Ghulam Hassan Beigh vs Mohammad Maqbool Magrey on 26 July, 2022

Bench: Abhay S. Oka, A.M. Khanwilkar

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2022
(ARISING OUT OF S.L.P. (CRIMINAL) NO. 4599 OF 2021)

GHULAM HASSAN BEIGH …APPELLANT(S)

Versus

MOHAMMAD MAQBOOL MAGREY & ORS. …RESPONDENT(S)

JUDGMENT

J.B. PARDIWALA, J. :

1. Leave granted.

2. This appeal is at the instance of the original complainant (husband of the deceased) and is directed against the order passed by the High Court of Jammu and Kashmir at Srinagar dated 26.11.2020 in the CM (M) No. 99 of 2020 by which the High Court rejected the revision application filed by the appellant herein Reason:

thereby affirming the order passed by the Additional Sessions Judge, Sopore (trial court) discharging the original accused persons (respondents Nos. 1 to 7 herein) from the offence of murder punishable under Section 302 of the Indian Penal Code (for short, 'IPC'). Upon affirmation the trial court proceeded to frame charge against the accused persons for the offence of culpable homicide punishable under Section 304 of the IPC.

FACTUAL MATRIX

3. It appears from the First Information Report (FIR) bearing No. 26/20 dated 22.03.2020 lodged by the appellant with the police station situated at Dangiwacha

that on the fateful day, the accused persons formed an unlawful assembly and laid an assault on the appellant and his family members after trespassing into the residential property of the appellant herein. It is the case of the prosecution that all the accused persons trespassed into the residential property of the appellant and started damaging the tin fence. When the appellant herein tried to restrain the accused persons from causing any further damage, they all started assaulting the appellant by giving fisticuffs. One of the accused persons is said to have hit the appellant with a wooden log. The wife of the appellant herein and his daughter-in-law viz. Rubeena Ramzan came to the rescue of the appellant. The accused persons are alleged to have caught hold of the deceased (wife of the appellant herein) and the daughter-in-law and both were beaten up causing injuries. It is further alleged that the two female members of the family were dragged by the accused persons as a result the clothes of the deceased got torned thereby outraging her modesty.

4. In connection with the aforesaid incident, the appellant went to the police station at Dangiwacha and lodged the FIR. The FIR was initially registered for the offences punishable under Sections 147, 354, 323 and 451 respectively of the IPC. The deceased (wife of the appellant) had to be shifted to a hospital as she suffered injuries on her body. No sooner the deceased was brought to the hospital than she was declared dead by the doctor on duty. In such circumstances, Section 302 of the IPC came to be added in the FIR.

The post mortem of the body of the deceased was performed. The statements of the various eye witnesses to the incident were recorded. Various panchnamas were drawn. At the end of the investigation, the police filed charge sheet against the accused persons for the offence of murder along with other offences as enumerated above.

5. The cause of death of the deceased as assigned in the post mortem is “cardio respiratory failure”. No poison was detected in the viscera.

6. It appears that the trial court heard the prosecution as well as the defence on the question of charge. Ultimately, the trial court thought fit to discharge the accused persons of the offence of murder punishable under Section 302 of the IPC and proceeded to frame charge against the accused persons for the offence of culpable homicide punishable under Section 304 of the IPC.

7. The appellant herein, being aggrieved by such decision of the trial court to discharge the accused persons of the offence of murder, challenged the legality and validity of the order by filing a revision application before the High Court. The High Court thought fit to affirm the order passed by the trial court discharging the accused persons of the offence of murder.

8. In such circumstances referred to above, the appellant has come up with the present appeal before this Court. ANALYSIS

9. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is : Whether the High Court was justified in affirming the order passed by the trial court discharging the accused persons of the offence of murder?

10. At this stage, we may look into the reasons assigned by the trial court as well as by the High Court for the purpose of discharging the accused persons of the offence of murder.

