

(2018) 09 J&K CK 0013

In the Jammu And Kashmir High Court

Case No : Criminal Revision No. No.19 Of 2017 & Ia No.1 Of 2017

Khursheed Ahmed And Ors @APPELLANT@Hash State Of Jammu & Kashmir

Date of Decision : 07-09-2018

Acts Referred:

Jammu and Kashmir State Ranbir Penal Code, 1989 — Section 109, 302
Code of Criminal Procedure 1973, — Section 173, 223, 224, 227, 228, 268, 269, 435

Citation : (2018) 09 J&K CK 0013

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Judgement

1. Through the medium of instant revision, the petitioners have assailed the validity of order dated 22.02.2017 passed by the Sessions Judge,

Bhaderwah whereby the petitioner Nos.1 to 5 have been charged with offences under Sections 302/109 RPC and petitioner No.6 under Section 302

RPC, with further prayer for setting aside the charges framed and the petitioners may be discharged of the charges framed against them, to meet the ends of justice.

2. Petitioner have stated in memo of petition that the whole of the prosecution case, as projected by the investigation agency in Challan presented

under Section 173 Cr.P.C., hinges on the story of dispute having arisen between the deceased wife with her husband, with allegations made by the

deceased against her husband (petitioner No.6) that accused was making and receiving calls to and from some girls during the night time, because of

which the relationship between the duo had become strained that too only 15 days prior to the occurrence and before that the deceased was pleasant

and cordial and there has been not a whisper of any dispute between the deceased and accused/petitioner No.6 nor there being any allegation of any

kind of harassment or any sort of complaint against any of the petitioners from deceased for the last three years of matrimonial life in the house of the petitioners. Taking the whole prosecution case on its face value, there was no role attributed to the petitioner Nos.1 to 5 nor has been there any allegation of any kind even any sort of a trivial harassment against petitioner Nos.1 to 5. There is not even an iota of evidence against petitioner Nos.1 to 5 for having played any sort of role in instigating the accused No.6 to commit the offence. The case being that of a circumstantial evidence not even a single prosecution witness has whispered a word so as to constitute an offence with which the petitioner nos.1 to 5 have been charged. There is neither any role attributed to the petitioner Nos.1 to 5 nor is there any motive. Even in the conclusion part of the investigation (challan), the investigating agency has not made any allegation against the petitioner Nos.1 to 5 for having abetted the commission of offence. It is further stated that the impugned order of framing of charge against the petitioners by the learned Sessions Judge in cryptic stereotypical and mechanical manner by sheer non-application of judicial mind is palpably erroneous, legally perverse, and factually incorrect and the same being abuse of the process of the Court and is, therefore, liable to be quashed to meet the ends of justice. It is further averred that to charge a person for the commission of an offence in a criminal trial there has to be a prima facie evidence against accused to constitute an offence with which the accused is to be charged. If the elements and the ingredients of the offence/Sections are not borne out of the evidence the accused has to be discharged to prevent the abuse of the process of the Court and that is the scope and ambit of Section 268 Cr.P.C. read with Sections 223 and 224 Cr.P.C. For constituting an offence under Section 109 RPC, the element of abetment and instigation for the commission of an offence is sine qua non. In the absence of there being any allegation of abetment or instigation, a person cannot be charged with offence of abetment under Sec.109. The explanation as attached to Sec 109 RPC expressly specifies the ingredients of Section 109 RPC. There is not a whisper of evidence on the file against petitioner Nos.1 to 5 for having committed the offence of abetting the commission of offence under Section 302 RPC. The impugned order of framing of charge has, as such, resulted in grave injustice to accused petitioners whose whole family has been spoiled for having committed no offence at all. The right to be discharged as has

been recognized under Section 268 Cr.P.C. is a valuable right which is borne out of the concept of right to liberty of an individual to be of a precious

right as recognized by the Constitution, which cannot be taken away by the undue process of law. It is further submitted that before charge sheeting

the petitioners, the trial Court also passed a brief order. Even in that order the trial Court has failed to appreciate as to how the petitioner Nos.1 to 5,

have abetted the commission of offence of murder in the absence of there being any evidence. The only reasoning given by the trial court is that;

“The omission on the part of A2 to A6 to come to the rescue of the deceased who was subjected to the torture and subsequent burning of A1

amounts to the abetment of the offence of murder.”

