

(2015) 09 DEL CK 0358

In the Delhi High Court

Case No : Criminal Rev. P. 149 and 152/2015

Sachin Kumar and Others

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 28-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 227, 228
Penal Code, 1860 (IPC) — Section 300, 302, 307, 323, 324

Citation : (2015) 4 JCC 2321

Hon'ble Judges : Ashutosh Kumar, J.

Bench : Single Bench

Advocate : Sunil K. Mittal, Vipin K. Mittal, Kshitij Mittal and Anshul Mittal, Advocates, for the Appellant; Raghuvinder Verma, APP and Pradeep Teotia, Advocate, for the Respondent

Judgement

Ashutosh Kumar, J.—Both the petitions have been heard together and a common order is being passed.

2. The petitioners have impugned the order dated 23.12.2014 passed by the learned Additional Sessions Judge, Karkardooma Courts, Delhi in connection with FIR No. 148/2014 (P.S. Anand Vihar) whereby the Court below, on the order on charge, held that a prima facie case is made out under Section 341 /302 /34 of the IPC against the petitioners as also against the charges which have been framed accordingly.

3. In order to appreciate the contention of the petitioners it is necessary to examine the FIR which has been lodged by one Ayush Dua, a friend of Ayush Kaushal (deceased).

4. In the FIR which was lodged on 7.3.2014, it has been alleged, inter-alia that on 05.03.2014 petitioner Amit Nagar had quarreled with the deceased over parking of car. The deceased had apologized on the next day and the dispute was resolved. On 07.03.2014, at about 10.30 AM, co-accused Kuldeep @ Dedha

abused the deceased and threatened of teaching him a lesson. Unmindful of such threatening, the deceased went inside the institute for taking his examination. After the examination was over, at about 12.40 pm, petitioner Amit Nagar along with the petitioners Tanuj Tiwari and Sachin, Kuldeep @ Dedha and two other friends came and stopped the deceased. It is alleged that the two unknown boys caught hold of the hands of the deceased while petitioner Tanuj Tiwari and petitioner Sachin Kumar also caught hold of the deceased. Amit Nagar and Kuldeep @ Dedha started assaulting the deceased by means of fists and kicks on his abdomen, chest and other parts of the body. While the deceased was being assaulted, he kept on pleading with the accused persons that he was suffering from heart ailment and that he should not be assaulted. Many people gathered at the spot. The deceased became unconscious and fell on the ground. Seeing the crowd, all the accused persons including the petitioners left the place of occurrence. The deceased was admitted to Dr.Hedgewar Hospital by the informant and one Hemant.

5. On the basis of the aforesaid statement, initially, FIR was registered under Sections 341 /307 /34 of the IPC. The deceased died on 08.03.2004 at about 6.28 A.M after suffering successive heart attacks. On the death of Ayush, Section 302 of the IPC was added.

6. It has been submitted on behalf of the petitioners that it is really unfortunate that the deceased died but the death was because of heart disease and not because of any assault having been perpetrated on him by the petitioners.

7. In support of such contention it is submitted that the injured Ayush Dua was admitted to Dr.Hedgewar Arogya Sansthan at about 1.00 PM on 07.03.2014. The MLC of the deceased clearly discloses that he was brought to the hospital by Hemant. The name of the informant namely Ayush Dua does not find mention on the MLC.

8. Attention of this Court has been drawn to the entry in the MLC regarding particulars of injuries. The MLC discloses that the injured suffered sudden syncopal attack and CPR (Cardiopulmonary Resuscitation) was started. It was, therefore, argued that in the MLC there is no reference of the name of Ayush Dua (the informant) and there is also no statement with regard to any assault having been made on the injured by the petitioners.

9. In this context, learned counsel for the petitioners has submitted that in *Devinder Vs. State of Haryana*, , the Supreme Court has stated that in cases of assault, it is expected that the name of the assailant would be disclosed to the doctor while furnishing the cause of injuries. In the absence of such names having been disclosed at the first opportunity, it could legitimately be inferred that at the earliest available opportunity, the name of the wrong doers was not disclosed.

