HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

Reserved on 23.03.2021
Pronounced on 19.05.2021

CRR No. 27/2010

State of J&K and another ...Petitioner/Applicant(s)

Through :- Ms. Asifa Padroo, AAG

v/s

Tanveer Ahmad Salah and others .....Respondent (s)

Through :- Mr. M. A. Qayoom, Advocate

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1. The present revision petition has been preferred against the order dated 27.07.2010 (hereinafter to be referred as the order impugned) passed by the Court of Learned 1st Additional Sessions Judge, Baramulla (hereinafter to be referred as the trial court) by virtue of which the respondents have been discharged for commission of offences under sections 302, 307 RPC and section 3 of the Public Properties (Prevention of Damages) Act and have been ordered to be charged for commission of offences under sections 304-A, 323, 336, 341, 427, 148 and 149 RPC.

2. The order impugned has been assailed primarily on the ground that the learned trial court has exceeded its jurisdiction and has virtually appreciated the statements of the witnesses recorded under sections 161 and 164-A Cr.P.C while passing the order impugned as if the trial court was passing final judgment of conviction or acquittal. It is also stated

that the trial court has discharged the accused on the ground that there are no chances of conviction of the accused under the provisions of sections 302, 307 and section 3 of Public Properties (Prevention of Damages) Act. It is also further stated that the learned trial court has committed a material irregularity by returning a finding that there is contradiction between the opinions submitted by the two medical officers.

3. Briefly stated, the prosecution case is that on 22.02.2010, FIR bearing No. 47 of 2010 was registered in Police Station, Baramulla for commission of offences under sections 148, 149, 302, 307, 336 and 341 RPC and section 3 of Public Properties (Prevention of Damages) Act on the basis of a reliable information that at Stadium Colony Baramulla, a group of unruly stone pelters boarded the Sumo vehicle of unknown registration number, are raising objectionable slogans and are forcibly de-boarding the passengers from the vehicle coming from Rafiabad in order to enforce a hartal call and beating the passengers and have also caused damage to the vehicles. It was also reported that the said persons have also dragged a lady, namely, Kulsuma W/o Nissar Ahmad Magray with a intention to kill her and infant in her lap, namely, Irfan Ahmad Magray was killed while her another son, namely, Ubaid age 4 years was injured. The riders were having ‘dandas and stones’ and were doing these activities in order to implement the call of hartal. After the registration of FIR, investigation was started and it was found that the incident had actually occurred near Aqua Impex Foods Baramulla instead of Stadium Colony, Baramulla and after the inspection of place

of occurrence, the site plan was prepared by the Investigating Officer and dandas, stones, glass pieces and shoes of different sizes from spot were also recovered and seizure memos were prepared. The statements of the witnesses were recorded. The dead body of the deceased was taken into possession from the Dangi Wacha Hospital and injury memo in respect of the injured child was also prepared but due to his being of tender age the statement was not recorded. PW 29 i.e. Medical Officer, Dangi Wacha Hospital reported the cause of death of the infant as "crushed to death by a mob followed by his bleeding from nose and mouth". However, the opinion for the injured child was reserved. As the parents of the deceased did not agree for post-mortem, so the body of the deceased(infant) was handed over to them for performing of his last rites. The Medical Superintendent of District Hospital Baramulla was also communicated for report in respect of the treatment and the cause of death of the infant and on receipt of his report, it was found that the cause of death as opined by the Superintendent, District Medical Hospital, Baramulla could be due to 'Septicemia'.

4. In order to clear the confusion with regard to the contradictory medical opinions, District Magistrate, Baramulla was requested for the exhumation of the body of the infant but no order was received. The search of the vehicle in which the deceased and his injured brother had boarded along with their parents and grandparent was concluded but no clue could be ascertained in respect of the said vehicle.

5. The respondents Nos. 1 to 8 were arrested, however, accused Nos. 9 to 11 could not be apprehended and they were proceeded against under

section 512 Cr.P.C. As the period of sixty days was expiring, the challan was filed by the Investigating Officer and it was stated that further investigation in respect of other important material will continue. The challan was committed by the learned Magistrate vide order dated 23.04.2010 and the same was finally transferred to the court of learned 1st Additional Sessions Judge, Baramulla.

