

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR
(Through Virtual Mode)**

Date of decision : 04.06.2024

Case: Crl R No.6/2023

c/w

Bail App No.166/2023

Mumtaz Ahmad Mir Aged 45 years S/o
Ghulam Qadir Mir R/o Gantamulla Bala,
Baramulla, Kashmir

..... Petitioner(s)

Through :- Mr. Asif Ahmad Bhat, Advocate.

Vs

1. Union Territory of Jammu and
Kashmir through Station House
Officer, Police Station Baramulla.

.....Respondent(s)

2. Muneeb Ahmad Shah
S/o Mohammad Maqbool Shah
3. Haris Ahmad Sheikh
S/o Mohammad Maqbool Sheikh
residents of Faqeerwani, Baramulla,
Kashmir

Through :- Ms. Nadiya Abdullah, Assisting counsel vice
Mr. Mohsin Qadiri, Sr. AAG for respondent
No.1.
Mr. N. H. Shah, Sr. Advocate with
Ms. Suwaiba, Advocate for respondent Nos.2 &
3.

CORAM:

HON'BLE MR. JUSTICE PUNEET GUPTA, JUDGE

JUDGMENT

04.06.2024

Crl R No.6/2023

01. The learned Court of 1st Additional Sessions Judge, Baramulla vide impugned order dated 06.02.2023 framed charges against the accused/respondent Nos.2 & 3 for offence under Section 304-I IPC. The

present petition has been filed by the petitioner, who had lodged a written complaint with the Police Station, Baramulla regarding the occurrence in which his brother in-law namely Mushtaq Ahmad Ganai died. The complaint resulted into registration of FIR No.24/2022 under Section 307 IPC registered with Police Station Baramulla. As the victim died later on, the offence under section 302 IPC was added against the accused persons. The accused have appeared in the petition and contested the petition in hand.

02. The learned counsel appearing for the petitioner herein submits that the record of the file clearly makes out that the accused are required to be charged under Section 302 and not 304-I as held by the trial Court. The trial Court has relied upon statement of PW-Sabreena which was recorded on 14.02.2022 after two days of occurrence and not on the statement recorded on 13.02.2022 i.e. one day after the occurrence wherein she has deposed that the accused had used 'lathi' during course of occurrence in addition to beating the victim with fist blows and kicks and that too without any reason. The trial Court has not relied upon the postmortem report in a way it should have for framing charges with other evidence that has come on record. The trial Court has sifted the evidence as if it was finally deciding the case.

03. Mr. N. H. Shah, learned senior counsel appearing for the accused/respondent Nos.2 & 3, has argued that the trial Court after going the record including the eye witnesses and the medical record has framed the charge against the accused persons. This court is not required to take the view other than the one taken by the trial Court in the impugned order.

04. On 12.02.2022 the deceased-Mushtaq Ahmad Ganai was with PW-Sabreena in Faqeerwani area when Haris Ahmad Sheikh and Muneeb Maqbool attacked the victim with an intention to kill him as a result he became unconscious and also fell on the ground and then taken to Baramulla Hospital by one of the witnesses and later on shifted to SKIMS Srinagar. The victim remained in the hospital till 04.04.2022 when he died in the hospital itself. The complainant -Mumtaz Ahmad Mir had lodged the report with the police after he was informed of the incident by Javid Ahmad Ganai. The challan was presented against the accused/ respondents under Section 302 IPC. Bilal Ahmad Shah was not made an accused in the challan presented before the trial Court though he initially was nominated as accused in the case.

05. The photo-copy of the record of trial Court is before this Court.

06. The court while framing the charge against the accused is not required to go deep into the evidence and sift the same as if it was finally deciding the trial. The grave suspicion if found and revealed from the evidence that is collected by the police agency results into framing of charge against the accused. Of course, the trial Court while framing the charge is not to act as a post office of the prosecution and is required to apply its mind independently of what is projected by the prosecution in the challan and determine the charges which are required to be framed against the accused. There cannot be any fixed parameter of circumstances that may be considered for framing the charges in a particular case against the accused as each case has its own facts and peculiarities.

07. During the course of investigation the statements of the witnesses have been recorded. Eye witnesses to the occurrence are also cited in the challan.

