

(2017) 04 RAJ CK 0153
In the Rajasthan High Court
Case No : 1147 of 2016

Hawa Singh Beniwal & ors.

APPELLANT

Vs

The State of Rajasthan & anr.

RESPONDENT

Date of Decision : 21-04-2017

Acts Referred:

[Customs Act, 1962](#), [Section 32](#) -
Imported goods not to be unloaded unless mentioned in import manifest or import report.

[Code of Criminal Procedure, 1973](#), [Section 397](#), [Section 397](#)

Citation : (2017) 04 RAJ CK 0153

Hon'ble Judges : P.K. Lohra

Bench : SINGLE BENCH

Advocate : G.R. Punia, Manoj Chotia, L.R. Upadhyay, R.S. Choudhary

Judgement

1. Accused-petitioners have preferred this criminal revision petition under Section 397 read with Section 401 Cr.P.C. imploring annulment of impugned order dated 8th of September 2016 passed by Addl. Sessions Judge, Bhadra (for short, "learned Court below"). By the order impugned, learned Court below has framed charges against the petitioners for offence under Section 304-II read with Section 34 IPC.

2. The facts, in brief, giving rise to this petition are that on 12th of September 2012, respondent No.2 Shamsheer Singh submitted a written report at Police Station Bhirani, inter-alia, stating therein that his neighbour Hawa Singh Beniwal and his two sons Mohan and Sunil @ Dholu gave beatings to his father Dharampal by fists and blows and as a result of which he died. On the basis of said report, FIR No.244/2016 was registered for offence under Section 302 IPC and during investigation report from Medical Board about the cause of death of Dharampal was sought in view of the fact that in the autopsy report no opinion for cause of death was spelt out. The viscera sent for chemical examination showed presence of ethyl alcohol and on that basis Medical Board opined that the

probable cause of Dharampal's death was intoxication. On conclusion of investigation, charge-sheet was filed against petitioners for offence under Section 304/34 IPC before the concerned Magistrate but the case being triable by the Court of Sessions it was committed and the learned Court below on 12th of January 2015 framed charges against the petitioners.

3. Being aggrieved, the petitioners earlier filed a revision petition before this Court assailing the order of framing charge under Section 304 Part II read with Section 34 IPC which came to be registered as S.B. Criminal Revision Petition No.96/2015 (Hawa Singh & Ors. Vs. State of Rajasthan & Anr.). The said revision petition was partly allowed by this Court vide order dated 24th August 2015 with following observations: "VERNACULAR MATTER OMITTED"

4. Pursuant to the aforesaid order of this Court, when petitioners made endeavour before learned Court below for passing de novo order on charge, the learned Court below declined the prayer of petitioners by the order impugned. The learned Court below in the impugned order reiterated its earlier view that evidence available on record prima facie make out a case of culpable homicide not amounting to murder for framing charge under Section 304 Part II read with Section 34 IPC. Thus, at the behest of petitioners, this second inning of litigation.

5. Learned Senior Counsel, Mr. G.R. Punia, submits that a bare perusal of the impugned order makes it abundantly clear that the learned Court below has not at all cared to examine and consider the observations made by this Court while partly allowing the earlier revision petition (S.B. Cr. Revision Petition No. 96/2015) of the petitioners. Learned Senior Counsel would contend that sans any external or internal injury on the person of the victim coupled with Histopathology report and the report of Medical Board showing cause of death due to consumption of ethyl alcohol, framing charge under Section 304 Part II IPC against the petitioners is per se not sustainable.