6. The learned trial court after hearing the arguments on charge/discharge, discharged the respondents 1 to 8 for commission of offences under sections 302 and 307 RPC and also section 3 of the Public Properties (Prevention of Damages) Act and charged the respondents for commission of offences under sections 148, 149,341, 336, 323, 304-A, and 447 R.P.C.

7. Ms. Asifa Padroo, learned AAG appearing for the petitioners has vehemently argued that the learned trial court has passed the order impugned as if the learned trial court was passing a judgment after the conclusion of the trial and the exercise of appreciation of evidence as conducted by the learned trial court, can be conducted only after the conclusion of the trial and the learned trial court virtually prejudged the case. Ms. Padroo has vehemently argued that the respondents were well aware about the consequences of their act that they were performing and as such, the learned trial court at this stage, could not have returned any finding with regard to lack of intention to cause of particular offence. Ms. Padroo further argued that by no stretch of imagination offence under section 304-A RPC could be attributed to the respondents

and they were required to be charged for commission of offences under sections 302 and 307 RPC.

8. Mr. M. A. Qayoom, learned counsel appearing for the respondents has vehemently argued that the learned trial court has rightly passed the order as the intention of the respondents was never to cause death of any person and they were simply enforcing the hartal and if in enforcing the hartal, death of the infant has taken place, the respondents cannot be charged of offence under section 302 RPC. He has also vehemently argued that even offence under section 304-A RPC is not made out against the respondents.

9. Heard and perused the record of the trial court.

10. As per the mandate of section 267 and 268 of the Code of Criminal Procedure (now sections 227 and 228 of the Cr.P.C.), while considering the issue of framing of charge/discharge of the accused, the learned trial court has to form an opinion on the basis of material placed on record by the Investigating Officer as to whether there is sufficient ground for presuming that the accused has committed an offence or not and the material on record would constitute the statement of witnesses, injury report/post-mortem report along with other material relied upon by the prosecution. At this stage, learned trial court cannot indulge in critical evolution of the evidence, that can be done at the time of final appreciation of evidence after the conclusion of the trial.

11. The charge can be framed against the accused even when there is a strong suspicion about the commission of offence by the accused and at the same time, the learned trial court is not expected to merely act as a

post office and frame the charge just because challan for commission of a particular offence has been filed against the accused. The learned trial court can sift the evidence brought on record by the prosecution so as to find out whether the un-rebutted evidence placed on record fulfils the ingredients of the offences or not. But at the same time, the learned trial court cannot conduct a mini trial to find out as to whether the accused/respondents can be convicted for a particular offence or not. If the ingredients are lacking then, the court has no option but to discharge.

12. The Apex Court **in Sajjan Kumar v. CBI** reported in **(2010) 9 SCC 368** after considering its various pronouncements has culled out the following principles of law:

> **"Exercise of jurisdiction under Sections 227 and 228 CrPC**
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> **21.** On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:
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> (*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 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.
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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.
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> (*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 there from 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."

13. In **State of Karnataka v. M. R. Hiremath, (2019) 7 SCC 515,** the Apex Court has 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* [*State of T.N.* v. *N. Suresh Rajan*, (2014) 11 SCC 709 : (2014) 3 SCC (Cri) 529 : (2014) 2 SCC (L&S) 721] , 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."

14. Now this Court would examine the order impugned on touchstone of law mentioned above.

15. Sections 299 and 300 RPC are reproduced as under:

"299. Culpable homicide
whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.
Explanation: (1) a person who causes bodily injury to another who is laboring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that others, shall be deemed to have caused his death
(2) where the death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.
(3) the causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth though the child may not have breathed or being completely born."

300. Except in the cases herein after excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or;-
Secondly,- 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-
Thirdly,- 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-
Fourthly, 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 aforesaid."

16. Thus, the persons can be charged for offence of murder if the act by which death is caused falls within the essentials as prescribed under section 300 RPC and in other cases of culpable homicide not amounting to murder, the accused can be prosecuted for offences under section 304-part I or 304-part II RPC. A person can be charged for commission of offence under section 304-part II RPC if the act is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death. Thus, it is clear when an accused has a knowledge that a particular act is likely to cause death though he never intended to cause death, still he can be prosecuted for commission of offence under section 304-part II RPC.

