
(2014) 07 J&K CK 0036
In the Jammu And Kashmir High Court
Case No : 561-A No. 88 Of 2013

Sartaj Khalid

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 11-07-2014

Acts Referred:

Citation : (2014) 4 JKJ 219

Hon'ble Judges : Tashi Rabstan, J

Bench : Single Bench

Advocate : Sunil Sethi, Sr. Advocate and Mohsin Bhutt, Advocates for the Appellant; Ravinder Sharma, AAG, Advocates for the Respondent

Judgement

Tashi Rabstan, J.—Petitioner has invoked the jurisdiction of this Court under Section 561-A of Criminal Procedure Code (hereinafter, for

short, Cr.P.C.) for quashing the criminal Challan, titled as, State v. Mohd. Tariq Khan & others, arising out of FIR No. 31/2012 registered at

Police Station Poonch under Sections 302, 307, 452, 436, 109 and 111 of Ranbir Penal Code (hereinafter, for short, RPC) along with order

dated 27.02.2013 passed by the learned Sessions Judge, Poonch, whereby the charges under the aforesaid sections have been framed against

him, and the proceedings drawn in the said case. Initially the petition was registered as a criminal revision, which, later on, at the request of learned

counsel for petitioner, came to be registered as a petition under Section 561-A Cr.P.C. vide order dated 22.04.2013.

2. The facts as revealed in the petition are that on 07.03.2012 one Mohd. Tariq Khan, posted at 156 Territorial Army as a Sepoy, deserted the

camp along with his official AK 47 Rifle and three magazines and came to Poonch to kill his wife Shenaz Kousar and her alleged paramour,

petitioner herein. When he reached his residence at Alla Peer, Poonch, he did not find his wife and other members of the family there. He then

went to the house of petitioner and started firing in the air. Mother of petitioner, namely, Sara Begum opened the gate and he shot her dead with

his AK 47 Rifle and also critically injured a girl of 8/9 years old. Thereafter he went to his house and set it ablaze, and then he shot dead one

Yasmeen Akhtar, a close friend of his wife. SHO Police Station Poonch and other police personnel, who were on patrolling duty, after hearing

sound of gun shots reached Alla Peer area, near Chowk Jamia Masjid Sharif, Poonch. They overpowered and arrested Mohd. Tariq Khan. FIR

No. 31/2012 came to be registered against accused Mohd. Tariq Khan and AK 47 Rifle was also seized.

3. It is contended by the petitioner herein that during investigation the police also arrested him on the allegation that he had illicit relation with

Shenaz Kousar, wife of accused Mohd. Tariq Khan and he used to instigate and prompt the accused on the name of his wife, which infuriated

accused Mohd. Tariq Khan and the same resulted in killing the mother of petitioner herein, as well as one Yasmeen Akhtar and also injuring a girl

child of 8/9 years old. It is contended that on the basis of these alleged allegations, the police roped the petitioner also in the said FIR for the

commission of offences punishable under Sections 302, 307, 452, 436, 109 and 111 of RPC. It is further contended that after completion of

investigation the police filed a detailed Challan before the learned trial court citing as many as 84 witnesses and the trial court vide order dated

27.02.2013, impugned herein, framed charges against the petitioner also under the aforesaid sections of the Code.

4. It is pleaded that the petitioner was not involved in the commission of alleged offences, but has wrongly been implicated in the said case.

Further, it is the prosecution story itself that it was accused Mohd. Tariq Khan who had come to the house of petitioner to kill him, but when he

did not find the petitioner there, he killed his mother and injured the minor girl. Thus, it is contended, how the petitioner could be held guilty for the

commission of these offences. It is further contended that the trial court without going through this aspect of the case has charged the petitioner also

under the aforesaid sections. Further, it is contended that the trial court has not recorded any reasons or given any justification while framing the

charges against the petitioner as to how he has been roped in under these charges.

5. The contention of learned senior counsel appearing for petitioner is that there is no evidence, muchless sufficient one, available on record to

connect the petitioner, even prima facie with the commission of offence. He argued that the trial court has erred in framing charges against the

petitioner under Sections 302, 307, 452 and 436 RPC, that too with the aid of Section 109/111 RPC. He further argued that the trial court in a

mechanical manner framed charges against the petitioner also on wrong notion of law that at the stage of framing of charges the court cannot look

into the evidence or appreciate the same.