6. Learned counsel has argued that merely because statements of the witnesses have been recorded during interregnum when petitioners' first revision petition was pending before this Court, their afflictions in the present revision petition cannot be thwarted on this technical pretext that trial has progressed in the matter. Lastly, learned counsel has urged that cause of death according to Histopathology report is intoxication and consumption of ethyl alcohol by the deceased and not due to any internal or external injuries suffered by him, which are attributed to the petitioners, itself is sufficient to put under shadow. Castigation of them for offence of culpable homicide not amounting to murder makes the impugned order of slapping charge for offence under Section 304 Part II IPC vulnerable. Learned counsel in support of his submissions has placed reliance on following legal precedents: 1. Khangar & Ors. Vs. State of Rajasthan [2012(2) Cr.L.R. (Raj.) 933]

2. Mishriya & Ors. Vs. State of Rajasthan [1995 Cr.L.R. (Raj.) 542]

3. Ramdeo & Anr. Vs. State of Rajasthan [1993 Cr.L.R. (Raj.) 757]

4. Ram Singh Vs. State of Rajasthan [1981 Cr.L.R. (Raj.) 143]

7. Per contra, learned Public Prosecutor opposing the revision petition submits that the order passed by learned Court below is based on sound reasoning and appreciation of materials available on record, therefore, no interference in exercise of revisional jurisdiction is warranted.

8. Learned counsel for the respondent-complainant argued that at the stage of framing of charge culpability of the accused is not determined and the object of charge is simply to tell the accused precisely and concisely that what prosecution intends to prove against him and on which he will have to clear himself. Lastly, learned counsel for the complainant would contend that as seven witnesses have been examined and trial has materially progressed, no interference is warranted. Learned counsel has cited the following judgments: 1) Edward Vs. Inspector of Police, Aandimadam Police Station [2015 Cr.L.R. (SC) 756]

2) Subhash Chandra Singh Vs. Central Bureau of Investigation [2016 (1) Cr.L.R. (Raj.) 16]

3) State through Inspector of Police Vs. A. Arun Kumar & Anr. [(2015) 2 SCC 417]

4) Sajjan Kumar Vs. Central Bureau of Investigation [(2010) 9 SCC 368]

5) Order dated 17 January, 2014 passed by Supreme Court in Criminal Appeal No.158 of 2014 (Veer Bhan Vs. Prakash & Ors.).

9. I have given my anxious consideration to the arguments advanced at Bar and thoroughly scanned the materials available on record.

10. The core issue, which requires judicial scrutiny in the instant revision petition, is framing of charge under Section 304 Part II IPC. Charge as defined under Section 2(b) Cr.P.C. means a precise formulation of the specific accusation against a person who is entitled to know its nature at the earliest stage. Therefore, importance and significance of charge is a very sacrosanct judicial function and in a criminal trial charge is the foundation of entire trial. This being the position, it is expected of a criminal court to take utmost care that it is not only properly framed but that the evidence is available in respect of the matters put in the charge. The basic principle of law is that when a charge is actually framed, the Court concerned must be equipped with atleast prima facie material to show that the person, who is sought to be charged is guilty of an offence alleged against him.

11. In the present case, respondent-complainant in the FIR has specifically alleged that his father Dharampal (since deceased) was given severe beatings by petitioners and therefore he succumbed to the injuries suffered by him. During investigation, police has recorded statements of witnesses and all of them have reiterated the allegations against the petitioners that they have given beatings to the deceased in furtherance of common intention which eventually led to state of breathlessness and his death. Although some of the alleged ocular witnesses

have also attributed definite role to the accused persons in giving beatings to the deceased by using force and giving slaps, kicks and fist blows but the autopsy report has not corroborated the version of all these witnesses. As a matter of fact, the autopsy report, under caption External Appearance, below heading Abdomen, against point No.11 Organs of generation: external and internal, mentions "Healthy, No any External injury" and the final opinion is in following terms: "Opinion: From above mentioned finding, Medical Board have opinion that opinion regarding causes of death will be given after receiving report of chemical analysis and Histopathological examination for which above mentioned viscera have been preserved, sealed and handed over to accompanist police person."