17. So far as the instant case is concerned, this is the prosecution story that the respondents in order to enforce hartal armed with dandas and stones, were stopping the vehicles and were forcibly dragging the passengers out of the vehicles and while they were doing so, they entered into the vehicle, Tata Sumo in which PW-24 Ghulam Rasool Tali, PW-25 Mst Kulsuma and PW-26 Nissar Ahmad Magray were travelling with infant Irfan Ahmad Magray a child of 11 days old in the lap of his mother and Ubaid. There are statements of witnesses of PW Nos. 24 to 26 about the forcible de-boarding of the passengers from the vehicle (Tata Sumo). Once the respondents were forcibly de-boarding the passengers, they can be presumed to have a knowledge that forcibly de-boarding a lady having a minor infant in her lap may result in to death or fatal injury to

infant. Even the death or injury to any other major person travelling in a vehicle may occur. No doubt there is no evidence on record that the respondents intended to cause the death as it is evident that the respondents were enforcing hartal but at the same time, they can be presumed to have a knowledge that by dragging and forcibly throwing out any person out of the vehicle may result into injury/death of any person.

18. I have perused the order of the learned trial court and the learned trial court instead of sifting the evidence, has virtually conducted the mini trial by pointing out the contradictions between the statements of the witnesses i.e. PWs 24, 25 and 26 i.e. the grandfather, mother and the father of the deceased-infant. No doubt, the PWs 24, 25 and 26 have not said anything about the identification of the respondents but at the same time, there is set of evidence in the form of statements of PWs, 5, 13, 16, 20, 21, 22 and 23 with regard to the identification of the accused persons. The learned trial court further seems to have been swayed by the contradictory evidence of the two doctors as one has opined that the death in this case was due to crushing while the other has opined that the death was due to 'septicemia'. The learned trial court has also observed at page no. 35 that PWs 5, 13, 16, 20, 21, 22 and 23 had given evidence during investigation regarding the identification of the accused persons. The prosecution has cited as many as 42 witnesses out of which almost more than 20 witnesses are the eye witnesses. The learned trial court, at the time of framing of charge, should not have given much value to the contradictions between two medical reports as when the eye witnesses

with regard to the occurrence were available then the medical evidence has to be appreciated in light of the ocular evidence. After testimonies of eye witnesses in the court, the trial court could have appreciated the medical evidence in light of the direct evidence. Otherwise also opinion of Medical Superintendent District Hospital that death could be due to septicemia, was not conclusive in nature.

19. From the evidence brought on record, there is no evidence with regard to the offence under section 302 RPC but at the same time there is sufficient material on record in the form of statements of eye witnesses coupled with the medical report of Medical Officer Dangi Wacha Hospital that the minor child of 11 days died because of the act of the respondents of forcibly de-boarding the passengers from the vehicle in question. The accused at this stage can be presumed to have a knowledge that by enforcing hartal in such a manner by forcible dragging the passengers out, their act may result into injury or death of any person, as such, I am of the considered opinion that the learned trial court has wrongly framed the charge for commission of offence under section 304-A RPC against the respondents. The respondents are required to be charge sheeted for commission of offences under sections 304-part II, 323, 336, 341, 427, 148 and 149 RPC. So far as the discharge of the respondents for commission of offence under section 307 RPC and 3 Public Properties (Prevention of Damages) Act is concerned, there is no illegality in the order impugned.

20. In view of the above, the order of the trial court so far as the framing of charge for commission of offence under section 304-A RPC is

concerned, the same is required to be set aside, as such, the same to that extent is set aside. The trial court is further directed to frame the charges against the respondents for commission of offence under sections 304-Part II, 323, 336, 341, 427, 148 and 149 RPC.

21. As this Court has ordered the framing of charge against the respondents for commission of offence under section 304-Part II RPC, this Court deems it proper to grant one month's time to the respondents to approach the trial court for seeking bail in the said offence as the accused-respondents have been enlarged on bail for commission of offence under section 304-A RPC only along with other offences. Till the trial court decides the bail application, respondents shall remain on bail subject to same terms and conditions.

22. Accordingly, this petition is partly allowed. Record of the trial court be sent to Learned 1st Additional Sessions Judge Baramulla along with a copy of this judgment. Parties shall cause their appearance before the trial court through the mode available on 07.06.2021.

(RAJNESH OSWAL)
JUDGE

JAMMU
19.05.2021
Rakesh

Whether the order is speaking: Yes
Whether the order is reportable: Yes