

State of J. and K. Vs. Dev Raj and ors.

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Court : Jammu and Kashmir

Decided On : Aug-04-2005

Reported in : 2006CriLJ1005,2006(1)JKJ78

Judge : Nirmal Singh, J.

Acts : Ranbir Penal Code (IPC), 1989 Smvt. - Sections 34, 201, 279, 302, 304, 304II, 337 and 342; ;Jammu and Kashmir Code of Criminal Procedure (CrPC) , 1989 Smvt. - Sections 161, 173(2), 227, 228, 268, 435(4) and 497A; ;Indian Penal Code (IPC) - Sections 302 and 342

Appeal No. : Cri. R. No. 55 of 2003

Appellant : State of J. and K.

Respondent : Dev Raj and ors.

Advocate for Def. : Ajay Vaid, Adv.

Advocate for Pet/Ap. : B.S. Salathia, AAG

Judgement :

ORDER

Nirmal Singh, J.

1. This revision-petition has been filed by the State against the order dated 27-3-2003 passed by learned 2nd Addl. Sessions Judge, Jammu in File No. 22/Session whereby he has discharged the accused-respondents under Section 302, RPC but charged-sheeted them under Section 304, Part-II read with Section 34, RPC.

2. The relevant facts for the disposal of this revision-petition are that, originally a case under Sections 279/337, RPC was registered on reliable information that deceased Amrik Singh son of Sardar Singh was driving his Scooter bearing Registration No. 0637-JK02Q rashly and negligently on the road and he could not control the scooter and fell down and sustained grievous injuries and remained admitted in G.M.C. Hospital, Jammu.

3. The investigation was conducted and during investigation, statements of witnesses were recorded including the statement of Amrik Singh deceased and said statement of the deceased was treated as dying declaration. In his dying declaration, the deceased has stated that on 30-6-2002 he had gone to Bishnah on a scooter in connection with some domestic work along with one Rinku and when he reached Deoli from Bishnah, one Sukhdev Raj, Panch, told him that there is a 'Naka' against him ahead and he should not go from that way but it was not told to him that who has held that 'Naka.' He further deposed in his statement that he told Sukhdev Raj, Panch, that he has no enmity with any person so that how any body will kill him. When he along with Rinku went ahead for going to Lasora and reached near Deoli temple accused Sucha, Baldev Raj alias Billa and Puppi who are real brothers along with 10/12 persons, assaulted him with Lathies. He fell down from the scooter and Rinku raised alarm, he became unconscious. Amrik Singh succumbed to his injuries, a case against the accused was registered under Sections 302/34, RPC and 201, RPC.

4. After completion of the investigation, a challan was presented and case was committed to the Court of Session and thereafter the same was entrusted to the Court of 2nd Additional Sessions Judge, Jammu. Learned 2nd Addl. Sessions Judge, instead of framing charge against the accused persons under Section 302, RPC, framed charges under Section 304 -II, RPC and held that there is no prima facie case against the accused, aggrieved by which the present revision-petition

has been preferred by the State.

5. Mr. Ajay Vaid, learned Counsel for the respondents raised preliminary objections that discharging the accused under Section 302, RPC and framing charge under Section 304, Part-II, RPC is an interlocutory order, therefore, revision is barred under Section 435(4)(a) of the Code of Criminal Procedure. He also placed reliance on S.K. Mahajan v. Municipality Jammu 1982 Kash LJ 1 : 1982 Cri LJ 646. He contended that with the framing of charge against the accused under Section 304 -II, RPC, the proceedings are still subsisting before the trial Court and the order has not assumed finality.

6. I have given my thoughtful consideration to the preliminary objection raised by learned Counsel for the respondents but find the same without any substance.

7. When a report under Section 173(2), Cr. P.C. has been submitted for one offence or under more than one offence, either under the RPC or under any other special Act, but the trial Court, at the time of framing the charge charge-sheeted the accused for a lesser offence of the accused is charged for any of the offence for which the report has been submitted, discharging the accused for a major offence and charging under a lesser offence or the order of discharging the accused for one offence is a final order and is not an interlocutory order. The trial Court has no power to recall the order and reframe the charge under the section for which the accused has been discharged. Same view has been taken by Himachal Pradesh High Court in State of Himachal Pradesh v. S. Harbans Singh 1976 Cri LJ 894, wherein it has been observed as under :--

Where the accused were committed by the Magistrate to Sessions Judge to frame charge under Sections 302 and 342 of I.P.C. and the Sessions Judge discharged the accused for an offence under Section 302. Held that the order of discharge put an end in so far as offence under Section 302 was concerned and so was not an interlocutory order.