11. The trial court in its order dated 23.10.2020 observed in paragraphs 29 and 30 respectively as under :-"29. Scanning the evidence of prosecution, statements of the prosecution witnesses and statement of the deceased before her death who in their statements have stated that the accused persons entered the compound of the complainant and gave a blow with some object to the complainant, with the result complainant got injured and the accused persons outraged the modesty of the wife and daughter-in-law of the complainant. While going through the statement under section 161 Cr.P.C. of the deceased, which was recorded instantly after the alleged commission of offence, deceased has stated that the accused persons entered the compound and attacked his husband who was given a blow by some object with the result he got injured while as she and her daughter-in-law tried to intervene upon which the accused persons caught hold of them by hair and started beating with hands with the result she got injured and her modesty was outraged. Medical opinion on file reflect that there was no injury on any other part of the body of the deceased except over upper and lower lips with abrasions on face. Whether such act has caused the death of the deceased has not been mentioned anywhere in the record. Injury as reflected in the injury memo also does not reflect any such consequence which could lead to the death of the deceased. Report received from FSL also does not reflect anything which could in any way lead to the conclusion of death by the commission of the offence. In these circumstances it could not be said that the ingredients of sec 302 IPC are made out and the instant case does not fall within the paraments laid down under sec 302 IPC.

30. Penal code recognizes two kinds of homicides – i) culpable homicide, that deals between sections 299 and 304 IPC and ii) non-culpable homicides, which deals with section 304-A IPC. There are two kinds of culpable homicides; a) culpable homicide amounting to murder Sec 300 and 302 IPC and b) culpable homicide not amounting to murder Sec 304-II RPC. This section provides punishment for culpable homicide not amounting to murder. The accused person on virtual mode who are lodged in Sub Jail Baramulla, who pleaded not guilty and claimed to be tried. Copy of charge sheet was sent to Superintendent Sub Jail Baramulla for obtaining signatures of the accused persons who shall after obtaining the same attest the same and forward the charge sheet to this court. Prosecution shall produce evidence on next date of hearing. Put up on 04.11.20." (emphasis supplied)

12. The High Court, while affirming the aforesaid order passed by the trial court, held as under:-"9. The perusal of the order passed by trial court reveals that the trial court after considering the statement of the eye witnesses including the injured witnesses and the statement of the deceased has come to the conclusion that the ingredients of offence under section 302 I.P.C are lacking. The injury report of the deceased reflects that she was examined at 3.15 p.m. on 22.03.2020 and except

slight bleeding over upper and lower lips, there was no injury on any part of the body of the deceased Aisha Begum and at that time she had not suffered cardiac arrest. In the post mortem report, the concerned Medical Officer has given opinion regarding death of Aisha Begum that the deceased died due to cardiac arrest with alleged history of scuffle with neighbours. Even the deceased Aisha Begum in her statement has stated that the respondent Nos. 1 to 7 entered their compound and gave blow upon her husband (petitioner) as result of which he got injured and when she and her daughter-in-law tried to intervene, they also got hold of them and started beating her as a result of which she got injured and outraged her modesty. The cause of death in the post mortem report is cardiac arrest and not that the deceased died as a result of injury suffered by her. It would be relevant to note that the deceased was examined on 22.03.2020 at 3.15 P.M by Medical Officer. She was declared brought dead on 23.03.2020 in the Hospital at 1.37 A.M as per the death certificate placed on record by the petitioner. The trial court has rightly come to the conclusion that no offence under section 302 IPC is made out against the respondent Nos. 1 to7. There is no force in the contention of the petitioner that the trial court has critically evaluated the evidence but the trial court has simply examined the material facts so as to find out as to whether there is sufficient material to charge the private respondents for commission of offence under section 302 IPC or not and the conclusion of the trial court is rather the only conclusion that can be drawn from the material brought on record by the prosecution." (emphasis supplied)

13. We shall now take notice of the individual orders passed by the trial court framing charge against the accused persons. One such order framing the charge reads thus:-"Charge is hereby framed against you Midasir Ahmad Magrey that on 22.03.20 you in collusion with the other accused persons trespassed into the courtyard of the house of the complainant and you all started uprooting the tin fence. When the complainant asked you and other accused persons not to cause any damage, you all started assaulting the complainant with a weapon as a result the complainant suffered injuries and fell down on the ground. You also caused injuries to the wife of the complainant and outraged her modesty. The wife of the complainant died in the midnight hours on 22/23.03.2020. Therefore, you are to be tried for the offence punishable under Sections 451, 323, 324 and 304 of the IPC."