6. Status report/objections have been filed on behalf of respondent-State. It is contended that during investigation it was found that Shenaz

Kousar, wife of accused Mohd. Tariq Khan, was having illicit relation with the petitioner herein. Petitioner even had provided her a mobile phone

and a sim, and the telephone records disclose that they were in regular touch and oftenly used to talk to each other. Accused Mohd. Tariq Khan

used to warn his wife and petitioner herein to desist from such illicit relationship, but neither she nor the petitioner mend their ways, rather the

petitioner used to instigate and prompt accused Mohd. Tariq Khan that Shenaz Kousar is not his wife but she is the wife of petitioner. Mr.

Ravinder Sharma, learned AAG, argued that looking to the totality of evidence on record, prima facie the involvement of petitioner has been made

out and the charges have rightly been framed against him by the learned trial court. It is contended that their illicit relationship and petitioner's

abetment infuriated accused Mohd. Tariq Khan, which led to the commission of crime. Mr. Sharma, learned AAG, further argued that it is well

settled that at the stage of framing of charge the trial court is not to examine and go through in detail all the materials placed on record by the

prosecution nor is it for the court to consider the sufficiency of the materials to establish the offence alleged against the accused persons. He,

therefore, argued that in the present case the innocence of petitioner is under cloud and the trial is at its initial stage, therefore, if the petitioner is

discharged at this stage, it would not be in the interest of justice.

7. I have heard learned counsel appearing for the respective parties and

considered the rival contentions meticulously.

8. The question arising for consideration is whether the trial court on the strength of material collected during investigation was right in framing

charges against the petitioner for the commission of offence punishable under Sections 302, 307, 452, 436, 109 and 111 RPC.

9. Before dealing with the issue, it would be appropriate to reproduce Sections 302, 307, 452, 436, 109 and 111 RPC hereunder.

302. Punishment for murder

Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

307. Attempt to murder

Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of

murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and, if

hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore

mentioned.

436. Mischief by fire or explosive substance with intent to destroy house, etc.

Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the

destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be

punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to

fine.

452. House-trespass after preparation for hurt, assault or wrongful restraint

Whoever commits house-trespass, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully

restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either

description for a term which may extend to seven years, and shall also be liable to fine.

109. Punishment of abetment if the act abetted is committed in consequence and

where no express provision is made for its Punishment.

Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code

for the punishment of such abetment, be punished with the punishment provided for the offence.

111. Liability of abettor when one act abetted and different act done

When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had

directly abetted it:

Provided the act done was probable consequence of the abetment and was committed under the influence of the instigation, or with the aid or in

pursuance of the conspiracy which constituted the abetment.

10. After hearing the matter at length, what emerges from the prosecution story as well as the status report filed by the respondent-State and the

statements of witnesses recorded, is that it was accused Mohd. Tariq Khan who shot dead the mother of petitioner herein, as well as one

Yasmeen Akhtar and injured a minor girl with his official AK 47-Rifle and set ablaze his house. The reason attributed behind such killing was that

he was infuriated with the illicit relation of his wife, namely, Shenaz Kousar with the petitioner herein. As per the prosecution, he was warning his

wife and petitioner herein time and again to desist from such illicit relation but they did not mend their ways, rather the petitioner herein was

instigating and prompting accused Mohd. Tariq Khan by saying that Shenaz Kousar is not his wife but she is the wife of petitioner herein and he

has a relation with his wife. The abetment on the part of petitioner herein led to such a gruesome crime by accused Mohd. Tariq Khan. Further, as

per the prosecution, the petitioner herein had also provided a mobile phone and a sim to the wife of Mohd. Tariq Khan. The phone records

disclose that both of them regularly used to talk to each other.

