

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

Judgment Reserved on: November 19, 2017

% *Judgment Delivered on: December 04, 2017*

+ CRL.A. 1253/2015

ANIL

..... Appellant

Through: Mr.Ankit Mathur, proxy
counsel for Mr.Rajesh Dua,
Advocate

versus

STATE

..... Respondent

Through: Ms.Kusum Dhalla, APP for the
State with SI Vijay Kumar PS
Vijay Vihar

AND

+ CRL.A. 1278/2015

ASHISH @ KALI @ AMAR

..... Appellant

Through: Mr.Ajay Verma, Advocate with
Mr.Upendra Yogesh, Advocate

versus

STATE

..... Respondent

Through: Ms.Kusum Dhalla, APP for the
State with SI Vijay Kumar PS
Vijay Vihar

AND

+ CRL.A. 222/2016

PARVEEN @ MONTY

..... Appellant

Through: Mr.Sumeet Verma, Advocate
with Mr.Aman Choudhry,
Advocate

versus

STATE

..... Respondent

Through: Ms.Kusum Dhalla, APP for the
State with SI Vijay Kumar PS
Vijay Vihar

AND

+ CRL.A. 542/2016 & CRL.M.A.9188/2016

VINOD @ DADDU

..... Appellant

Through: Mr.S.K.Gandhi, Advocate with
appellant in person

versus

THE STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through: Ms.Kusum Dhalla, APP for the
State with SI Vijay Kumar PS
Vijay Vihar

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

HON'BLE MS. JUSTICE REKHA PALLI

PRATIBHA RANI, J.

1. These four appeals arise out of the judgment dated 24th August, 2015 and order on sentence dated 14th September, 2015 passed by the learned Trial Court in Sessions Case No.12/2014, pertaining to FIR No.429/2010, under Sections 302/394/34 IPC, PS Vijay Vihar, whereby the four appellants have been convicted for committing the offences punishable under Section 302/394/34 IPC and sentenced as under:-

- | | | |
|------|----------------|--|
| (i) | U/S 302/34 IPC | to undergo life imprisonment and to pay a fine of ₹5,000/- each and in default of payment of fine, to undergo SI for 6 months. |
| (ii) | U/S 394/34 IPC | to undergo RI for 4 years and to pay a fine of ₹2,500/- each and in default of payment of fine, to undergo SI for 3 months. |

2. The facts of the case as mentioned in the charge-sheet and noted by the learned Trial Court in the impugned judgment read as under:

- (i) *That on 18.12.2010 at about 9.40 pm, information was received in PS Vijay Vihar regarding robbery of valuable articles after giving knife injury near Rithala Bus stand in front of Talab. Said information was recorded vide DD no. 76B and same was entrusted to SI Satyavir Singh (PW25), who alongwith Ct.Kiran Pal (PW18) reached at the place of information. In the meantime, Inspector Sameer Kumar Jha (PW28) alongwith HC Mahavir Singh (PW27) also reached there on receipt of information about the incident. A lot of blood was found lying at Chabutra as well as a bench available in the Gumti of Talab Wala Park, Village Rithala. On enquiry, it was revealed that injured had been removed to BSA hospital. In the meantime, Ct.Kuldeep (PW12) and Ct.Yashpal (PW16) also reached there. After leaving HC Mahavir Singh and Ct.Yashpal at the scene of crime, Inspector Sameer Kumar Jha alongwith, ASI Satyavir Singh and Ct.Kiran Pal rushed to BSA hospital, where MLC of injured Ranjit was collected. After sometime, injured Ranjit expired. One public person namely Rajesh @ Pauda (PW-5) met them in the hospital and claimed himself to be an eye witness of the incident in question;*
- (ii) *Inspector S.K. Jha recorded statement of complainant Rajesh @ Pauda, wherein he claimed that after attending their duties when he alongwith deceased were returning back to their respective houses, they purchased beer from Mall in front of Ambedkar Hospital and reached at Talab Wala Park, Rithala at about 9.15 pm. Both of them went inside the said park for attending the call of nature, when four boys in the age group of 20-25 years came there. Two of them caught hold of him*