08. The statements of PW-Sabreena were recorded on 13.02.2022 and 14.02.2022 under Section 161 Cr.P.C. and are indeed crucial in the case. In the statement recorded on 13.02.2022 the said witness has deposed that the accused gave fist blows and kicked the victim and also attacked him with 'lathi' as a result the victim became unconscious and fell on the ground. In the meantime, one Bilal Amin Shah came on spot and carried the victim in an unconscious state to the Baramulla hospital. This witness again recorded her statement on 14.02.2022 before the police. In the statement recorded on 14.02.2022 she has not deposed regarding the use of 'lathi' and has stated that the accused gave fist blows to the victim and further mentions that the victim was given blows with hands on the head of the victim as a result the victim fell on the ground and became unconscious. She also deposed that she had tried to conceal the real facts due to fear and later on related the incident to her father. The witness tried to give twist to her earlier version recorded before the police a day earlier. The other witnesses, who are cited as eye witnesses, have not stated of the use of 'lathi' by the accused during the course of occurrence as stated by PW-Sabreena in the statement recorded on 13.02.2022.

09. The medical report as well as the postmortem report of the victim was obtained by the police during the course of investigation. As per the

medical report the cause of death of the victim was 'traumatic brain injury' with acute SDH.

10. The overall evidence that had surfaced during investigation and brought on the challan is required to be considered at the time of framing of charge. The trial Court has taken note of both the statements of PW-Sabreena and other witnesses while considering the charge against the accused persons. The court has also taken note of the fact that 'lathi' was not seized by the police during the course of investigation and also held that it cannot be gathered that the accused intended to inflict the particular type of injury upon the deceased. The star witness in the case namely Sabreenad who was with the victim having stated initially before the police that the 'lathi' was used by the accused during course of occurrence the said version cannot be brushed aside for considering the charge on the aforesaid statement though not stating so in her statement recorded under Section 161 Cr.PC on the second occasion before the police. There may be shortcoming in the manner investigation has been carried out by the investigating agency but that should not come in the way of the court to frame the charge on the evidence brought on record. The trial Court while framing the charge under Section 304 Part-I has diagnosed the occurrence as if the court was giving finding on the conclusion of trial. The trial court has far stretched the intention of the accused at the stage of framing of charge. That is not permissible. The Court cannot lose sight of the fact that the victim on receiving injury had, as per witnesses, become unconscious and had remained in the hospital for about two months in such a condition that

even his statement could not be recorded till he breathed his last on 04.04.2022. As per the medical report the victim died due to 'traumatic brain injury' with acute SDH meaning thereby that the accused had received injury on the sensitive & crucial part of his body which ultimately resulted into his death. The accused were required to be charged for offence under Section 302 IPC

11. The Hon'ble Supreme Court in case titled 'Ghulam Hassan Beigh Vs. Mohammad Maqbool Magrey and others' reported in 2022 LiveLaw (SC) 631 (decided on 26.07.2022) **has** held that 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. The court also noted the reason as to why the charge under Section 302 IPC should be framed and not under Section 304 Part-II IPC as in case the lesser charge is framed against the accused then in that case the prosecution would not be in a position to lead the evidence beyond the charge framed against the accused.

12. The learned senior counsel for the accused/respondents has referred to (2008) 10 Supreme Court Cases 394 titled 'Yogesh alias Sachin Jagdish Joshi Vs. State of Maharashtra' wherein the Apex Court held that the accused is required to be discharged if the Judge is satisfied that the evidence produced by the prosecution gives rise to suspicion and not grave suspicion.

13. In AIR 2010 Supreme Court 663 titled 'P. Vijayan Vs. State of Kerela and anr.' the Apex Court while reiterating the aforesaid principle of law

further held that the Judge is not a mere post office and frame the charge just on the asking of the prosecution.

14. In AIR 2024 Supreme Court 193 titled 'Shashikant Sharma and others Vs. State of Uttar Pradesh and another', the Apex Court set aside the charge framed against the accused appellants for the offence punishable under Section 3(2)(v) of the SC/ST Act keeping in view the facts of the case.

15. In 2022 (1) JKJ 294 (HC) titled 'Inder Singh Vs. State of J&K', this Court reiterated the afore stated proposition of law. There can be no quarrel with what has been held by the courts in aforesaid judgments.

16. The Court is of the view that the trial Court erred in passing the impugned order for the reasons stated above. The revision petition is **allowed**. The order impugned is **set aside** whereby the trial court has directed framing of charge under Section 304-I IPC. The accused/respondent Nos.2 & 3 are required to be proceeded under Section 302 IPC. The learned trial Court is directed to proceed in the matter and accordingly frame the charge against the accused/respondent Nos.2 & 3 under Section 302 IPC. Any observation made in the order is confined to the disposal of the present petition only. The case for further proceedings before trial Court is fixed for 20.06.2024.

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17. List the bail application on 08.07.2024 as per roster.

(PUNEET GUPTA)
JUDGE

Jammu

04.06.2024 *Shammi

Whether the judgment is reportable?

Yes