14. We shall now look into the police statement of one of the eye witnesses recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short, 'CrPC') dated 23.03.2020. The statements of all other eye witnesses are on the same footing. The statement thus reads:-"Statement of Wali Mohammad Sheikh R/o: Ghulam Mohi-ud-din Sheikh R/o Yarbugh, age – 59 Years, Occupation – Farmer under Section 161 Cr.PC dated 23-03-2020 I am a resident of Yarbugh and am a Farmer by profession. On 22-03-2020, I went to offer Prayers and was returning from the Mosque towards my Home. On the way I saw that the accused persons namely 1.

Mohammad Maqbool Magray S/o Mohammad Shaban Magray; 2. Zahoor Ahmad Magray S/o Mohammad Shaban Magray; 3. Tariq Ahmad Magray S/o Mohammad Shaban Magray; 4. Mudasir Ahmad Magray S/o Mohammad Shaban Magray; 5. Abdul Rashid Beigh S/o Mohammad Beigh; 6. Suhail Ahmad Beigh S/o Abdul Rashid Beigh; and 7. Nasir Ahmad Beigh S/o Abdul Rashid Beigh Residents of : Yarbugh Rafiabad, in an unlawful assembly with a preplanned concert, entered the residential compound of complainant and started breaking his Tin Fence. The complainant objected

to such act and told them that the said Tin Wall was constructed mutually. On listening to this, the accused persons forming an assembly, caught hold of the complainant and started beating him up with kicks and blows. Further, they hit the complainant with a wooden log as a result he got injured. The wife of complainant namely Mst. Ashiya Begum and Daughter□in□law of the complainant namely Rubeena Ramzan came to the rescue the complainant. The accused persons also caught hold of them and beat them up with kicks and blows thereby causing injuries to both. The said two ladies were dragged by the accused persons due to which their modesty was outraged and the Feran worn by the wife of the complainant was also tore off by the accused persons. The complainant then filed a written complaint with the Police Station Dangiwacha in the incident. At 10:00 PM, the wife of the complainant namely Mst. Ashiya Begum who was beaten and injured by the accused persons complained of severe complications and was rushed to hospital for medical treatment and on way she succumbed to death. In fact, the deceased died due to the assault and beating of accused persons and injuries by them. Today, Police Dangiwacha recorded my statement and I attested my signature upon it. Hence, my statement." POSITION OF LAW

15. Section 226 of the CrPC corresponds to sub□section (1) of the old Section 286 with verbal changes owing to the abolition of the jury. Section 286 of the 1898 Code reads as under:□"286.(1) In a case triable by jury, when the jurors have been in chosen or, in any other case, when the Judge is ready to hear the case, the prosecutor shall open his case by reading from the Indian Penal or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

(2) The prosecutor shall then examine his witnesses." Section 226 of the 1973 Code reads thus:

> "226. Opening case for prosecution.□When the ac□cused appears or is brought before the Court in pur□suance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the ac□cused." Section 226 of the CrPC permits the prosecution to make the first impression regards a case, one which might be difficult to dispel. In not insisting upon its right under Section 226 of the CrPC, the prosecution would be doing itself a disfavour. If the accused is to contend that the case against him has not been explained owing to the non□ compliance with Section 226 of the CrPC, the answer would be that the Section 173(2) of the CrPC report in the case would give a fair idea thereof, and that the stage of framing of charges under Section 228 of the CrPC is reached after crossing the stage of Section 227 of the CrPC, which affords both the prosecu□tion and accused a fair opportunity to put forward their rival con□tentions.

16. Section 227 of the CrPC reads thus:

> "227. Discharge.□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 not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons

for so doing."

