

Rabia Choudhary vs Cbi & Ors on 24 December, 2024

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on:24.12.2024

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CRL.M.C. 863/2019, CRL.M.A. 3457/2019, CRL.M.A. 3459/2019, CRL.M.A. 30886/2019, CRL.M.A. 30887/2019, CRL.M.A. 5444/2021 & CRL.M.A. 13117/2021

RABIA CHOUDHARY

.....Pe

versus

CBI & ORS

.....Responde

Advocates who appeared in this case:

For the Petitioner : Ms. Kawalpreet Kaur & Mr. Umesh Kumar, Advs.

For the Respondent : Mr. Rajesh Kumar, SPP with Ms. Mishri Pandita, Adv.
Dr. S.Q. Kazim & Mr. Shivkumar, Advs.
R2 to R9

CORAM

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present petition is filed challenging the order dated 14.12.2018 (hereafter 'impugned order'), passed by the learned Trial Court, in CBI No.3/2018 arising out of RC No. 16(S)/2015/CBI/SC-III/ND, whereby charges were framed against all the accused persons for the offences under Sections 323/341 of the Indian Penal Code, 1860 ('IPC') read with Section 34 of the IPC. Charge was framed against Respondent No.3 for the offence under Section 304 of the IPC.

2. The petitioner has sought directions to the learned Trial Court to frame charges against all the accused persons under Sections 302/325/326/342/201 and 120B read with Section 34 of the IPC. The petitioner has also sought directions for video and audio recording of the full trial.

3. The facts of the present case are as follows:

3.1. It is alleged that on 07.09.2015, at around 5:42 PM, a call was made to the police control room by a lady named Farah regarding a quarrel between her and her husband. Pursuant to the call, a PCR Van was dispatched to the spot along with Respondent Nos. 2 to 4. It is alleged that the said officials tried to pacify the dispute, however, Farah refused to go along with her husband and sat in the PCR Van.

When the said officials were trying to pacify the couple, the victim who was travelling on a motorcycle with his wife (the petitioner) and their minor child stopped and intervened upon noticing Farah, who was his acquaintance. It is alleged that the victim advised Farah to settle the family dispute amicably and to get down from the PCR Van. Respondent Nos. 2 to 4 allegedly asked the victim to not interfere and go away, however, he did not heed their advice which led to heated arguments. Respondent No.2 also slapped the victim. When the victim objected to the same, Respondent Nos. 3 and 4 allegedly pushed the victim. Thereafter, the victim allegedly wanted to go to the police station and complain about the conduct of the said police officials and sat on his motorcycle. Respondent Nos. 2 to 4 however removed the keys of the victim's motorcycle, pushed him again and started beating and abusing the victim. This continued for 5-7 minutes. The said police officials also allegedly said that-"Police yahan per hai tu thane me kya karega, jo kahna karna hai yahan per kar".

3.2. It was found during investigation that Respondent Nos. 5 and 6 had been deployed on the concerned day for patrolling duly and a police gypsy had been provided to them. On 07.09.2015, at around 5:05 PM, Sub Inspector Rajinder along with Respondent Nos. 7 and 8 had left the police station for execution of a warrant of attachment in a case. Sub Inspector Rajinder and Respondent No. 7 left on a motorcycle while Respondent No. 8 was taken to the concerned premises by Respondent No. 5 in the gypsy driven by Respondent No. 3.3. When Respondent Nos. 5 and 8 were returning to the Police Station Nand Nagri in the police gypsy driven by Respondent No. 6, they stopped at the spot of the incident on noticing the crowd and the PCR Van parked on the road side to ascertain the reason for the assemblage of the crowd. Respondent No.2 told Respondent No.5 about the incident in detail and the obstruction by the victim. Respondent No.7 also reached the place of occurrence by his motorcycle. Thereafter, Respondent No. 5 allegedly had an altercation with the victim and warned him to not interfere in the matter, however, the victim kept asking Farah to get down from the PCR Van. It is alleged that Respondent Nos. 2 to 7 took umbrage to the victim's intervention in their duty and started assaulting the victim with lathi. It is alleged that the said accused persons also tried to drag the victim in the police gypsy multiple times. It is alleged that when the petitioner prevented the accused persons from thrashing and beating the victim and pulling him into the gypsy, Respondent No. 8 separated the petitioner from the victim and stopped her from saving the victim. Respondent No.2 allegedly climbed on the legs of the victim and hit him with a wooden rod as well. In addition to the police officials, Respondent No.9 who was a part of the crowd also indulged in beating the victim with the wooden rod.

