident from the evidence of the injured eye-witness that the appellant and his associate had gone to the house of the Khannas with the intention of killing them and committing robbery. Although Dwarka Nath Khanna was also severely beaten up at that time but he survived. He had deposed that at the time of the incident he had become unconscious and it appears that the appellant and his associate must have thought that he had also died otherwise they would have ensured his death also as in that event there would have remained no eye-witness of the incident. So appellant's conviction for the attempted murder of Dwarka Nath Khanna was also justified. However, his conviction under Section 307 IPC also

needs to be altered to one under Section 307 read with Section 34 IPC for the reasons which we have given for altering his conviction from Section 302 to Section 302 read with Section 34 IPC. Since the evidence of the injured witness in respect of the injuries caused to him is also not to the effect that only accused Sanjay had assaulted him and caused any particular injury with the intention of killing him. He had deposed that accused Sanjay and his companion had both assaulted him also.

21. In the result, while altering the conviction of the appellant from Section 302 to Section 302 read with Section 34 IPC and from Section 307 IPC to Section 307 read with Section 34 IPC and maintaining his conviction under Section 394 IPC and the sentences imposed by the trial Court for each of these convictions this appeal is dismissed.

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