17. Section 228 of the CrPC reads thus:

> "228. Framing of charge.□(1) If, after such considera□tion and hearing as aforesaid,the Judge is of opinion that there is ground for presuming that the ac□cused has committed an offence which□(a) is not exclu□sively triable by the Court of Session, he may frame a charge against the accused and, by or□der, transfer the case for trial to the Chief Judicial Magis□trate, or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judi□cial Magistrate, or as the case may be, the Judicial Mag□istrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report;
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> (b) is exclusively triable by the Court, he shall frame in
> writing a charge against the accused.
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> (2) Where the Judge frames any charge under clause (b) of sub□section (1), the charge shall be read and ex□plained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claim□sto be tried."

18. The purpose of framing a charge is to intimate to the accused the clear, unambiguous and precise nature of accusation that the accused is called upon to meet in the course of a trial. [See: deci□sion of a Four Judge Bench of this Court in V.C. Shukla v. State through C.B.I. reported in1980 Supp SCC 92: 1980 SCC (Cri) 695).

19. The case may be a sessions case, a warrant case, or a sum□mons case, the point is that a prima facie case must be made out before a charge can be framed. Basically, there are three pairs of sections in the CrPC. Those are Sections 227 and 228 relating to the sessions trial; Section 239 and 240 relatable to trial of warrant cases, and Sections 245(1) and (2) with respect to trial of summons case.

20. Section 226 of the CrPC, over a period of time has gone, in oblivion. Our understanding of the provision of Section 226 of the CrPC is that before the Court proceeds to frame the charge against the accused, the Public Prosecutor owes a duty to give a fair idea to the Court as regards the case of the prosecution.

21. This Court in the case of Union of India v. Prafulla Kumar Samal and another, (1979) 3 SCC 4, considered the scope of en□quiry a judge is required to make while considering the question of framing of charges. After an exhaustive survey of the case law on the point, this Court, in paragraph 10 of the judgment, laid down the following principles :□"(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."

22. There are several other judgments of this Court delineating the scope of Court's powers in respect of the framing of charges in a criminal case, one of those being Dipakbhai Jagdishchndra Patel v. State of Gujarat, (2019) 16 SCC 547, wherein the law relating to the framing of charge and discharge is discussed elaborately in paragraphs 15 and 23 resply and the same are reproduced as under:

> "15. We may profitably, in this regard, refer to the judgment of this Court in State of Bihar v. Ramesh Singh wherein this Court has laid down the principles relating to framing of charge and discharge as follows:
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> "4.....Reading Sections 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at the beginning and initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a 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. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima

> facie whether the court should proceed with the trial or not. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in 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....

If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227." "23. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the Court is expected to do is, it does not act as a mere post office. The Court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the Court dons the mantle of the Trial Judge hearing arguments after the entire evidence has been adduced after a full□fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the Court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence."

23. In Sajjan Kumar v. CBI [(2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] , this Court had an occasion to consider the scope of Sections 227 and 228 CrPC. The principles which emerged there□from have been taken note of in para 21 as under: (SCC pp. 376□77) "21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following prin□ciples emerge:

> (i) The Judge while considering the question of framing the charges under Section 227 CrPC 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.
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> (ii) Where the materials placed before the court dis□close 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.
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> (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 ac□cused has committed the offence.

(v) At the time of framing of the charges, the proba□tive value of the material on record cannot be gone into but before framing a charge the court must ap□ply 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 emerg□ing therefrom taken at their face value disclose the existence of all the ingredients constituting the al□leged offence. For this limited purpose, sift the evi□dence 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 dis□charge the accused and at this stage, he is not to see whether the trial will end in conviction or ac□quittal."

24. The exposition of law on the subject has been further considered by this Court in State v. S. Selvi, (2018) 13 SCC 455 : (2018) 3 SCC (Cri) 710, followed in Vikram Jo□har v. State of Uttar Pradesh, (2019) 14 SCC 207 : 2019 SCC OnLine SC 609 : (2019) 6 Scale 794.