3.4. It was found during investigation that Respondent No.2 called the police control room at 6:08 PM and the Duty Officer, Police Station Nand Nagri at 6:12 PM regarding a man misbehaving with them which is causing a traffic jam. He requested for deputation of additional force as well.

3.5. It is alleged that the accused persons continued thrashing the victim for quite some time in broad day light which was witnessed by several passerby and a video clip of the incident was also prepared by an unknown person. The accused persons finally succeeded in forcefully pulling the victim into the police gypsy and laid him on the floor in the gap between the two rear seats. The petitioner was also made to sit in the gypsy. Respondent No. 5 sat on the front seat while Respondent No. 3, one unknown policeman and Respondent No. 7 sat on the left rear seat.

Respondent No. 9, the petitioner and Respondent No. 8 sat on the rear seat on the right hand side. The gypsy was driven by Respondent No. 6. Respondent Nos. 2 and 4 followed the gypsy in the PCR van.

3.6. On way to the police station, when the injured victim was trying to get up, Respondent No. 3 prevented him from doing so by putting his right knee on the chest of the victim close to his neck. The unknown policeman put his knee on the stomach of the victim and Respondent No. 7 held the feet of the victim. Respondent No. 9 continued hitting the victim with his helmet. The victim was crying in pain and started gagging. Despite the pleas of the petitioner to leave the victim, the said accused persons did not leave the victim. It is alleged that the petitioner also pleaded with Respondent No. 5 to direct his subordinates to leave the victim, however, Respondent No. 5 started abusing the victim and directed Respondent Nos. 3 and 7 and the unknown police officer to hold down the victim tightly. After five minutes, the gypsy reached the police station, the petitioner and the victim were taken out from the gypsy and the victim was found to be motionless at that time.

3.7. Upon finding the victim to be motionless, the SHO concerned asked Respondent Nos. 5 to 6 to take him to the hospital for medical treatment. The victim was brought to the Guru Teg Bahadur Hospital Dilshad Garden Delhi by police gypsy at around 6:45 PM. Upon examination of the victim, he was declared as brought dead at 6:54 PM. The post mortem examination of the dead body of the victim revealed that the cause of death is asphyxia as a result of ante mortem compression of neck produced by broad object. All the twenty three external injuries on the body of the victim were found to be ante mortem in nature.

3.8. Initially, inquest proceedings were conducted under Section 176 (1A) of the Code of Criminal Procedure, 1973 in respect of the death of the victim in custody of the police. The learned Metropolitan Magistrate, after going through the testimony of the witnesses, the post mortem report and other documents, conducted enquiry and in order dated 06.10.2015, observed that the death of the victim was not natural. Pursuant to the same, FIR No. 155/2015 dated 13.10.2015 was registered in Crime Branch for offence under Sections 302/34 of the IPC.

3.9. Thereafter, the present case was registered in compliance of order dated 03.12.2015, passed by this Court, in WP (Crl) 2349/2015, whereby CBI was directed to register and investigate the case concerning the death of the victim.

IMPUGNED ORDER

4. The learned Trial Court, in the impugned order, observed that there was no premeditation in the mind of the accused persons to cause the death of the victim and their common intention was to only beat the victim which resulted in external injuries to him. It was observed that even as per the statement of the complainant, the victim was trying to get up. It was found that the intention of the concerned accused persons was to hold down the victim and it could not be said that they wanted to kill him. It was observed that Respondent No.3 however was pressing on the chest of the victim near his neck with all force. The victim was not offering much resistance despite which Respondent No.3 continued to press his neck due to which Respondent No.3 was imputed with the knowledge that he

will kill the victim. In view of the same, it was found that all accused persons were liable to be tried for offences under Sections 323/341 of the IPC read with Section 34 of the IPC and Respondent No.3 was also liable to be tried for the offence under Section 304 of the IPC.