while other two caught hold of deceased and they all started beating them with fist and kick blows. They robbed his purse containing his driving license, Voter I-Card, cash amount of ₹510/-, etc. and his mobile phone make Nokia 2310 having SIM no.9818342573. He further claimed that when Ranjit (since deceased) resisted the act of robbery of assailants, one of those boys gave knife blow on his thigh as well as on left side of his neck and robbed mobile phone and purse of Ranjit. Thereafter, all four of them fled away from there. Injured Ranjit became unconscious and fell down on Chabutra in the Gumti of said park. He informed his brother Main Pal Singh (PW1) by calling him from the nearby shop of Rahul. Accordingly, Main pal Singh also reached there and both of the with the help of some passerby shifted injured Ranjit to BSA hospital. He could identify all said four boys/offenders on being shown to him;

- (iii) On the basis of said statement, Inspector S.K.Jha got registered FIR in question for offences punishable U/s 302/394/34 IPC through Ct.Kuldeep and investigation was entrusted to him;*
- (iv) During investigation, IO Inspector S.K.Jha seized relevant exhibits of deceased from the hospital and got postmortem of dead body conducted in SGM hospital. He also lifted relevant exhibits from scene of crime and also prepared site plan of the place of occurrence;*
- (v) During investigation, IO Inspector S.K.Jha recorded statements U/s 161 Cr.P.C. got collected call details record of mobile phone no. 9818342573. On analysis of said call details record, it was revealed that SIM no.8802720390 of Aircel had been used on 20.12.2010 in the mobile*

handset of complainant. Accordingly, call details record of SIM no.8802720390 were also collected. It was revealed that said SIM was being used by one Vijay @ Sonu @ Cheel (PW-29) who, on enquiry, disclosed that accused Ashish @ Kali had visited his factory on 20.12.2010 for disposing off one mobile handset and he had used aforesaid SIM by inserting the same inside said mobile handset;

- (vi) As per the case of prosecution, FIR no.432/10 U/s 363 IPC regarding kidnapping of son of complainant in that case, had been registered at PS Vijay Vihar. On 25.12.2010, JCL Nitin had been apprehended in said case. During his interrogation, he confessed to have committed the incident in question alongwith present four accused persons facing trial in this case before this Court. It is alleged that in pursuance of his version, JCL Nitin led to the arrest of accused Anil. Accused Anil in pursuance of his disclosure statement, got recovered purse containing photocopy of driving license of complainant Rajesh @ Pauda from inside the room situated on first floor of his house;*
- (vii) It is further case of prosecution that accused Anil led to the arrest of JCL Rahul who was found in possession of one Aircel SIM no.8802720390 which used in the mobile handset of complainant Rajesh @ Pauda on 20.12.2010;*
- (viii) That on 30.12.2010, accused Asish @ kali was arrested on the basis of secret information. In pursuance of his disclosure statement, said accused got recovered half burnt driving license and other documents from his rented house. Not only this, he also allegedly got recovered weapon of offence i.e. knife from near round around (gole chakkar) of Rani Jhansi Road;*

- (ix) *That on 15.01.2011, accused Vinod @ Daddu was arrested. In pursuance of his disclosure statement, said accused got recovered robbed purse of deceased Ranjit from below the mattress of bed of his residential house. On 17.07.2011, accused Pravin @ Monty was also arrested from his house and said accused got recovered his blood stained pant, which he was wearing at the time of incident in question;*
- (x) *During the course of investigation, accused Anil was correctly identified in his judicial TIP, while remaining accused persons refused to participate in their judicial TIP. Robbed recovered purse was also identified by complainant in judicial TIP of case property. Subsequent opinion with regard to weapon of offence was also collected, relevant exhibits were got deposited in FSL Rohini and scaled site plan was got prepared from draftsman and PCR Form was also collected from Control Room. After completion of investigation, chargesheet had been filed before the Court.*

3. After the case was committed to the Court of Sessions, all the four convicts were charged for committing the offences punishable under Section 120-B IPC, under Section 302 r/w 396 r/w 120-B IPC, under Section 397 IPC and under Section 412 IPC.