25. In the case of Asim Shariff v. National Investigation Agency, (2019) 7 SCC 148, this Court, to which one of us (A.M. Khanwilkar, J.) was a party, in so many words has expressed that the trial court is not expected or supposed to hold a mini trial for the purpose of marshalling the evidence on record. We quote the relevant observations as under:□"18. Taking note of the exposition of law on the subject laid down by this Court, it is settled that the Judge while considering the question of framing charge under Section 227 CrPC in sessions cases(which is akin to Section 239 CrPC pertaining to warrant cases) 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; where the material placed before the Court discloses grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, 3 2018(13) SCC 455 4 2019(6) SCALE 794 the trial Judge will be justified in discharging him. It is thus clear that while examining the discharge application filed under Section 227 CrPC, it is expected from the trial Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. It is true that in such proceedings, the Court

is not supposed to hold a mini trial by marshalling the evidence on record." (emphasis supplied)

26. In the case of State of Karnataka v. M.R. Hiremath, reported in (2019) 7 SCC 515, this Court held as under:□"25. The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 CrPC. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. In State of T.N. v. N. Suresh Rajan, (2014) 11 SCC 709, adverting to the earlier decisions on the subject, this Court held: (SCC pp. 721□22, para 29) "29. ... At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."

27. Thus from the aforesaid, it is evident that the trial court is enjoined with the duty to apply its mind at the time of framing of charge and should not act as a mere post office. The endorsement on the charge sheet presented by the police as it is without applying its mind and without recording brief reasons in support of its opinion is not countenanced by law. However, the material which is required to be evaluated by the Court at the time of framing charge should be the material which is produced and relied upon by the prosecution. The sifting of such material is not to be so meticulous as would render the exercise a mini trial to find out the guilt or otherwise of the accused. All that is required at this stage is that the Court must be satisfied that the evidence collected by the prosecution is sufficient to presume that the accused has committed an offence. Even a strong suspicion would suffice. Undoubtedly, apart from the material that is placed before the Court by the prosecution in the shape of final report in terms of Section 173 of CrPC, the Court may also rely upon any other evidence or material which is of sterling quality and has direct bearing on the charge laid before it by the prosecution. (See :

Bhawna Bai v. Ghanshyam, (2020) 2 SCC 217).

28. In Amit Kapoor v. Ramesh Chander, (2012) 9 SCC 460, this Court observed in paragraph 30 that the Legislature in its wisdom has used the expression "there is ground for presuming that the accused has committed an offence". There is an inbuilt element of presumption. It referred to its judgement rendered in the case of State of Maharashtra v. Som Nath Thapa and others, (1996) 4 SCC 659, and to the meaning of the word "presume", placing reliance upon Blacks' Law Dictionary, where it was defined to mean "to believe or accept upon probable evidence"; "to take as true until evidence to the contrary is forthcoming". In other words, the truth of the matter has to come out

when the prosecution evidence is led, the witnesses are cross-examined by the defence, incriminating material and evidences put to the accused in terms of Section 313 of the Code, and then the accused is provided an opportunity to lead defence, if any. It is only upon completion of such steps that the trial concludes with the Court forming its final opinion and delivering its judgement....." (emphasis supplied)

29. What did the trial court do in the case on hand? We have no doubt in our mind that the trial court could be said to have conducted a mini trial while marshalling the evidence on record. The trial court thought fit to discharge the accused persons from the offence of murder and proceeded to frame charge for the offence of culpable homicide under Section 304 of the IPC by only taking into consideration the medical evidence on record. The trial court as well as the High Court got persuaded by the fact that the cause of death of the deceased as assigned in the post mortem report being the "cardio respiratory failure", the same cannot be said to be having any nexus with the alleged assault that was laid on the deceased. Such approach of the trial court is not correct and cannot be countenanced in law. The post mortem report, by itself, does not constitute substantive evidence. Whether the "cardio respiratory failure" had any nexus with the incident in question would have to be determined on the basis of the oral evidence of the eye witnesses as well as the medical officer concerned i.e. the expert witness who may be examined by the Prosecution as one of its witnesses. To put it in other words, whether the cause of death has any nexus with the alleged assault on the deceased by the accused persons could have been determined only after the recoding of oral evidence of the eye witnesses and the expert witness along with the other substantive evidence on record. The post mortem repot of the doctor is his previous statement based on his examination of the dead body. It is not substantive evidence. The doctor's statement in court is alone the substantive evidence. The post mortem repot can be used only to corroborate his statement under Section 157, or to refresh his memory under Section 159, or to contradict his statement in the witness-box under Section 145 of the Evidence Act, 1872. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.