5. The learned Trial Court also dealt with the defence raised by the accused police officials in relation to absence of the sanction under Section 140 of the Delhi Police Act, 1978. It was noted that the accused persons had dragged the victim to the gypsy after he had attempted to leave the place. It was observed that on the face of it, the acts of the said accused persons do not appear to be connected to their duty. It was opined that the question of sanction may not necessarily be decided at the stage of charge itself and the same can depend on the facts as established during trial. The learned Trial Court also took note of the argument that some of the accused persons were apparently not visible in the video clip and rejected the same by noting that the oral testimony of witnesses, including the complainant, could not be ignored where the role of every accused has been duly defined. The learned Trial Court also rejected the objection to the CFSL report of the video clipping of the incident by noting that even though the person who made the video could not be found, the video was not found to be manipulated and the requirement of the certificate under Section 65 B of the Evidence Act, 1872 could be dispensed with in the interest of justice.

6. The impugned order led to filing of the present petition by the victim's wife praying that charges be framed against all the accused persons for offence under Section 302 of the IPC.

SUBMISSIONS

7. The learned counsel for the petitioner submitted that the magisterial enquiry of the incident leading to the death of the victim found in its report dated 15.09.2015 that the victim was suffering from no ailment and he would have been alive had he not intervened in the scuffle of the couple. He submitted that it was noted that the eye witnesses have corroborated the statement of the petitioner. He submitted that it was also noted that the victim succumbed to his injuries caused by being pinned down by three of the accused persons.

8. He submitted that the victim had intervened purely out of a gesture of good will and he had merely attempted to conciliate the quarrelling couple.

9. He submitted that the victim was thrashed and beaten by all the accused persons despite the pleas of the petitioner. He further submitted that the minor child who was merely three and a half months old at that time was also separated from the petitioner for some time. He submitted that the entire incident of severe brutal beatings was witnessed in broad daylight by several eye witnesses.

10. He pointed to a table of the specific role of each accused person in the pleadings. The same is reproduced hereunder:

A-1	He slapped Shahanawaj initially while at Gagan Cinema T point argument. Later in the PCR he also climbed on the legs of Shahnawaj and also hit him with the
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- wooden rod. Took umbrage of Shahnawaj in the duty and started assaulting / thrashing / beating / pulling Shahnawaj into the Gypsy and taking away from there.
- A-2 Put his knee on the chest close to the neck of the deceased Shahnawaj Chaudhary, and prevented him from getting up Took umbrage of Shahnawaj in the duty and started assaulting / thrashing / beating / pulling Shahnawaj into the Gypsy and taking away from there.
- A-3 Took umbrage of Shahnawaj in the duty and started assaulting / thrashing / beating / pulling Shahnawaj into the Gypsy and taking away from there.
- A-4 He started abusing the deceased Shahanawaj and said that he would teach him a lesson in the Police station and told his subordinates to hold him tightly and said Daba kar rakho Saleko" Took umbrage of Shahnawaj in the duty and started assaulting / thrashing /beating / pulling Shahnawaj into the Gypsy and taking away from there.
- A-5 Took umbrage of Shahnawaj in the duty and started assaulting / thrashing / beating / pulling Shahnawaj into the Gypsy and taking away from there.
- A-6 Constable Sumit held the legs of Shahanawaj Chaudhary and had forcefully dragged and pulled

- Shahanawaj Chaudhary and his wife Ms. Rabiya @ Mamta Took umbrage of Shahnawaj in the duty and started assaulting / thrashing / beating / pulling Shahnawaj into the Gypsy and taking away from there.
- A-7 The accused lady Constable Anita Yadav prevented Smt. Rabia w/o deceased Shahnawaj to save her from police officials several times

A-8 This accused identified as Vinay Kumar also indulged in beating Shahnawaj with the wooden rod. He also indulged in continuously beating with the helmet that he carried with him.

11. He submitted that the police officials further made the petitioner give tutored statements before the learned Magistrate. He submitted that the petitioner was told to not disclose anything else her husband would suffer the consequences. He submitted that the whereabouts of the victim were also concealed by the police. The petitioner set off to the GTB Hospital to find the victim as soon as she was dropped at her parents house at 3AM on the next day.

12. He submitted that the post mortem clearly reveals that the death of the victim was not natural. He submitted that despite the same, initially, no FIR was registered and no investigation was done in the matter either.