10. The Supreme Court in the aforesaid case at para 7 has held as hereunder:-

"7. Having carefully gone through the entire materials on record, we are unable to sustain the impugned judgment. Though apparently there is not reason to disbelieve the two eye witnesses, there are certain underlying circumstances which persuade us to give the benefit of reasonable doubt to the appellant. According to the prosecution case - and as testified by Jagdish - immediately after the assault Ramphal was taken to the hospital by him (Jagdish) and Umesh (not examined), who were present at the time of the assault. Dr. Jain testified that at the time of admission Ramphal was fully conscious and his blood pressure and pulse were normal. From the medico legal report (Ex. PS) that the doctor sent to the police after examining Ramphal we find that apart from his name, the father's name of Ramphal, his address, his occupation and an account as to how the injuries were caused find place. Obviously all these particulars had been furnished by Ramphal, and/or Jagdish and Umesh, who had accompanied him. In that context it was expected, if really the appellant was the assailant, that his name would be disclosed by all or any of them while furnishing the cause of the injuries. It can, therefore, be legitimately inferred that at the earliest available opportunity the name of the appellant was not disclosed."

11. It has been submitted that dealing with the question of delay in disclosing the name of the assailants the Supreme Court in *Jagir Singh Vs. The State (Delhi)*, held that non disclosure of the name of the assailants, claimed to be previously known, at the first possible instance while admitting the deceased in the hospital and reporting the incident to the police constable on duty would be unnatural conduct and conviction cannot be based on such testimony. In the aforementioned case, the concurrent finding of guilt recorded by the Trial Court and affirmed by the High Court was set aside by the Supreme Court on that ground.

12. Similar view was expressed by the Supreme Court in *Shivaji Dayanu Patil Vs. State of Maharashtra*, where it was held that if the name of the assailant is not disclosed at the earliest available opportunity, the accused was entitled to the benefit of reasonable doubt.

13. It was, therefore, vehemently urged that non-mention of the name of the informant in the MLC of the deceased leads to a strong inference that the informant was not an eye witness to the occurrence and the absence of names of the assailants is absolutely intriguing as the petitioners were known by name to the informant.

14. In this context, attention of this Court has been drawn to the statement of Hemant who had got the deceased admitted in Dr.Hedgewar Arogya Sansthan. Aforesaid Hemant in his statement under Section 161 Cr.P.C has only stated that on 07.03.2014 when he came out of the Institute at about 12.50 PM he saw a crowd of many boys in front of Kottakkal Ayurveda Hospital. In the crowd, Hemant could spot the deceased lying on the road in an unconscious state. He has further stated that with the help of some boys, he brought the injured/deceased, in an unconscious state, in his car to Dr.Hedgewar Hospital. The time

of admission of the injured/deceased in the hospital was 1.00 PM.

15. In the aforesaid statement, Hemant has, interestingly, neither named Ayush Dua (informant) or other known persons with whose help he brought the injured/deceased to the hospital. The absence of the name of the informant as also the name of the assailants in his statement clearly establishes, it has been urged, that the first information report lodged by Ayush Dua is a post incident, confabulated statement. Thus the part of the first information report which alleges that while the injured/deceased was being assaulted, he kept on reminding the assailants that he was suffering from heart disease, is also incorrect and fabricated for the purpose of giving a serious colour to a minor incident of scuffle between same age group boys. The statements of the father of the deceased namely Ashwini Kaushal and a so called eye witness Mudit Makhijani also do not reveal that the deceased was suffering from heart disease or that the deceased reminded the assailants/petitioners of his suffering from heart disease.

16. The MLC of the injured/deceased, in juxtaposition to the averments made in the first information report, refers to only a scar on the left eyebrow of the deceased and no other injury on his person.

17. The death summary of the deceased which is enclosed as Annexure P-5 to the petition, discloses the diagnosis as alleged history of assault with blunt injury to chest and abdomen with post cardiac arrest with pulmonary oedema with respiratory and metabolic acidosis. It also refers to the case of the deceased being a follow up case of severe left ventricular hypertrophy with decompensated heart.

18. The death summary further reveals that the deceased was transferred from Dr.Hedgewar Arogya Sansthan with alleged history of assault injury to chest and abdomen with history of LOC and cardiac arrest at Dr.Hedgewar Hospital and once in ambulance while being shifted to Max Hospital.

19. In the Max Hospital the deceased suffered a third cardiac arrest. Since there was no cardiac activity or pulse, CPR was done but no cardiac activity could be noted for a very long time. Despite all efforts of the hospital, the deceased could not be revived and was declared dead on 08.03.2014 at 6.28 AM.