4. In order to substantiate its case, the prosecution examined 29 witnesses in all. All the four convicts were afforded an opportunity to explain the incriminating evidence during their examination under Section 313 Cr.P.C. They simply denied the case of prosecution and claimed their false implication on the basis of false and fabricated documents by the Investigating Officer. They preferred not to lead any evidence in their defence.

5. After considering the testimony of PW-5 Rajesh - the eye witness, PW-29 Vijay whose SIM was used in the mobile phone robbed from PW-5 Rajesh which was put on surveillance and which led to ascertaining the identity of the offenders involved in the occurrence, recovery of the weapon of offence i.e. the knife at the instance of convict Ashish and partial recovery of the robbed articles, the learned Trial Court held that all the accused persons had participated during commission of the offences and they were sharing the common intention to commit the offences within the meaning of Section 34 IPC. Learned Trial Court held that all the accused persons in furtherance of their common intention committed robbery of the purses and mobiles belonging to PW-5 Rajesh and the deceased Ranjit and the multiple knife injuries caused by Ashish on the vital part of the deceased, were in furtherance of their common intention. All the four appellants were convicted for committing the offence punishable under Section 302/394/34 IPC and sentenced in the manner stated above. However, all the appellants were acquitted of the remaining charges.

6. Mr.Ankit Mathur, learned counsel for convict Anil, Mr.Sumeet Verma, learned counsel for convict Parveen @ Monty and Mr.S.K.Gandhi, learned counsel for convict Vinod @ Daddu have challenged the conviction of convicts Anil, Parveen and Vinod under Section 302/34 IPC by submitting that even if it is assumed for the sake of arguments that these three convicts were with the convict Ashish @ Kali at the time of commission of robbery, they did not share any common intention with Ashish @ Kali to commit the

murder of Ranjit (deceased). It has further been submitted that the star witness i.e. PW-5 Rajesh @ Pauda who was with the deceased Ranjit at the time of occurrence, did not attribute any role to these three convicts which could even remotely suggest that they shared the common intention even at the spur of the moment. It has been contended that while committing robbery or taking away their purse and mobile etc., convicts Anil, Parveen and Vinod admittedly neither inflicted any injury nor they had shown any weapon either to PW-5 Rajesh – the eye witness or to the deceased Ranjit. Learned counsel for the convicts Anil, Parveen and Vinod have relied on the statement of PW-5 Rajesh – the complainant/eye witness to the effect that when Ranjit resisted the attempt by the two persons to rob him, convict Ashish @ Kali took out a knife and stabbed Ranjit twice. Thus, in the absence of even any exhortation by the three convicts to Ashish @ Kali to attack Ranjit with a knife or to kill him, with the aid of Section 34 IPC they could not have been convicted for committing the murder of Ranjit. While referring to the statement of PW-5 Rajesh that he initially did not even identify all the convicts and was declared hostile, it has been contended that on the testimony of a hostile eye witness, the prosecution cannot be said to have discharged the onus to prove the charges beyond reasonable doubt.

7. Attention of this Court has also been drawn to the testimony of PW-29 Vijay who deposed before the Court that he was also illegally detained by the police and tortured. But later he was cited and examined as a prosecution witness. It has been contended that no reliance could have been placed by learned Trial Court on the

testimony of PW-29 Vijay who himself was a suspect in the eyes of police and was interrogated in depth. The whole case of the prosecution is based on the testimony of public witnesses who have either turned hostile or suspects and could not have been made the basis to hold the convicts guilty.