12. As per autopsy report, viscera was preserved, sealed and handed over to the police personnel and thereafter Histopathological examination of the portion of viscera was conducted. The result of the analysis reads as under: "On chemical examination, portions of viscera (1- 8) from two packets marked B & A respectively gave positive tests for the presence of Ethyl Alcohol and gave negative tests for metallic poisons, methyl alcohol, cyanide, alkaloids, barbiturates, tranquilizers and insecticides."

The said FSL report is further examined by Medical Board pursuant to the directions issued by learned Court below and the Medical Board tendered its final opinion in the matter on 15th of December 2014. The recitals contained in Final Opinion Report read as infra: "Final opinion Report - As per FSL Report No.RFSL/JDR/Toxi/717/2012 dated 26.08.2013 provided by PS Bhirani (Hanumangarh) on chemical examination portions of viscera (1-8) from two packets marked B & A respectively gave positive tests for the presence of Ethyl alcohol. These viscera include stomach, piece of small intestine, piece of large intestine, piece of liver, piece of spleen, piece of kidney, piece of heart and piece of lung). Accordingly, the Medical Board have opinion that the probable cause of the death may be ethyl alcohol intoxication"

13. Thus, the FSL report, which is admissible in evidence under Section 293 Cr.P.C., clearly and unequivocally rules out the cause of death as alleged in the FIR and reiterated by the witnesses. Contrary to it, the FSL report, which is admissible in evidence, clearly indicates that cause of death of the deceased is consumption of ethyl alcohol. While it is true that when ocular evidence is pitted against medical evidence, precedence has to be given to the ocular evidence but then any evidence of sterling worth, more particularly, which is admissible in evidence, by virtue of Section 293 Cr.P.C., cannot be altogether ignored even at the stage of framing charge.

14. The coordinate Bench while hearing first revision petition, i.e. S.B. Cr. Revision Petition No.96/2015, alongwith S.B. Cr. Revision Petition No.191/2015, was abreast with the fact situation and therefore considering Histopathology report and the report of Medical Board, set aside the order of learned Court below framing charge and remanded the matter back for undertaking exercise of framing charge de novo. The observations made by the coordinate Bench are

quoted supra. Consideration of legal precedents relied upon by the petitioners:

15. This Court in Khangar & Ors. (supra) made sincere endeavour to examine cause of death in the light of injuries suffered by the deceased vis-a-vis Postmortem and FSL reports available on record. Relying on the postmortem report and FSL report, Court found that charges framed against accused persons are not sustainable. The Court held: "I have given my thoughtful consideration to the material available on record and, in the opinion of this Court; it appears that the trial Court has not applied its mind properly to the facts and circumstances before framing charge against the petitioner. Definitely, from the medical evidence available on record, it cannot be said that the injuries on the person of the deceased were responsible for his death. Rather it is disclosed from the record i.e. the post mortem report and the report of the F.S.L. available on record that the deceased expired as a result of excessive consumption of liquor.

Accordingly, the revision petition succeeds. The order dated 18.08.1994 on the basis of which charge under Section 302 read with Section 34 I.P.C. has been framed against the petitioner is set aside and the matter is remitted back to the learned trial Judge, to pass a fresh order by considering the complete facts of the case."

In Mishriya & Ors. (supra), while considering offence under Section 304-B IPC, the coordinate Bench has found that evidence of cruelty or harassment soon before death is essential for framing charge under Section 304-B IPC. The Court held:

"In the case on hand Smt. Phuli, Smt. Poppy independent neighbours Smt. Muli Meghwal, Smt. Malki Bhil, and Smt. Tulchi Ghoshi in their police statements have in unequivocal, explicit and clear words stated that prior to her "Vida" Smt. Kankuri had vomited twice at her parents' house and that at that time they thought that due to summer season and the fact that she had not taken any food, she might have vomited. Damariya, the brother of the deceased, who took her on his bicycle to her in-laws house on the day of incident, in his police statement has specifically stated that she had again vomited twice in the way. Smt. Gavari, the wife of Damariya has stated that when Smt. Kankuri came to petitioners' house the latter had vomited 2-3 times and that contents of her vomits were blackish. It has also been specifically mentioned in the challan that Smt. Kankuri deceased had taken some insecticide, used for killing rats, at her parents' house. The learned trial Magistrate though relied on the statements of the aforementioned witnesses has conveniently ignored these material facts. She has also conveniently ignored that from the evidence collected by the I.O. one of the basic ingredients constituting the offence under Section 304-B IPC to wit that the deceased was not subjected to cruelty or harassment soon before her death in connection with any demand of dowry, is conspicuously missing. Thus even prima facie no offence under section 304-B IPC is made out against the petitioners."