3. Though the above finding of the trial court is ambiguous, but otherwise also it is in total contradiction of the requirement of the Section 109 RPC as

is elaborated in the explanation to Sec. 109 RPC. It is further contended that the impugned order has been passed in a very casual manner and in total

disregard of the legal rights of accused persons is perverse, illegal, unjust and is liable to be quashed. It is also stated that even otherwise there is no

substantial evidence on the file, direct or circumstantial, as to how the fire had broken-out in the room of the deceased; whether the death is suicidal,

homicidal or accidental. The story of murder of the deceased is hypothetical and is based on surmises which sans any cogent evidence. It is therefore,

prayed that the impugned order dated 22.02.2017 passed by the learned Sessions Judge, Bhaderwah may kindly be quashed and the petitioners may be

discharged of the charges framed, to meet the ends of justice.

4. On 23.05.2017, this Court while entertaining the instant petition, issued notice to the respondents and having regard to the role attributed to petitioner

Nos. 1 to 5, they were admitted to interim bail till next date before the Bench and were released after furnishing personal bonds in the amount of

Rs.50,000/- each along with surety bonds in the like amount to the satisfaction of the learned Sessions Judge Bhaderwah.

5. Objections to IA No.1/2017 seeking release on bail, have been filed on behalf of respondents, wherein it is contended that charges have been

framed against the petitioners/applicants under Sections 302/109 RPC which are non-bailable. The learned Trial Court has, prima facie, found that

commission of offence punishable under Section 302 RPC has been disclosed

against accused No.1, whereas offence under Sec 302/109 RPC is disclosed against No.1 to 6 and the applicants have been charged of the aforesaid offence by the learned trial Court after going through the material placed before it and after being satisfied that prima facie grounds exist for presuming commission of offence. Under these circumstances, no right is vested to the petitioners/applicants to seek release on bail. The charges have been framed against the petitioners/applicants and evidence is yet to be recorded. As such, it is not in the interest of justice, to release the petitioners/applicants on bail as there is every possibility of their pressuring the witnesses and also jumping the bail. It is further stated that in light of the fact that prima facie charges are established against the petitioners and it is only after a regular trial they can claim that there is nothing against them. The person who commits any offence cannot be permitted to allege suffering of irreparable loss for having to undergo trial. It is therefore, prayed that the present petition being misconceived, baseless and may kindly be dismissed.

6. Heard learned counsel for the parties and have perused the record.

7. From perusal of the record, it reveals that one Shahista Begum, wife of A-1, daughter in law of A-2 and A-3 and sister-in-law (Bhabi) of A-4 to A-

6 died of burning on 29.04.2016 at Thathri. The deceased was married to A-1 $\frac{3}{4}$ years prior to the occurrence and had mothered a male child out of

this wedlock. The matrimonial relations between the couple soured few days before the occurrence because the deceased suspected her husband

having extra marital relations. It is alleged by the police that on 29.04.2016, A-1 strangled the deceased in a room of his house at Mohalla Arif,

Thathri and thereafter poured kerosene on the deceased and set her ablaze. The other accused persons, who were present at home did not come to

the rescue of the deceased and have, therefore, been indicted for instigation of the crime. On the basis of written report lodged by PW1 Ghulam Nabi,

father of the deceased in Police Station, Thathri, FIR No.19/2016 for the commission of offences u/Ss 302/109 RPC was registered and the

investigation was commenced. The investigation was concluded in filing of this final police report against the accused for the commission of offences

under Sections 302/109 RPC before the learned JMFC, Thathri, who committed the same for trial to the learned Addl. Sessions Judge Doda. On the

relate to the trial of cases before the Court of Sessions. It is to be seen whether prima facie case has been made out for framing charge or not. It is

apt to quote sections 268 and 269 of Cr.P.C as under: -

268 Discharges:

If upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the judge considers that there is no sufficient ground for proceedings against the accused, he shall discharge the accused and record his reasons for so doing.