8. Mr.Ankit Mathur, learned counsel for convict Anil, Mr.Sumeet Verma, learned counsel for convict Parveen @ Monty and Mr.S.K.Gandhi, learned counsel for convict Vinod @ Daddu have further submitted that not only the prosecution has failed to prove that the four convicts shared the common intention to commit the murder of Ranjit, but even the number of persons involved in the commission of crime though stated to be four by the complainant PW-5 Rajesh in FIR Ex.21/A, was subsequently shown to be six including two JCL. While justifying their refusal to take part in the TIP by convicts Parveen, Ashish and Vinod, it has been submitted that they were earlier shown to the witness, hence their refusal to take part in TIP was justified. It has also been contended that since the occurrence had taken place during night in an isolated dark spot in the park, it was not possible for the eye witness i.e. PW-5 Rajesh to see all the offenders in the park so as to be able to identify them during TIP. Recovery of pair of blood stained pant after seven months of the incident, at the behest of convict Parveen from his house, was also contended to be improbable as any person involved in a crime would not keep blood stained clothes hidden under the mattress for almost a month. It has been contended that the beer bottles allegedly consumed by the deceased and PW-5 Rajesh were not seized from the spot and the

empty wallet of the deceased claimed to have been recovered from convict Anil is also doubtful as nobody would retain the empty wallet robbed in a robbery and murder case for such a long time. Attempt has also been made to assail the testimony of PW-5 Rajesh on the ground that after the occurrence instead of calling the family of the deceased, he preferred to call his brother PW-1 Sh. Main Pal Singh and this also casts a serious doubt on the truthfulness of his version. It has also been contended that the call was made by PW-5 Rajesh from the shop of one Rahul but even he has not been examined which also casts serious doubt on the case of prosecution. Even the car in which the deceased was shifted to the hospital was not seized and this also creates a serious doubt in the prosecution version. Refusal on the part of PW-5 Rajesh – the complainant to get himself medically examined despite stating that he was also given beatings, was also taken as a ground to discard his version. Learned counsel for the convicts Anil, Parveen and Vinod have contended that even if testimony of PW-5 Rajesh – the complainant is considered reliable by the Court, the only offence proved against them could be under Section 394/34 IPC and not under Section 302/34 IPC as they did not share the common intention to commit the murder of Ranjit.

9. Mr. Ajay Verma, learned counsel for convict Ashish @ Kali, while seeking his acquittal, in addition, has submitted that the testimony of PW-5 Rajesh who was claimed to be an eye witness by the prosecution, needs to be discarded for the reasons that he did not fully support the prosecution case. It was during his cross examination by learned APP for the State that certain suggestions

given to him in leading form have been admitted to be correct by him. PW-5 Rajesh has identified three convicts only during his cross examination by learned APP for the State. Mr.Ajay Verma, learned counsel for convict Ashish @ Kali has contended that it was not possible for the Investigating Officer to lift the samples from the scene of crime during that foggy winter night. While referring to the testimony of PW-29 Vijay, Mr.Ajay Verma, Advocate has contended that he was coerced to become a prosecution witness by the police which fact has been duly admitted by him, hence no conviction could have been placed by learned Trial Court on the basis of testimony of wholly unreliable public witnesses i.e. PW-5 and PW-29.

10. While disputing the recovery of knife Ex.P1 at the behest of convict Ashish @ Kali, it has been contended that the knife was planted to solve the case. The recovery has been shown to be from the Chambery of Rani Jhasi Road which is a place accessible to the public at large. The date of occurrence is 18th December, 2010 whereas knife has been recovered after sixteen days and it is highly improbable that in respect of an occurrence that was committed in Rithala, knife would be brought upto Rani Jhansi Road and hidden there. Non-joining of public witness at the time of recovery of knife was also claimed to be one of the reasons for discarding the testimony of police officials who were witnesses to the recovery of knife Ex.P1.