16. In *Ramdeo & Anr.* (supra), learned Single Judge of this Court, while emphasizing essential pre-requisites for framing of charge, observed that evaluation of material and documents on record is necessary for framing charge. The Court held: "Having gone through the aforesaid decision of the Supreme Court in *Nirajan Singh's* case (supra), the submissions made before me on behalf of both the sides and having gone through the order dated 18.5.1992 passed by the trial court and the charges as has been framed against Ramdeo and Prabhu Dayal and the record which is available with me, I am of the opinion that in the instant case, the trial court has not discharged its duty of evaluating the material to find out if the facts emerging therefrom taken at their face value, establish the ingredients constituting the offences or not. This failure on the part of the trial court has resulted into framing of the charges which is not at all compatible with the trial court's own order dated 18.5.92, and I am of the opinion that it will not be in the interest either of the accused petitioners or the prosecution to allow the trial court to proceed on the basis of the charges as have been framed against the petitioners Ramdeo and Prabhu Dayal. According to the provisions of Sections 227 and 228 Cr.P.C. evaluation of the material and documents on record, with a view to finding out as to whether the facts emerging therefrom, taken at their face value, disclose the existence of ingredients of the offences or not, is a condition precedent and pre-requisite. If this condition precedent is not followed, for the purpose of consideration of the question on the point of framing of charge, the charge framed cannot be sustained and therefore, in the facts of this case, I find that there is total non-compliance of Sections 227 and 228 Cr.P.C. so far as the present two accused petitioners Ramdeo and Prabhu Dayal are concerned and the matter deserves to be remanded back to the trial court."

In *Ram Singh* (supra), learned Single Judge culled out guiding principles for framing of charge. The Court held:

"Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to

discharge the accused."

A cumulative reading of all the above referred judgments and upon construing the ratio decidendi propounded therein, in light of facts and circumstances of the instant case, in my view, vulnerability of the impugned order is clearly apparent. Consideration of legal precedents relied upon by complainant:

17. The judgment of Supreme Court in *Edward* (supra) on which the learned counsel for the respondent-complainant has relied, is ofcourse a case under Section 304 Part II IPC and Supreme Court has held that ocular evidence must be given due credence and only on the medical evidence order of acquittal cannot be passed. The facts of that case are clearly distinguishable inasmuch as in that case the deceased had sustained injuries and was taken to hospital in a serious condition. Contrary to the facts of that case, in the instant case, autopsy report is clear and unequivocal that there is no external or internal injury suffered by the deceased. Furthermore, Histopathology report is also indicating cause of death as intoxication. Therefore, this judgment cannot render any assistance to the respondent-complainant.

18. In *Subhash Chandra Singh* (supra), learned Single Judge of this Court has held that at the state of framing charge Court is required to see prima facie case as to whether sufficient evidence is available to frame charge. The legal proposition, adumbrated therein, obviously reiterates sound principle governing the province of framing of charge. In *Sajjan Kumar* (supra), Supreme Court, while examining Section 227 & 228 Cr.P.C., observed that at the stage of framing charge, the Magistrate or a Judge concerned to analyse all the materials including pros and cons, reliability or acceptability etc. The Court held: "At the stage of framing of charge under Section 228 of the Cr.P.C. or while considering the discharge petition filed under Section 227, it is not for the Magistrate or a Judge concerned to analyse all the materials including pros and cons, reliability or acceptability etc. It is at the trial, the Judge concerned has to appreciate their evidentiary value, credibility or otherwise of the statement, veracity of various documents and free to take a decision one way or the other."