8. Therefore I am of the view that discharge of the accused under Section 302, RPC is a final order and revision against which is maintainable.

9. The next point which has to be considered is whether the learned Sessions Judge was justified in discharging the accused as there was no material before the learned Sessions Judge to discharge the accused under Section 302, RPC. At the time of framing of charge, the Court has only to see whether from the evidence collected during investigation, there are sufficient grounds for charging the accused, at that stage the Court is not to see whether the accused has to be convicted or acquitted as has been held in *State of Bihar v. Ramesh Singh* : 1977 CriLJ1606 , where it has been held as under :--

Reading Sections 227 and 228 together in Juxtaposition, as they have got to be, it would be clear that at the beginning and the 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 and 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.

10. Same view has been taken in *R.S. Nayak v. A.R. Antulay* : 1986 CriLJ1922 .

11. When an offence is triable by the Court of Session, the accused can be discharged under Section 268, Cr.P.C., which reads as under :--

268. 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 no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

12. Perusal of Section 268 (supra) shows that before discharging an accused the Sessions Judge has to record his reasons for doing so, so that the correctness of

the order can be examined by superior Court. The learned Sessions Judge while discharging the accused under Section 302, R.P.C. has observed as under:

Therefore applying the above mentioned rulings, considering the arguments advanced by learned APP and the defence counsel in the instant case it reveals that as per the dying declaration made by the deceased-Amrik Singh there was no inimical relation between the deceased and the accused. Therefore, while going through the dying declaration placed on the file and statements of the witnesses recorded under Section 161, Cr. P.C. the offence under Sections 304, Part 11/34, RPC is prima facie made out against the accused instead of Section 302, RPC.

13. These observations made by the learned Addl. Sessions Judge are palpably erroneous. The learned Sessions Judge, while passing the order has relied upon 1992 Supp (3) SCC 103 : (1992 Cri LJ 1283), : 1994 CriLJ21 and : 1993 CriLJ3680 . These judicial precedents referred to by the learned Sessions Judge in his order have no applicability at the time of framing the charge. In all these cases, evidence, of the witnesses was recorded by the trial Court and after recording the evidence Court came to the conclusion that the offence under Section 302 is not made out but offence under Section 304 -II is made out.

14. I have perused the statement of the deceased-Amrik Singh and other witnesses recorded under Section 161, Cr. P.C. as well as the post-mortem report. From the material on record there was a prima facie case to presume that the accused have committed the offence under Section 302, RPC but the learned Sessions Judge has held that there was no previous enmity between the accused and the deceased, therefore, offence under Section 302, RPC is not made out and offence under Section 304 -II, RPC is made out. Under law the Court, at the time of framing the charge has not to record such a finding. Such finding can be recorded only after evidence is recorded and the defence cross-examine the witnesses. The Court cannot presume of its own, without the evidence that there was no previous enmity between the parties. Some time murders are committed on trifle matters, without any previous enmity, therefore, the order of discharging the accused under Section 302, RPC, cannot sustain and is set aside and the learned Sessions Judge is directed to frame the charge against the accused

persons under Sections 302/34, RPC.

15. Mr. B.S. Salathia, learned AAG, contended that the charge has been framed under Section 304 -II, RPC with a ulterior motive to allow bail to the respondents as if charge under Section 302, RPC is framed than the accused would not be entitled to bail as there is legal bar as provided under Section 497A, Cr.P.C.

16. Bail was allowed to the respondents-accused solely on the ground that the charge has been framed under Section 304 -II, RPC, but now as the charge under Section 302, RPC has been directed to be framed against the accused persons, as such, bail granted in their favour stands cancelled. They are directed to be taken into custody. However, they are at liberty to move application for bail, which will be considered by the trial Court on its own merits.

17. The revision-petition is accepted in terms of the above order.

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