11. Refuting the arguments on behalf of the convicts, Ms.Kusum Dhalla, learned APP for the State has submitted that the learned Trial Court has passed a well reasoned judgment dealing with all the contentions which have also been raised before this Court. The

recovery of knife from Rani Jhansi Road Chambery has been dealt with by observing that convict Ashish @ Kali is a resident of Sadar Bazar. Therefore, Rani Jhansi Road Chambery being on the way to his residence from place of occurrence in Rithala, he might have found it convenient to hide it there. Learned Trial Court has dealt with the issue of non-joining of public witness at the time of recovery of knife observing that public witness are often reluctant for various reasons hence that itself could not be a ground to discard the testimony of the police officials on the issue of recoveries made from the convicts which includes half burnt driving licence and three visiting cards of the deceased and weapon of offence i.e. knife Ex.P1 at the instances of convict Ashish @ Kali, blood stained jeans at the instance of convict Parveen which was worn by him at the time of incident, purse of the deceased at the instance of convict Vinod and purse and driving licence (photocopy) of PW-5 Rajesh at the instance of convict Anil. Learned APP for the State has submitted that merely because a witness has been cross examined by learned APP for the State in itself is not sufficient to discard his testimony in toto. While emphasizing that all the convicts shared common intention to commit the murder of Ranjit who offered resistance, learned APP for the State highlighted that the convicts are involved in various cases and they had the knowledge as to who is in possession of the knife and when it was to be used, so the judgment of the learned Trial Court whereby the convicts have been convicted for committing the offence punishable under Section 302/394/34 IPC as well the order on sentence may be upheld.

12. We have considered the rival contentions and also carefully gone through the Trial Court Record.

13. The evidence adduced by the prosecution and the submissions made on behalf of the appellants need to be examined on the following aspects:

- (i) The involvement of the appellants in the occurrence dated 18th December, 2010.
- (ii) Recovery of exhibits from each of the convicts on the basis of their disclosure statement to connect them with the crime.
- (iii) Whether the convicts shared common intention to commit the robbery or to commit the robbery and murder both.

14. PW-5 Rajesh when examined before the learned Trial Court deposed as under:-

- (i) He alongwith Ranjit (deceased) was working in Sector-9, Rohini and on 18th December, 2010 after the duty hours, he alongwith his friend Ranjit (deceased) was returning home.
- (ii) On the way back home, they purchased two beer bottles from a shop situated in front of Ambedkar Hospital and consumed the same and threw the bottles on road side.
- (iii) While passing through Rithala Park, they entered the park for urinating and while they were urinating, four boys came there.
- (iv) Out of those four boys, two boys caught hold of him and two boys caught hold of Ranjit and started giving beatings to them and took them to a 'Gumti' inside the park.

(v) The boys who had caught hold of him (PW-5) snatched his mobile and purse containing ₹500/-, driving licence and those two boys ran towards school.

(vi) The boys who had caught hold of Ranjit, took his mobile and purse and also ran towards school.

15. PW-5 Rajesh identified convict Anil to be one of the boys who had caught hold of him but initially he was unable to identify the two boys who had caught hold of Ranjit. During cross examination by learned APP for the State, he stated that Ranjit was stabbed on his thigh and left side of his back by one boy identified by him as Ashish @ Kali. He also identified during trial the three convicts (who refused to take part in TIP) as Ashish, Parveen and Vinod who were also identified by PW-5 in Rohini Court where he had gone for some personal work. He identified convict Parveen, to be the person who caught hold of Ranjit and convict Ashish, who stabbed Ranjit.

16. As per the prosecution, the occurrence has taken place on 18th December, 2010 at about 9.40 pm in Talab Wala Park, Rithala. The first version in respect of the occurrence given by PW-5 Rajesh - the eye witness, who was also robbed, in the complaint Ex.PW5/A reveals the sequence of events as under:-

(i) The eye witness Rajesh (PW-5) as well deceased Ranjit were working as drivers in a society in Sector-9, Rohini.

(ii) On 18th December, 2010 at about 8.00 pm after finishing their duty, both of them were returning home on foot and when they reached Ambedkar hospital, they purchased two beer bottles from the

nearby Mall and consumed the same while walking and threw the bottles on the road.