13. He submitted that the present case does not fall within the ambit of Section 304 of the IPC and Section 302 of the IPC is made out against the accused persons. He submitted that the acts of the accused persons were deliberate and not careless. He submitted that the act of continuing to apply pressure on the neck with added vigour when the victim was already choking was especially telling of the intentions of the accused. He submitted that it is clear that it was the intention of the accused to cause serious harm and bodily injury to the accused and such injury that was sufficient in the ordinary nature of things to cause death.

14. The learned counsel for Respondent Nos. 2 to 9 submitted that no prima facie case for the offence under Section 302 of the IPC is made out against the accused persons in the present case. He submitted that the victim was drunk and he had interrupted the police officials from carrying out their duty which had led to the altercation.

ANALYSIS

15. The law in regard to discharge and framing of charge is provided in Sections 227 and 228 of the CrPC respectively. For the sake of convenience, the statutory provisions are reproduced hereunder:

"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.

228. Framing of charge.

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

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

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

(2) Where the Judge frames any charge under clause (b) of subsection (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

16. It is trite law that the Trial Court, while framing charges under Section 228 of the CrPC, is not required to conduct a mini trial and has to merely weigh the material on record to ascertain whether the ingredients constituting the alleged offence are prima facie made out against the accused persons. The Hon'ble Apex Court, in the case of Sajjan Kumar v. CBI : (2010) 9 SCC 368, has culled out the following principles in regards to the scope of Sections 227 and 228 of the CrPC:

"21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles 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.

(ii) 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.

(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 accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply 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 emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence 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 discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

(emphasis supplied)

17. It is a settled law that the scope of interference by High Courts while exercising revisional jurisdiction is limited and ought to be exercised sparingly, in the interest of justice, so as to not impede the trial unnecessarily.

18. In the case of Amit Kapoor v. Ramesh Chander : (2012) 9 SCC 460, the Hon'ble Apex Court had noted that while considering the point of charge, the Court is required to consider the record of the case and discern whether there are grounds to believe that the accused has committed the offence. It was noted that the Court has to satisfy itself as to the existence of elements of the alleged offence. The Hon'ble Apex Court, advertent to a catena of precedents, had also noted that the test for quashing an order on charge in exercise of revisional jurisdiction or inherent jurisdiction is limited to whether the allegations, as made from the record of the case, taken at their highest, are patently absurd and whether the basic ingredients of the offence, for which the charge is framed, are not made out. The relevant portion of the said judgment is reproduced hereunder:

"17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the "record of the case" and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the section exists, then the court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and

the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is the expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

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27. Having discussed the scope of jurisdiction under these two provisions i.e. Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a "civil wrong" with no "element of criminality" and does not satisfy the basic ingredients of

a criminal offence, the court may be justified in quashing the charge. Even in such cases, the court would not embark upon the critical analysis of the evidence.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice. 27.10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained. 27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution. 27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie. 27.14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge. 27.15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that the interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae i.e. to do real and substantial justice for administration of which alone, the courts exist..."

(emphasis supplied)

19. It is clear that this Court, at this stage, is not required to reevaluate the evidence or hold a mini trial as the same would tantamount to this Court assuming appellate jurisdiction. Thus, all that has to be seen is whether the learned Trial Court has adequately appreciated the material on record and whether the Court could form an opinion that the accused might have committed the offence on the basis of the material placed before it.

20. The present challenge is preferred by the petitioner and is essentially limited to the issue of enhancement of the charges framed against the accused persons.

21. The relevant portion of the impugned order is reproduced hereunder:

"56. Now, I shall deal with the role and culpability of accused persons. From the alleged facts, it is amply clear that there was no premeditation of mind among accused persons to cause death of Shanu. Though, a common intention did come' into existence being shared by all accused persons, to beat Shanu, which resulted into external injuries to him. Apparently, Shanu was restrained from leaving that place, with purpose to teach him lesson and was given beatings accordingly. Despite plea of Shanu as well as his wife Rabia, Shanu was not left and was detained to be beaten on the spot. Accused Anita, though did not beat Shanu, but she did participate in this process so as to facilitate beating of Shanu by other police officials, by restraining Rabia to intervene and save Shanu from beatings. Therefore, I find that all accused persons are liable to be tried for offence u/s 323/341 IPC read with Section 34 IPC.