30. The prosecution should have been given opportunity to prove all the relevant facts including the post mortem report through the medical officer concerned by leading oral evidence and thereby seek the opinion of the expert. It was too early on the part of the trial court as well as the High Court to arrive at the conclusion that since no serious injuries were noted in the post mortem report, the death of the deceased on account of "cardio respiratory failure" cannot be said to be having any nexus with the incident in question.

31. Whether the case falls under Section 302 or 304 Part II, IPC could have been decided by the trial court only after the evaluation of the entire oral evidence that may be led by the prosecution as well as by the defence, if any, comes on record. Ultimately, upon appreciation of the entire evidence on

record at the end of the trial, the trial court may take one view or the other i.e. whether it is a case of murder or case of culpable homicide. But at the stage of framing of the charge, the trial court could not have reached to such a conclusion merely relying upon the port mortem report on record. The High Court also overlooked such fundamental infirmity in the order passed by the trial court and proceeded to affirm the same.

32. We may now proceed to consider the issue on hand from a different angle. It is a settled position of law that in a criminal trial, the prosecution can lead evidence only in accordance with the charge framed by the trial court. Where a higher charge is not framed for which there is evidence, the accused is entitled to assume that he is called upon to defend himself only with regard to the lesser offence for which he has been charged. It is not necessary then for him to meet evidence relating to the offences with which he has not been charged. He is merely to answer the charge as framed. The Code does not require him to meet all evidence led by prosecution. He has only to rebut evidence bearing on the charge. The prosecution case is necessarily limited by the charge. It forms the foundation of the trial which starts with it and the accused can justifiably concentrate on meeting the subject□matter of the charge against him. He need not cross□examine witnesses with regard to offences he is not charged with nor need he give any evidence in defence in respect of such charges.

33. Once the trial court decides to discharge an accused person from the offence punishable under Section 302 of the IPC and proceeds to frame the lesser charge for the offence punishable under Section 304 Part II of the IPC, the prosecution thereafter would not be in a position to lead any evidence beyond the charge as framed. To put it otherwise, the prosecution will be thereafter compelled to proceed as if it has now to establish only the case of culpable homicide and not murder. On the other hand, even if the trial court proceeds to frame charge under Section 302 IPC in accordance with the case put up by the prosecution still it would be open for the accused to persuade the Court at the end of the trial that the case falls only within the ambit of culpable homicide punishable under Section 304 of IPC. In such circumstances, in the facts of the present case, it would be more prudent to permit the prosecution to lead appropriate evidence whatever it is worth in accordance with its original case as put up in the chargesheet. Such approach of the trial court at times may prove to be more rationale and prudent.

34. In view of the aforesaid discussion, the order of the High Court as well as the order of the trial court deserve to be set aside.

35. In the result, this appeal succeeds and is hereby allowed. The orders passed by the High Court and the trial court are hereby set aside. The trial court shall now proceed to pass a fresh order framing charge in accordance with law keeping in mind the observations made by this Court.

36. We clarify that we have otherwise not expressed any opinion on the merits of the case. The observations in this judgment are absolutely prima facie and relevant only for the purpose of deciding the legality and validity of the order discharging the accused persons of the offence of murder punishable under Section 302 of the IPC. We once again clarify that ultimately it is for the trial court to take an appropriate decision as regards the nature of the offence at the end of the trial.

.....J. (A.M. KHANWILKAR) .....J. (ABHAY S. OKA) .....J. (J.B. PARDIWALA) NEW DELHI;

JULY 26, 2022