(iii) At about 9.15 pm when they reached Talab Wala Park, Rithala and were urinating in the park, four boys in the age group of 20-25 years, came there.

(iv) Two boys caught hold of him (PW-5) and other two boys caught hold of Ranjit and took them to a 'Gumti' in the park.

(v) The two boys who caught hold of him, took out his purse containing his driving licence, water bill, identity card etc. and ₹510/- as well his mobile phone (make Nokia having SIM No.9818342573).

(vi) The other two boys who had caught hold of Ranjit (deceased) tried to take out his belongings from his pocket. When he resisted, one of those two boys took out a knife and stabbed on his thigh and waist and after taking his purse and mobile, they ran away.

(vii) Ranjit fell unconscious on the 'Chabootra'.

(viii) He went to the nearby tempo stand and from the shop of Rahul, called Main pal Singh (PW-1) and apprised him about the incident.

(ix) When Mainpal Singh (PW-1) reached the park, they with the help of some other persons removed Ranjit (deceased) to Baba Saheb Ambedkar Hospital in a car but he could not note down the registration number of the car.

17. The information given by PW-1 Sh. Mainpal Singh to PCR about the incident of stabbing and articles being snatched near Rithala Bus Stand in front of *talab* was recorded vide DD No.76-B (Ex.PW2/A).

18. The case of prosecution is based on the eye witness account given by PW-5 Rajesh who himself was beaten and robbed but escaped unhurt as he did not put any resistance. No doubt PW-5 Rajesh has been subjected to cross examination by the State but that itself is not sufficient to discard his testimony in toto.

19. Legal position is well settled that evidence of a declared hostile witness is not wholly effaced from the record and that part of evidence which is otherwise acceptable can be acted upon to the extent the version is found to be dependable on a careful scrutiny thereof.

20. PW-5 Rajesh himself was victim of robbery. He made a call from a nearby shop of Rahul to PW-1 Sh.Mainpal Singh who reached the spot within a short time and both of them with the help of some passersby removed deceased Ranjit to Baba Saheb Ambedkar Hospital in a car. To that extent the statement of PW-5 Rajesh has been fully corroborated by PW-1 Sh.Mainpal Singh. While appreciating the testimony of an eye witness, undue importance cannot be attached to minor discrepancies if the witness is not able to fully recollect the incident or is over-awed by the Court atmosphere.

21. In the case Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat (1983) 3 SCC 217, the Apex Court has held that discrepancies which do not go to the root of the matter and shake the basic version of the prosecution should not be attached undue importance for the following reasons:

‘(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an

incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

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

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

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

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding

sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment'

22. The postmortem report Ex.PW15/A records the injuries suffered by the deceased Ranjit and cause of death as under:-

'External Examination:

1. Stab wound 1.5 cm x 0.3 cm obliquely placed single edge with sharp edge upwards present over left posterior axillary region over 10 intercostal space, placed 18 cm below left posterior axillary fold. On fine dissection of wound it is 2.6 cm deep cutting into intercostals muscles going downwards medial and anterior in direction.

2. Stab wound 4 cm x 1.5 cm obliquely placed single edge with sharp edge upwards present over lateral side of left thigh is placed 26 cm below iliac fossa and 25 cm above left knee joint. On fine dissection wound is 9.5 cm deep cutting into underlying soft tissues, blood vessels and muscles of lateral side of thigh going anterior medial and upwards.

Opinion:

Cause of death is shock and hemorrhage consequent upon stab injuries one and two. Injuries one and two are caused by a sharp object and sufficient to cause death in ordinary course of nature.'

23. PW-5 Rajesh has deposed about Ranjit being stabbed twice which fact is corroborated by the postmortem report Ex.PW15/A. The purse robbed from PW-5 Rajesh has been identified by him during

judicial identification proceedings of the case property Ex.PW13/A. The purse of the deceased though recovered from convict Vinod could not be subjected to test identification as father of the deceased was residing in the village, hence was not in a position to identify the purse of his son. This shows the fairness with which the investigation has been carried out.