11. At the time of framing of charge, the court has to consider the material, which is collected during investigation or inquiry, in order to satisfy as

to whether there exists sufficient ground to proceed against the accused. It has been pointed out by the Hon'ble Supreme Court in Suresh

Budharmal Kalani @ Pappu Kalani Vs. State of Maharashtra, , that at the stage of framing of charge, the court is required to confine its attention

to only those materials collected during investigation or enquiry which can be legally translated into evidence and not upon further evidence (dehors

those materials) that the prosecution may adduce in the trial which would commence only after the charges are framed and the accused denies the charges.

12. In the present case, on a close scrutiny of materials placed on record, what transpires is that it was accused Mohd. Tariq Khan who was

infuriated with the alleged illicit relation of his wife with the petitioner herein. The prosecution story and the statements of witnesses recorded do not

allege presence of petitioner at the spot when the crime was committed, rather it was the prosecution story that the petitioner had already filed

away from the spot suspecting threat to his life at the hands of accused Mohd. Tariq Khan. When petitioner himself was suspecting threat to his life

at the hands of accused Mohd. Tariq Khan, then how could it be alleged that he had abetted commission of these offences by the accused Mohd.

Tariq Khan. Further, it is not forthcoming from the record nor there is any material to show or connect the petitioner herein with the commission of

offences punishable under Sections 302, 307, 452, 436, 109 and 111 RPC. The presumption of guilt of the accused, which is to be drawn at the

initial stage, is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. 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. If there is no prima facie

evidence or the evidence is totally unworthy of credit, it is the duty of the Magistrate to discharge the accused; on the other hand, if there is some

evidence on which the conviction may reasonably be based, he must commit the case. 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.

13. In my view, the charge can be quashed if there is no sufficient ground for proceeding with the trial. In the instant case, there was no basis for

the learned trial court to conclude that there is sufficient ground to proceed against the petitioner by framing of charges against him under Sections

302, 307, 452, 436, 109 and 111 RPC. There exists no material on record which

can be converted into evidence in the course of trial to raise

grave suspicion against the petitioner that either he was in any way involved in the killing or attempted to kill, or committed trespass, or mischief by

fire or any explosive substance or abetted commission of these offences. The impugned order appears to have been passed without application of

mind and without keeping in view the settled principles of law. Therefore, the impugned order framing charges against the petitioner under Sections

302, 307, 452, 436, 109 and 111 RPC is not sustainable and is liable to be set aside.

14. In *Satish Mehra Vs. Delhi Administration and Another*, , a two Judge Bench judgment, it was observed that if the accused succeeds in

producing any reliable material at the stage of taking cognizance or framing of charge which might fatally affect even the very sustainability of the

case, it is unjust to suggest that no such material should be looked into by the court at that stage. It was held that the object of providing an

opportunity to the accused of making submissions as envisaged in Section 227 of the Code of Criminal Procedure, 1973 is to enable the court to

decide whether it is necessary to proceed to conduct the trial. If the materials produced by the accused even at that early stage would clinch the

issue, why should the court shut it out saying that such documents need be produced only after wasting a lot more time in the name of trial

proceedings. It was further observed that there is nothing in the Code which shrinks the scope of such audience to oral arguments and; therefore,

the trial court would be within its power to consider even material which the accused may produce at the stage contemplated in Section 227 of the

Code.

15. In *State of M.P. Vs. S.B. Johari and Others*, , it was held that 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, cannot show that the accused committed the particular offence. In that case, there

would be no sufficient ground for proceeding with the trial.

16. The judgment referred to by Mr. Sharma, learned AAG, in case, titled as, *Sheoraj Singh Ahlawat and Others Vs. State of U.P. and Another*, ,

in my view is not applicable to the case in hand as the said decision is reduced on a different set of facts. More so, in criminal cases the court

should bear in mind that each case must rest on its own facts and the similarity of facts in one case cannot be used to bear in another case. In the

said case the wife had levelled allegations against her husband that he was harassing her to complete and fulfill the demand of dowry; whereas, the

present case stands on a different footing.

17. In view of the above discussion, the petition under Section 561-A Cr.P.C. is allowed and the charges framed against the petitioner under

Sections 302, 307, 452, 436, 109 and 111 RPC by the trial Court vide order dated 27.02.2013 and the proceedings conducted under the

aforesaid sections of the RPC are quashed. Disposed of along with connected CrMA(s), if any.