

(2024) 03 GUJ CK 0041

In the Gujarat High Court

Case No : R/Criminal Appeal (Against Conviction) No. 1945 Of 2021, R/Criminal Appeal No. 337 Of 2022

Manubhai Haridas Rathod & Ors

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 14-03-2024

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 216, 216(4), 217, 374
Indian Penal Code, 1860 — Section 114, 302, 306

Citation : (2024) 03 GUJ CK 0041

Hon'ble Judges : A.S. Supehia, J;Vimal K. Vyas, J

Bench : Division Bench

Advocate : Parth S Tolia, Shirishchandra B Tolia, Dhawan Jayswal

Final Decision : Allowed

Judgement

A.S. Supehia, J

1. The present appeals filed under Section 374 of the Criminal Procedure Code, 1973 (for short, "the Cr.PC"), emanate from the judgment and order of conviction and sentenced dated 30.10.2021, passed by Sessions Judge, Bhavnagar, in Sessions Case No.127 of 2019, wherein and whereby the trial court has convicted the accused for the offences punishable under Section 302 read with Section 114 of the Indian Penal Code, 1860 (for short, "the IPC"), though they were charged for the offence punishable under Sections 306 and 114 of the IPC.

2. At the outset, learned advocate Mr.Tolia for the appellants – original accused Nos.1 to 3 has submitted that the trial Court has committed grave error by ignoring the provisions of Sections 216 and 217 of the Cr.PC and the accused are held to be guilty of graver offence of murder, which carries capital punishment, without altering the charge or framing the charge and without giving opportunity of hearing to the accused to meet such charge.

3. In support of his submissions, learned advocate Mr.Tolia placed reliance on the judgment of the Supreme Court rendered in the cases of – (1) Wakil Yadav and Another vs. State of Bihar, (2000) 10 S.C.C. 500, (2) Babu @ Balasubramaniam and Another vs. State of Tamil Nadu, (2013) 8 S.C.C. 60; and (3) Shamnsaheb M. Multani vs. State of Karnataka, (2001) 2 S.C.C. 577. Hence, he has urged that the matter may be remanded back to the trial Court for framing of appropriate charge by setting aside the judgment and order of conviction.

4. Learned advocate Mr.Kodekar appearing for the appellant-original accused No.4 has adopted the arguments advanced by the learned advocate Mr.Tolia.

8. Learned APP Mr.Dhawan Jayswal appearing for the respondent–State is unable to controvert the fact that the trial court has not framed the charge of Section 302 of the IPC before convicting the accused persons.

5. The brief facts of the case are as under:

6. According to case of the prosecution, the incident occurred on 09.06.2019 at about 12:30 p.m., for which the F.I.R. has been registered on 14.06.2019 by the husband of the deceased – Sunitaben Yusufbhai Babubhai Parmar. As per the case of the prosecution, the deceased – Sunitaben was having one open plot and the present accused persons and Nituben Maheshbhai and Daxaben Rameshbhai wanted to encroach the said plot and, therefore, the dispute took place between them. On the day of incident, because of mental cruelty by all the accused, the deceased–Sunitaben poured kerosene and set herself ablaze and thereby committed suicide. After this incident, she was moved to Sir T. Hospital, Bhavnagar, where she was admitted as an indoor patient and thereafter she was moved to Punit Narsing Home Hospital and thereafter, she was transferred to Anand Surgical Hospital at Ahmedabad, where she succumbed to the injuries on 14.06.2019 at about 4:00 a.m. Further, on 14.06.2019, the first informant, the husband of the deceased lodged the F.I.R. at Ghogha Road Police Station, Bhavnagar before the Police Inspector, Shri G.K. Israni. Upon completion of the investigation, charge-sheet was filed against the four accused and the case was registered as Sessions Case No.127 of 2019 and tried by Sessions Judge, Bhavnagar.

7. The charge was framed at Exh.9 against all the four accused for the offences punishable under Sections 306 and 114 of the IPC. All the accused did not plead guilty to the charge and claimed to be tried. In all, 12 prosecution witnesses have been examined and also produced certain documentary evidence on record. Thereafter, further statements of the accused were recorded under the provisions of Section 313 of the Cr.PC, wherein they have stated that they have not committed any offence and they are falsely involved in the crime.

9. Since, a short issue involved in the present appeals, we have taken up the same for final hearing.

10. We have perused the charge at Exh.9, the same is translated and

incorporated as under:

CHARGE

"I, K.K. Shukla, 9th Additional Sessions Judge, Bhavnagar framed the following charge upon the accused:

- (1) Manubha Haridas Rathod, Aged – 54,
- (2) Vijendra alias Kuriyo Manubhai Rathod, Aged – 29,
- (3) Mahesh Manubhai Rathod, Aged – 35,
- (4) Romesh Ranubhai Parmar, Aged – 34,

All residents of Adodiyavas, Bhavnagar and doing labour work.