269 Framing of charge

(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which

a) is not exclusively triable by the Court of Sessions, he may frame charge against the accused and by order, transfer the case to the Chief Judicial

Magistrate or any Judicial Magistrate competent to try the case, and thereupon the Chief Judicial Magistrate or any Judicial Magistrate to whom a

case may have been transferred shall try the offence in accordance with the procedure provided for the trial or warrant cases instituted on police

report,

b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub section (1) the charge shall be read and explained to the accused and the accused

shall be asked whether he pleads guilty of the offence charged or claims to be tried.

10. A conjoint reading of sections 268 and 269 of Cr.P.C. would reveal that upon consideration of the record of the case and documents submitted, if

Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and if after such consideration

and hearing, Judge is of the opinion that there is ground for presuming that accused has committed offence, he may frame charges against the

accused or transfer the case to CJM or Judicial Magistrate, if he is of the opinion that offence made out against the accused is triable by a

Magistrate.Â

11. At the initial stage, if there is strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused.Â The Judge while considering the question of framing the charges under section 269 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.Â

12. From the perusal of the material on record and looking into the facts of the case at this stage, it cannot be said that no offence is made out against the petitioners/accused persons. All the submissions made at the Bar relate to the disputed questions of fact, which cannot be adjudicated upon by this Court in exercise of power conferred under Section 435 Cr.P.C. Power under section 435 Cr.P.C. relates to see legality, propriety and correctness of order; a detail appreciation of evidence cannot be again done by this Court while exercising the power vested to this Court under revision. At the time of framing of charges, Court has to only see prima facie case in the light of the evidence collected during the course of investigation. It is not the case of petitioners that Court below was not competent to conduct trial.

13. The foremost ground taken in the petition is that there is no convincing evidence that accused no.6 committed offence in presence of accused 1-5, because there are glaring contradictions in the statements of prosecution witnesses with regard to presence of all accused at home at the time of occurrence. The law is settled that at the time of framing of charge contradictions in the statements of prosecution witnesses cannot be taken note.

Another ground taken is that there is no evidence with regard to abetment of offence by petitioners 1-5; this ground is also not tenable. Because it is fact which has to be appreciated during trial.

14. In 2000 (2) SCC 57 case titled State of M.P v. S. B. Johari and othersâ??, it is held as under:-

â??In our view, it is apparent that the entire approach of the High Court is illegal and erroneous. From the reasons recorded by the High Court, it appears that instead of considering the prima facie case, the High Court has appreciated and weighed the materials on record for coming to the

conclusion that charge against the respondents could not have been framed. It is settled law that at the stage of framing the charge, the Court has to

prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and

arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima facie case is

made out for proceeding further then a charge has to be framed. The charge can be quashed if the evidence which the prosecutor proposes to adduce

to prove the guilt of the accused, even if fully accepted before it is challenged by cross examination or rebutted by defence evidence, if any, cannot

show that accused committed the particular offence. In such case, there would be no sufficient ground for proceeding with the trial. In *Niranjan Singh*

Karam Singh Punjabi etc. v. Jitendra Bhimraj Bijjayya and Others etc. reported in (1990) 4 SCC 76, after considering the provisions of Sections

227 and 228, Cr.P.C., Court posed a question, whether at the stage of framing the charge, trial court should marshal the materials on the record of the

case as he would do on the conclusion of the trial? The Court held that at the stage of framing the charge inquiry must necessarily be limited to

deciding if the facts emerging from such materials constitute the offence with which the accused could be charged. The Court may peruse the records

for that limited purpose, but it is not required to marshal it with a view to decide the reliability thereof. -----â??

15. Further in present case, it is not the case of petitioners that, there is some legal embargo in framing of charges against the petitioners.â??

16. In view of the above law, the arguments advanced by counsel for petitioners are not sustainable. The order ofâ?? Principal Sessions Judge,

Bhaderwah is, thus, correct and does not suffer from any infirmity of law.â?? Copy of this order be sent to the trial Court. Record of Court below be

sent back. Petitioners, who are on interim bail, shall file fresh application for bail before trial Court, who shall consider it afresh as per law, till

consideration of bail, interim bail granted by this Court shall remain in force.