20. In this context, it would be necessary to refer to the post mortem report. The post mortem report reveals fracture of the 6th rib on the left side. In the heart, Aortic Stenosis was present and Valve CVSP was found to be opaque with heavy Calcific deposits. The opinion of the Autopsy Surgeon was kept reserved till the receipt of clinical analysis report of viscera and histopathology report. After the FSL and the Histopathology report, the opinion regarding the cause of death was stated to be Syncope as a result of Left Ventricular Hypertrophy with Valvular heart disease and its sequel (natural disease). The deceased was also stated to have consumed ethyl alcohol prior to his death.

21. The learned counsel for the petitioner submitted that the fracture of the 6th rib could not have been the result of any assault on the deceased by the petitioners as CPR (where the chest is pumped for resuscitation) was done at Dr.Hedgewar Hospital and at Max Hospital. Had the left rib been broken because of assault, CPR would not have been possible.

22. Thus it is argued that, if at all, one of the ribs in the chest was found to be broken in post mortem report, the probable cause of the same would be CPR and not any assault on the deceased prior to his death. Neither the MLC nor the death summary records any such injury like breakage of one of the ribs of the body of the deceased.

23. The combined reading of the MLC, death summary, post mortem report and the Histopathology report in conjunction with the statements of Hemant, Mudit Makhijani and Ashwani Kaushal (father of the deceased), leave no room for doubt that the deceased died a natural death. At the most, it has been argued, if the statement of the informant is believed, the petitioners would be liable to be prosecuted for offence under Section 323 /324 and 325 of the IPC but nothing beyond that. It has also been urged that by the time the injured/deceased was admitted to the Hedgewar Hospital, the doctors had come to learn that the injured/deceased had suffered heart attack. Thus the possibility of tutoring Ayush Dua (informant) into making such a statement that the petitioners were aware of the deceased suffering from heart disease, cannot be ruled out. Even assuming such a statement to be true, the petitioners cannot be tried for an offence under Section 302 IPC.

24. On the other hand learned advocate appearing on behalf of the complainant has argued that out of a criminal conspiracy and a premeditated plan, the deceased was attacked by the petitioners. Had it not been for an earlier planning to kill the deceased, two other persons namely Bhoop Khari and Krishan Khari would not have been called to attack the deceased. Admittedly, a quarrel had taken place two days prior to the incident when petitioner Amit Nagar and the deceased fought amongst themselves over the issue of car parking. If any attack was made two days thereafter, it is a certainty that such an attack was pursuant to a premeditated, pre arranged and well thought out plan to eliminate the deceased.

25. With regard to the contention of the petitioners that the Histopathology report and post mortem report unveiled the deceased to have consumed alcohol, learned counsel for the complainant has submitted that because of the deceased having been given sedatives to cure his heart disease, alcohol was found in his body. It has also been suggested that in order to manage hypertrophy, the deceased was put to alcohol septal ablation which is a technique where alcohol is infused in order to cause a controlled heart attack so as to avoid a big attack. Such issues could only be thrashed out at the trial and not at any stage anterior to it. Whether the fracture of ribs was because of CPR having been practiced on the deceased or because of assault made by the petitioners would also be the

subject matter of trial. With respect to the allegations made in the first information report, it has been urged on behalf of the complainant and the State that the case clearly comes within the mischief of Section 300 punishable under Section 302 of the IPC.

26. Learned counsel for the complainant also argued that a mini trial is not to be held at the stage of framing of charge and that proper sifting of evidence could only be resorted to at the trial.

27. I have heard learned counsels for the parties and have carefully gone through the documents and the statements of the so called eye witnesses to the incident. But before analyzing the facts of this case it needs to be seen as to what is the requirement of law at the stage of framing of charge in a criminal case. The principles governing the framing of charge is no longer in dispute. It does not require any elaboration that framing of charge is a serious business and the Court is required to evaluate the materials and documents on record for finding the existence of the ingredients for constituting the alleged offence. It is only for this limited purpose that the Trial Court is permitted to sift the evidence.