The Court further culled out certain principles while examining the scope of Sections 227 & 228 Cr.P.C. The Court held:

"On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully

justified in framing a charge and proceeding with the trial.

(iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

There cannot be two opinions that at the stage of framing charge reliability or acceptability etc of the evidence or credibility of evidence cannot be examined. However, at the time of framing charge, Court has to consider the material in totality. There must be some material on record to prima facie show that accused was guilty of the offence charged.

19. A. Arun Kumar & Anr. (supra), the accused were charged for offences punishable under Sections 420, 467, 468, 471 and 477-A IPC, Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and Section 32 of the Customs Act, 1962. Upon consideration of the materials available on record, Supreme Court found that it was a case disclosing grave suspicion against the accused-respondents and therefore framing of charge by the Special Court was a right decision and consequently set aside the order of the High Court. Supreme Court has also reiterated the principle laid down in Sajjan Kumar's case.

20. After examining the law laid down by Supreme Court, there remains no

quarrel on the legal proposition adumbrated therein but the fact situation in the instant case is entirely different wherein prosecution case is set up on the basis of first information report and the investigation is in complete derogation to the autopsy report of the deceased and the Histopathology report. Therefore, this case also cannot render any assistance to the cause of the complainant. The order passed in Veer Bhan (supra) dated 17th of January, 2014 in Criminal Appeal No.158 of 2014, Supreme Court has simply set aside the observations made by High Court touching the merits of the case while remanding the matter back to trial Court.

21. As observed hereinabove, the entire edifice of the prosecution case is that deceased was given beatings by petitioners and that resulted in his death. If the prosecution case is examined in light of the autopsy report of deceased and Histopathology report (FSL report), then it clearly emerges out that there was no external or internal injury on the person of deceased. In fact, the cause of death as shown in the Histopathology report is intoxication, i.e., consumption of ethyl alcohol. This being the position, prima facie, it is rather difficult to comprehend that there was any causal connection between alleged beatings of the deceased by the accused/petitioners and his death.

22. It is trite that Court, while framing charge, is required to adopt pragmatic approach and in case material available on record does not disclose the ingredients of the offence with which the accused is charged, charge should not be framed. Eventually, framing of charge in such cases may result in an exercise in futility thereby wasting valuable time of the Court. I am at loss to say that while deciding the first revision petition, this Court has addressed this aspect of the matter and remanded the matter back to learned Court below but the learned Court below while passing the impugned order has completely eschewed the above quoted observations of the Court. Such an approach of the learned Court below cannot be countenanced. The contention of the learned counsel for the complainant that trial has progressed and almost 8 prosecution witnesses have been examined cannot dissuade this Court from exercising revisional jurisdiction when the impugned order is not satisfying the test of parameters laid down under Section 397/401 Cr.P.C. It is also noteworthy that out of 8 witnesses, 7 witnesses were examined during pendency of the first revision petition and the last 8th witness was also examined on the very same day on which the order was passed in first revision petition. Therefore, this contention of the learned counsel for the complainant merits rejection. In totality, upon examining correctness, legality or propriety of the impugned order, unhesitatingly, in my opinion, impugned order cannot be sustained.

23. Consequently, revision petition is allowed, impugned order is quashed and set aside and the matter is remanded back to learned Court below to examine it afresh for framing charge strictly in accordance with law while adhering to Sections 227 & 228 Cr.P.C. It is also ordained that the learned Court below, while examining the issue relating to framing of charge, is expected to consider the

materials available on record, including the autopsy report of deceased and the Histopathology report (FSL report), which is admissible in evidence by virtue of Section 293 Cr.P.C. Needless to observe here that the learned trial Court shall examine the matter de novo dispassionately, uninfluenced by the observations made supra. Let record of the Court below be sent back forthwith.