24. Out of the four convicts, only one i.e. convict Anil opted to take part in TIP proceedings and he has been duly identified by PW-5 Rajesh to be one of the offenders. The other three convicts namely Ashish, Parveen and Vinod have been identified by him at the stage of investigation in Rohini Court when the witness happened to be present in Rohini Court premises and thereafter at the stage of prosecution evidence. Thus, not only the case property but also all the persons involved in the occurrence were identified by PW-5 Rajesh – the complainant. Mere non-joining of public witnesses at the time of apprehension of the convicts and the recoveries effected at their behest cannot be a ground to discard the testimony of the prosecution witnesses, as has been held by the Apex Court in State of U.P. vs. Anil Singh ASI 1988 SC 1998 as under:-

... in the great majority of cases, the prosecution version is rejected either for want of corroboration by independent witnesses, or for some falsehood stated or embroidery added by witnesses. In some cases, the entire prosecution case is doubted for not examining all the witnesses to the occurrence. The indifferent attitude of the public in the investigation of crimes could also be pointed. The public is generally reluctant to come forward to depose before the court. It is, therefore, not

correct to reject the prosecution version only on ground that all witnesses to occurrence have not been examined. It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. It is also experienced that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.'

25. It is settled legal position that corroborative evidence of an eye witness cannot be rejected merely because of some contradictions in the deposition. Mobile No.9818342573 was robbed from the eye witness PW-5 Rajesh, which was put on surveillance. Just after two days of the incident, SIM No.8802720390 was used in the mobile handset of the complainant Rajesh which led the Investigating Officer to PW-29 Vijay. His interrogation revealed the identity of convict Ashish @ Kali and his co-convicts. All of them were made to take part in TIP and while three convicts namely Ashish, Parveen and Vinod refused to join the TIP proceedings, one convict namely Anil

who opted to take part in TIP proceedings was duly identified by PW-5 Rajesh. Merely because PW-29 Vijay was subjected to extensive interrogation, is no ground to disbelieve his testimony. Rather he appears to be a truthful witness who deposed not only about the treatment meted out to him during interrogation but also the circumstances under which his SIM No.8802720390 was used in the mobile handset robbed from the complainant. He revealed that convict Ashish @ Kali and his associates were routine visitors to that place for offering mobiles for sale and that mobile handset make Nokia (i.e. of PW-5 Rajesh) was brought to him by the convicts. PW-29 Vijay inserted his SIM in that mobile handset which was on surveillance. He was interrogated by the IO. Statement of PW-5 Rajesh – the complainant regarding the incident of robbery of his purse and mobile finds corroboration from the statement of PW-29 Vijay as the mobile of PW-5 Rajesh was brought to PW-29 Vijay by none else but Ashish and other convicts. The convicts failed to explain their possession in respect of the mobile and purses of PW-5 Rajesh and deceased Ranjit.

26. Taking into consideration the un-rebutted, reliable and trustworthy deposition of the victim of robbery i.e. PW-5 Rajesh who also witnessed his companion Ranjit being stabbed twice on offering resistance and also robbed, which has been duly corroborated by the medical and scientific evidence, we are of the considered view that the learned Trial Court has rightly come to the conclusion that all the convicts are guilty of committing the offence punishable under Section 394/34 IPC.

27. We also find ourselves in complete agreement with the reasoning given by the learned Trial Court to hold appellant Ashish @ Kali guilty of the offence punishable under Section 302 IPC. However, it needs to be examined whether the other three convicts namely Parveen, Anil and Vinod could have been convicted by the learned Trial Court for the offence punishable under Section 302/34 IPC as they were present at the spot when convict Ashish stabbed Ranjit who was resisting his attempt to commit the robbery.

28. Section 34 IPC incorporates the principle of vicarious liability when an accused shares a common intention with the actual principal perpetrator of the crime. Two essential requirements of the Section are (i) common intention and (ii) participation of the accused in the commission of the offence.