That on 09.06.2019 at 12:30 hours the offence took place and that you all in order to grab the possession of the plot belonging to the complainant and adjoining your plot, used to mentally tortured and harassed the complainant, the witness since last three years as well as the deceased by making false allegations and filing police complaints, thereby you all forced the deceased to commit suicide by pouring kerosene and setting herself ablaze and she died during the treatment. Therefore, you all abated in committing the offence punishable under Sections 306 and 114 of the IPC, which is within the jurisdiction of this Court, therefore, I order that the trial of this offence be conducted in this Court.

Place: Bhavnagar

K.K. Shukla

Date: 16.12.2019 9th Additional Sessions
Judge,

Bhavnagar"

11. Thus, the plain and simple reading of the charge at Exh.9, reveals that the charge for the offence punishable under Section 306 read with Section 114 of the IPC was framed against all the accused. It is brought to the notice of this Court that the accused No.1 has already passed away.

12. The sole contention raised in these appeals is that the trial court has failed to appreciate the provisions of Sections 216 and 217 of the Cr.PC and the same are incorporated as under:

"Sec. 216. Court may alter charge.—(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial

as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

Sec. 217. Recall of witnesses when charge altered.— Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed—

(a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the Court may think to be material.”

13. The provisions of Section 216 of the Cr.PC pertain to the alteration of the charge by the Court. It begins with the sentence that any court may alter or add to any charge at any time before the judgment is pronounced and every such alteration or addition shall be read and explained to the accused. It further mandates that if alteration or addition to charge is such that proceedings immediately with the trial Court are not likely in the opinion of the Court “prejudice” the accused in his defense or prosecutor to conduct the case. The court may in its discretion after such alteration or addition has been made, proceed with the trial, as if altered or added charge had been in the original charge.

14. In the present case, the accused have been charged for the offence punishable under Sections 306 and 114 of the IPC, which carries the imprisonment for either discretion for a term which may be extended to 10 years and also shall be liable to fine, whereas the punishment prescribed for the offence punishable under Section 302 of the IPC is capital punishment, which is death or imprisonment for life. Unquestionably, despite the charge having been framed under the provisions of Section 306 of the IPC, the accused have been finally punished and held guilty for the offence punishable under Section 302 of the IPC.

15. Sub-Section (4) of Section 216 of the Cr.P.C. further, stipulates that in case the alteration or addition of charge is such that if the same is prejudicial, the accused or the prosecutor, the court either direct or adjourn trial for such period

as may be necessary.

15. Section 217 of the Cr.P.C. further provides for recall of the witness when charge is altered. In the present case, it is noticed by us that the judgment and order of conviction is passed by the trial Court in total ignorance of the aforementioned provisions.

16. The trial court in the judgment with regard to the alteration of the charge has observed thus at internal Page No.55 – Paragraph No. 41, and the same is translated as under:

“Thus, as discussed above, now that the offence under Section 302 of the IPC instead of offence under Section 306 of the IPC has been proved against the accused and despite the fact that there is evidence on record of the case under Section 302 of the IPC, the Investigating Officer did not file charge sheet under Section 302 of the IPC and instead filed it under Section 306 of the IPC, thereby an attempt has been to convert the major offence into minor offence, which can apparently be seen.

Since the charge under Section 306 of the IPC has been framed against the accused, the same can be changed at any stage of the case as well as at the appellate stage and hence there is no need to alter the charge against the accused. As per the decision of the Supreme Court in the case of Dalbir Singh Vs. State of Uttar Pradesh, reported in 2004(0) AIJEL – SC 7178, Section 306 of the IPC cannot be treated to be minor offence. Therefore, as discussed above, since the offence under Sections 302 and 114 of the IPC and not under Section 306 and 114 of the IPC is proved against the accused, hence the accused can as well be punished for the offence under Section 302 and 114 of the IPC, even though the charge has been framed against the accused for the offence under Section 306 of the IPC.”

17. The approach of the trial court, as recorded hereinabove in paragraph No.41 is absolutely perverse and de hors the provisions of Section 216 of the Cr.P.C. It appears that the trial Court is oblivious of the offence prescribed under Section 302 of the IPC and provisions of Section 306 of the IPC, which are separate and distinct offences, inviting absolute different sentence, one carries capital punishment, whereas the other is not. Thus, conviction on the basis of the provisions of Section 302 of the IPC by the trial Court without framing the charge has caused serious prejudice to the accused.

18. Under the circumstances, we have no other option but to accede to the request of the learned advocates appearing for the appellants to set aside the judgment and order of the Trial Court and remand the matter to the trial Court to decide afresh. The impugned judgment and order recording conviction and sentence is hereby quashed and set aside. The trial Court shall decide the trial proceedings within a period of 06 (six) months after observing the procedure as prescribed under Sections 216 and 217 of the Cr.P.C.

19. The accused shall furnish fresh bail bond before the concerned Sessions Court. The accused No.2 - Vijendra @ Kuriyo Manubhai Rathod is also ordered to be released on bail to the satisfaction of the trial Court on suitable conditions as trial court deem fit.

20. R & P shall be returned back forthwith to the trial Court.