57. As far as causing death of Shanu is concerned, it is relevant to refer to statement given by Rabia. Rabia alleged that Udai Veer sat on the chest of her husband by putting his right knee on the chest, close to his neck. Sumit had held legs of her husband and Vinay was holding left hand of her husband. The purpose of doing so is exemplified by alleged exhortation of accused Manjoor Hasan. As per Rabia, when she requested Maifjoor Hasan to direct his fellow police men to leave Shanu else he would die, then Manjoor Hasan exhorted the constables to hold her husband tightly saying that "Dabakar rakho sale ko". Such exhortation of Manjoor Hasan explains their intention to hold Shanu so as to stop his physical resistance, if any. Rabia herself has stated that Shanu was trying to get up and free himself. Therefore, it cannot be said that either Udai Veer or other police officials present in that Police Gypsy wanted to kill Shanu. Had it been their intention, then there was no relevance of saying that 'keep/held him tightly'. Hence, I am not in agreement with contentions made by counsel for complainant that it was an intentional killing.

58. However, for Udai Veer, it was a matter of common knowledge that by pressing chest near neck with all force, he was likely to cause death of Shanu due to suffocation. Shanu, when was not offering much physical resistance, then continuing pressing his neck was not required and when Udai Veer continued doing so, he is imputed with the knowledge that by doing so, he could cause his death.

59. Therefore, in view of my foregoing discussions, observations and findings, I reach to conclusion that it is only accused Udai Veer, who is liable to be tried for offence punishable u/s 304 IPC. Ordered accordingly."

22. In the present case, the accused persons inside the police gypsy were charge sheeted under Section 304 of the IPC. The charge under Section 304 of the IPC was however framed only against Respondent No. 3 and all the accused persons, including Respondent No. 3, were charged under Sections 323/341 of the IPC read with Section 34 of the IPC. It is argued that the present case warrants trial for the offence under Section 302 of the IPC.

23. The petitioner is aggrieved that the accused persons were not charged for offence under Section 302 of the IPC and only one of the accused persons has been charged for offence under Section 304 of the IPC for culpable homicide not amounting to murder.

24. It is the case of the petitioner that all the accused persons should have been charged for committing murder as defined in Section 300 of the IPC.

25. Before delving into the facts of the present case, this Court considers it apposite to succinctly discuss the ingredients in regard to offences of murder and culpable homicide not amounting to murder.

26. Culpable homicide is defined in Section 299 of the IPC. The same stipulates that whoever causes death by doing an act with the intention of causing death, or with the intention of causing bodily injury as is likely to cause death, or with knowledge that he is likely to cause death, commits culpable homicide. Culpable homicide is not murder, as punishable under Section 302 of the IPC, if the same falls within the exception as provided in Section 300 of the IPC.

27. Section 300 of the IPC deals with the offence of murder. The same reads as under :

"300. Murder.--Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--

2ndly.--If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

3rdly.--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-- 4thly.--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a

sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A, is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1.--When culpable homicide is not murder.-- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:--

First.--That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.--That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant. Thirdly.--That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.--Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a

thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose, Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.--Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.--Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation.--It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.--Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration A, by instigation, voluntarily causes Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder."

28. As provided in the aforesaid Section, except in the cases where the matter falls under one of the stipulated exceptions, a person commits a murder not only if the act is done with the intention of causing death, but also if the act is done with the intention of causing such bodily injury as the offender knows to be likely to cause death; or if the act is done with the intention of causing bodily injury to any person which is sufficient in the ordinary course of nature to cause death; or if the offender knows that the act is so imminently dangerous that it must in all possible probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury.

29. Thus, the distinction between culpable homicide and murder lies in the exceptions envisaged under Section 300 of the IPC. Culpable homicide is not a murder if the same falls within the exceptions as provided therein, that is, if the offender causes death when he is deprived of the power of his self-control by grave and certain provocation (Exception 1); if the offender exceeds his right of private defence without premeditation in good faith and causes death of the person against whom he is exercising such right (Exception 2); if the offender, being a public servant or aiding a public servant, exceeds the powers given to him by law in advancement of public justice (Exception 3); or if culpable homicide is committed without premeditation in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner (Exception 4); or if the victim, who is above the age of eighteen years, suffers death or takes the risk of death with his own consent (Exception 5). The first exception is subject to the respective provisos as provided in Section 300 of the IPC.