29. In the decision reported as Rajesh Kumar v. State of H.P., (2008)15 SCC 705, the Supreme Court elucidated and laid down the following principles as applicable to Section 34 IPC:

“13. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge

of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab (AIR 1977 SC 109), the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.”

30. In the decision reported as Arun v. State by Inspector of Police, Tamil Nadu, 2008(16) SCALE, 335, reference was made to the decision of the Privy Council in Hardev Singh & Anr. v. State of Punjab, (1975) 3 SCC 731 and benefit was given to one of the accused as he did not act conjointly with others in committing the murder. The Supreme Court followed the decision in Dharam Pal & Ors. v. State of Haryana, (1978)4 SCC 440 after referring to the test which should be applied before Section 34 IPC can be invoked, which is extracted hereunder:

“14. It may be that when some persons start with a prearranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an understanding may appear from the conduct of

the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf. A criminal court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender.”

31. Examining the facts of the present case in the light of legal principles discussed above, we are of the considered opinion that all the four convicts had the common intention to commit the robbery. However, as is proved from the statement of PW-5 Rajesh, the purpose of giving physical beating while taking them to ‘Gumti’ was only to create a fear in their mind so as to make them handover their belongings without offering any resistance. The versions of PW-5 that after taking away his valuables, the two persons who had caught him, ran away towards the school, confirms this fact. The other two persons namely Ashish and Parveen who were holding Ranjit also

wanted to take away the valuables only. At that time Parveen who was holding Ranjit to take away from him his mobile and purse etc., could not have comprehended that Ashish @ Kali was going to stab him for resisting his attempt to rob him. In that circumstance, the three convicts namely Anil, Vinod and Parveen could not have been enjoined with the constructive liability for the criminal act of committing murder of Ranjit by convict Ashish @ Kali with the aid of Section 34 IPC.

32. In view of above discussion, we do not find any illegality or perversity in the finding of learned Trial Court for convicting appellant Ashish @ Kali for committing the offence punishable under Section 302 IPC as well for committing the offence punishable under Section 394/34 IPC and the sentence awarded to him thereunder. To that extent the finding of learned Trial Court calls for no interference. Resultantly, **Crl.A. No.1278/2015 filed by convict Ashish @ Kali is dismissed.**

33. So far as the other three convicts namely Parveen, Vinod and Anil (appellants in Crl.A. Nos.222/2016, 542/2016 and 1253/2015) are concerned, **Crl.A. Nos.222/2016, 542/2016 and 1253/2015 are allowed to the extent that convicts Parveen, Vinod and Anil are acquitted of the charges under Section 302/34 IPC. However, their conviction and sentence awarded to them for committing the offence punishable under Section 394/34 IPC is maintained.**

34. Convicts Anil and Vinod are on bail whereas convict Parveen is in custody. The period undergone by convicts Anil, Vinod and Parveen in custody in this case as per their nominal rolls is as under:-

<i>Name of convict</i>	<i>As on date</i>	<i>Sentence undergone</i>
Parveen @ Monty	27.10.2017	Six years, nine months and ten days.
Anil (on regular bail w.e.f. 03.06.2017)	27.10.2017	Six years, five months and seven days.
Vinod @ Daddu (on regular bail w.e.f. 02.12.2016)	02.12.2016	Five years ten months and six days.

35. As per the nominal rolls, the convicts Parveen, Anil and Vinod have already undergone the sentence of four years awarded to them for committing the offence punishable under Section 394/34 IPC.

36. Convict Parveen be set at liberty forthwith if not wanted in any other case.

37. Since Crl.A. No.1278/2015 filed by convict Ashish @ Kali is dismissed, he shall undergo the sentence as awarded by the learned Trial Court and affirmed by this Court.

38. TCR be sent back alongwith copy of this order.

39. A copy of this order be sent to the concerned Jail Superintendent for information and compliance.

PRATIHBA RANI
(JUDGE)

REKHA PALLI
(JUDGE)

December 04 2017
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