28. In *Niranjan Singh Karam Singh Punjabi and Others Vs. Jitendra Bhimraj Bijja and others*, , the Supreme Court has defined the parameters to be followed by a Court of law at the stage of framing of charge. The Supreme Court at para 7 has held as hereunder:-

"7. The next question is what is the scope and ambit of the "consideration" by the trial court at that stage. Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is obvious that since he is at the stage of deciding whether or not there exist sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution. In *the State of Bihar Vs. Ramesh Singh*, this Court observed that at the initial stage of the framing of a charge, if there is a strong suspicion- evidence 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. 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 the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. In *Union of India (UOI) Vs. Prafulla Kumar Samal and Another*, , this Court after considering the scope of Section 227 observed that

the words "no sufficient ground for proceeding against the accused" clearly show that the Judge is not merely a post-office to frame charge at the behest of the prosecution but he has to exercise his judicial mind to the facts of the case in order to determine that a case for trial has been made out by the prosecution. In assessing this fact it is not necessary for the court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but he may evaluate the material to find out if the facts emerging therefrom taken at their face-value establish the ingredients constituting the said offence. After considering the case law on the subject, this Court deduced as under:

(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 adduced 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.

(4) That in exercising his jurisdiction under Section 227 of the Code of judge which under the present Code is a senior and experienced judge cannot act merely as a Post office or a mouth-piece 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 appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

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From the above discussion it seems well settled that at the Sections 227-228 stage the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there from taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The court may for this limited purpose sift the evidence as it cannot be expected even at the 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."

(Emphasis supplied)

29. In a subsequent decision in State of Maharashtra, Etc. Etc. Vs. Som Nath

Thapa, Etc. Etc., , the Supreme Court had the occasion to deal with the aforesaid issue. The Supreme Court has observed thus:-

"....If on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists."

30. In State of M.P. Vs. S.B. Johari and Others, , the Supreme Court enunciated as follows:-

"4.....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."

31. Similar was the view of the Supreme Court in State of Madhya Pradesh Vs. Mohanlal Soni, .

32. In Yogesh @ Sachin Jagdish Joshi Vs. State of Maharashtra, , the Apex Court has held that Section 227 of the Code of Criminal Procedure requires the exercise of judicial mind on the part of the Trial Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. The test to determine a prima facie case would depend on the facts of each case but if two views are equally possible on the set of facts and the Trial Judge is satisfied that the evidence produced before him gives rise to the suspicion only as distinguished from grave suspicion, he could discharge the accused. What is to be seen at that stage, is not whether the trial would end in conviction but a broader test namely whether the materials on record, if unrebutted, make a conviction reasonably possible. The aforesaid view was based on earlier decisions of the Apex Court in State of Bihar Vs. Ramesh Singh, and Union of India (UOI) Vs. Prafulla Kumar Samal and Another, .

33. In Prafulla Kumar Samal (Supra) the following principles were listed:-

"(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.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post Office or a mouth-piece 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 appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

34. Thus applying these principles on the facts of the present case, the order impugned does not appear to be correct. It would be too much to presume that the petitioners killed the deceased and made themselves liable to be prosecuted under Section 302 IPC. The absence of any serious injury on the person of the deceased and a very non serious genesis of the occurrence coupled with the fact that no weapon appear to have been used by anyone of the petitioners, framing charges against them under Section 302 of the IPC does not appear to be just and proper. There does not appear to be any intention on the part of the petitioners to kill the deceased or to inflict such bodily injury on him, which in ordinary course of nature, could have killed the deceased. The requisite "knowledge" and "intention" for the offence of murder to be established is critically absent. Even if the allegation in the first information report and materials in the police papers are accepted at its face value no offence under Section 302 IPC can at all be made out.

35. The petitioners could be liable for being prosecuted for other lesser offences.

36. For what offence, the petitioners ought to be charged and tried would be evaluated and decided by the Trial Court.

37. For the present, this Court is not inclined to uphold the impugned order whereby charges have been framed against the petitioners under Section 302 IPC.

38. The order on charge and the orders framing charge are hereby set aside.

39. The matter is remitted to the Trial Court for writing out a fresh order in accordance with law after applying its mind over the facts of the case and what has been indicated above.

40. The petition is allowed.

Crl.M.A No. 3687/2015 in Crl.Rev.P No. 149/2015 & Crl.M.A No. 3723/2015 in

Crl.Rev P No. 152/2015

41. In view of the petitions having been allowed, no orders are required to be passed in the instant applications.

42. Dismissed as infructuous.