30. The present case relates to the death of the petitioner's husband after he had intervened in a dispute of his acquaintance. It is alleged that the accused police officials took offence to the interruption created by the victim and thrashed him mercilessly with their batons.

It is alleged that after being beaten, the victim was pulled into the police gypsy. The victim was declared to be brought dead. The chargesheet was filed attributing specific roles to the accused persons as has been summarised in Paragraph 10 above.

31. The learned Trial Court rightly noted the allegations as made by the petitioner being an eye-witness of the incident, however, fell in error in framing charge for offence under Section 304 of the IPC against one accused person and for lesser offences against other accused persons by finding that they had no intention to murder the victim.

32. The learned Trial Court perused the video clipping and found that the same seemed to show that a common intention had fructified between the accused persons which resulted into them beating the victim and him suffering external injuries. It was also noted that one of the accused persons, that is, Respondent No.8 did not beat the victim but she participated in the process by facilitating the beating of the victim by other Police Officials by restraining the petitioner from intervening. It was thus found that all the accused persons were liable to be tried for offences under Sections 323/341 of the IPC read with Section 34 of the IPC.

33. It was further observed that Respondent No.3 sat on the chest of the victim by putting his right knee close to his neck, Respondent No.7 held legs of the victim and the Respondent No.9 was holding left hand of the victim and the purpose of doing so is exemplified by exhortation of accused Manjoor Hasan. It was observed that such exhortation explains their intention to hold the victim so as to stop his physical resistance.

34. In the opinion of this Court, the learned Trial Court erred in noting that it cannot be said that the accused persons wanted to kill Shanu by erroneously observing that the intention of the concerned accused persons was to merely hold down the victim.

35. The learned Trial Court held that the killing of the victim was not intentional and therefore only Respondent No.3 is liable for trial for offence under Section 304 of the IPC.

36. The present case, however, is not of such a nature. A bare perusal of the allegations, as supported by the video clipping and the version of the petitioner who witnessed the incident, shows that the accused persons firstly gave beatings to the victim in broad daylight as he interceded in a quarrel involving his acquaintance. It is alleged that Respondent Nos. 2 to 4 took umbrage to the victim's interference, and thereafter, got further agitated when the victim objected to Respondent No.2 slapping him. Respondent Nos. 2 to 4 allegedly stopped the victim from leaving the spot by taking the keys to his motorcycle. It is alleged that the other accused persons also joined in giving beatings to the victim. It is alleged that the accused persons dragged the victim and gave him beatings with a lathi. They also allegedly tried to force him into the police gypsy. One bystander, that is, Respondent No.9 also joined in giving beatings to the victim. After forcing the victim into the gypsy, all accused persons, apart from Respondent Nos. 2 and 4, sat in the gypsy where Respondent No.3 pressed on the chest of the victim near his neck to prevent him from getting up. Respondent Nos. 7 and 9 also held the legs and hand of the victim and Respondent No. 9 also allegedly beat the victim on the head with his helmet. The accused persons did not relent, despite the pleas of the petitioner, even when though the victim was crying and gagging. Respondent No.5 also abused the victim and directed Respondent Nos. 3 and 7 to hold down the victim.

37. Whether the act of the accused persons falls under Section 302 of the IPC or Section 304 of the IPC can only be decided after the evaluation of the entire oral as well as other evidence that may be led by the prosecution as well as the defence. It is only after the appreciation of the entire evidence that a Court can reach a conclusion as to whether the same is a case of murder or a case of culpable homicide not amounting to murder. Only if the circumstances were such where the facts leave no iota of doubt that the death caused was not a murder as the case falls under one of the exceptions as provided in Section 300 of the IPC, that a charge could have been framed under Section 304 of the IPC and not under Section 302 of the IPC.

38. However, at the stage of framing of charge, especially in the grave facts of the present case, no such conclusion could have been arrived at this juncture. In the opinion of this Court, the learned Trial Court ought not to have conducted a roving enquiry into the intention of the accused persons in the gypsy in holding the victim. As per the petitioner, who is the eye witness to the incident that took place in the gypsy, the accused persons did not relent even though the victim was crying in pain

and gagging. She has stated that the victim was exhausted due to the beatings. She has stated that Respondent No. 9 was also beating her husband with his helmet when Respondent No.3 was pressing down on his chest and Respondent No.7 was holding his legs. She has also alleged that the Respondent Nos. 5 and 6 were constantly abusing the victim and Respondent No. 5 exhorted the concerned accused persons to press down on the victim. The version of the petitioner, which will be tested during trial, prima facie, does not indicate that it was the intention of the accused persons to merely restrict the victim. Moreover, the incidents in the gypsy cannot be seen in isolation. The victim was thrashed after he tried to leave the spot with his wife and minor child. He was forced inside the gypsy where he was pressed down in such a manner that he ended up getting asphyxiated to death.

39. The learned Trial Court has noted that it is a matter of common knowledge that by pressing chest near neck with all force, Respondent No.3 was likely to cause death of the victim by suffocation and therefore charge under Section 304 of the IPC has been framed against him. However, no regard has been given to the other allegations that prima facie show the complicity of the other accused persons in inciting the action as well as in holding down the other body parts of the victim. The knowledge of the actions, at this stage, cannot be restricted to Respondent No.3 before the prosecution has led its evidence. Whether the same was sufficient to constitute the offence of murder will be seen during trial. At the stage of framing charges, the Court is not required to see whether the case is one of acquittal or conviction.

40. In the case of Santosh v. State of Maharashtra : (2015) 7 SCC 641, the Hon'ble Apex Court had held as under:

"13. Even assuming that the accused had no intention to cause the death of the deceased, the act of the accused falls under clause Fourthly of Section 300IPC that is the act of causing injury so imminently dangerous where it will in all probability cause death. Any person of average intelligence would have the knowledge that pouring of kerosene and setting her on fire by throwing a lighted matchstick is so imminently dangerous that in all probability such an act would cause injuries causing death."

41. Even if the offenders did not have the intention to kill the victim, once the Trial Court has made a prima facie observation that the injury was one where the accused must have had common knowledge that the same will result in death, whether the knowledge would amount to commission of culpable homicide not amounting to murder or murder should be seen after the parties have led the evidence.

42. The Hon'ble Apex Court, in the case of Ghulam Hassan Beigh v. Mohd. Maqbool Magrey and Others : (2022) 12 SCC 657, while dealing with a challenge to an order framing charges against the accused persons under Section 304 of the IPC, where the complainant was similarly praying that the accused persons be tried under Section 302 of the IPC, had held as under :

"32. 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.

33. 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 post-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.

34. 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 the 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.

35. Once the trial court decides to discharge an accused person from the offence punishable under Section 302IPC and proceeds to frame the lesser charge for the offence punishable under Section 304 Part II 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 302IPC 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 304IPC. 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

charge-sheet. Such approach of the trial court at times may prove to be more rationale and prudent.

36. In view of the aforesaid discussion, the order [Ghulam Hassan Beigh v. Mohd. Maqbool Magrey, 2020 SCC OnLine J&K 735] of the High Court as well as the order of the trial court deserve to be set aside."

(emphasis supplied)

43. Each of the accused persons, as rightly observed by the learned Trial Court, had a common intention to beat the victim which resulted into external injuries to the victim. After being beaten in such a manner, he was dragged inside the gypsy where he was pressed down upon and his legs and arms were restrained. The same ultimately led to his death. It is trite law that no overt act is required to reflect common intention and common intention of criminality and adequate knowledge is sufficient to implicate an accused person. At this stage, considering the facts of the present case, it cannot be said that some of the accused persons should be charged with lesser offences. As observed by the Hon'ble Apex Court in the case of Ghulam Hassan Beigh v. Mohd. Maqbool Magrey and Others (supra), in circumstances where the case can ultimately be proved after the entire evidence is led, the learned Trial Court normally should proceed to frame charge for a higher offence since it would be open for the accused to persuade the Court at the end of the trial that the case falls within the ambit of lesser offence. Whereas, if the charges are framed for a lesser offence and ultimately the learned Trial Court reaches the conclusion that a bigger offence is made out, the entire trial may have to start afresh.

44. In view of the aforesaid discussion, the impugned order is set aside and the matter is remitted to the learned Trial Court for passing order on charge afresh after hearing the parties in accordance with law and considering the observations as made in the present order.

45. The present petition is disposed of in the aforesaid terms. Pending applications also stand disposed of.

AMIT MAHAJAN, J DECEMBER 24, 2024