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JASVINDER SAINI & ORS.

v.

STATE (GOVT. OF NCT OF DELHI)
(Criminal Appeal No. 819 of 2013)

B

JULY 2, 2013

[T.S. THAKUR AND RANJANA PRAKASH DESAI, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

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s.216 - Court's power to alter charge - Trial court subsequent to order in Rajbir's case, adding charge for offence punishable u/s 302 to that already framed for offences punishable u/ss 304-B and 498-A IPC etc. - Held: A charge u/s 304B IPC is not a substitute for a charge of murder

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punishable u/s 302 - Ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients - If there is evidence direct or circumstantial to prima facie support a charge u/s 302 IPC, trial court can and indeed ought to frame

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*such a charge, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters -Order in **Rajbir's** case, explained - In the instant case, trial court acted mechanically, for it framed an additional charge u/s 302 IPC without adverting to evidence adduced*

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*in the case and simply on the basis of direction issued in **Rajbir's** case - Order passed by High Court and that passed by the trial court framing the charge u/s 302 IPC are set aside and the matter is remitted to trial court for a fresh order keeping in view the observations made in the judgment.*

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Charges were framed by the Addl. Sessions Judge against the appellants for offences punishable u/ss 498-A and 304-B read with s.34 IPC. Subsequently after the

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order of Supreme Court in *Rajbir Singh's* case¹, the trial court added a further charge u/s 302 IPC. The appellants challenged the order in a writ petition which was dismissed by the High Court. A

The question for consideration before this Court was: whether the trial court was justified in framing a charge u/s 302, IPC against the appellants and whether the High Court was justified in affirming that order and dismissing the writ petition. B

Allowing the appeal, the Court C

HELD: 1.1 Court's power u/s 216, CrPC to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced. The circumstances in which such addition or alteration may be made are not, however, stipulated in s.216. It is all the same trite that the question of any such addition or alternation would generally arise either because the court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the court. [para 11] [347-G; 348-A-C] D E

1.2 The direction in *Rajbir* to add a charge u/s 302 IPC where the accused are charged with s.304-B, was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant was that in a case where a charge alleging dowry death is framed, a charge u/s 302 IPC can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court. If there is evidence whether direct or circumstantial to prima facie support a charge u/s 302 F G

1. *Rajbir @ Raju & Anr. v. State of Haryana* 2010 (13) SCR 886. H

A IPC, the trial court can and indeed ought to frame a charge of murder punishable u/s 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charge of dowry death punishable u/s 304B is established. A charge u/s 304-B IPC is not a substitute for a charge of murder punishable u/s 302 IPC. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court, in that view of the matter, acted mechanically for it framed an additional charge u/s 302 IPC without advertent to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir's case. The High Court no doubt made a half hearted attempt to justify the framing of the charge independent of the directions in Rajbir's case, but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by it. [para 13] [349-F-H; 350-A-E]

Rajbir @ Raju & Anr. v. State of Haryana 2010 (13) SCR 886 =AIR 2011 SC 568 - explained.

F *Satya Narayan Tiwari @ Jolly & Anr. v. State of U.P.* 2010 (12) SCR 1137 = (2010) 13 SCC 689 - referred to.

1.3 The order passed by the trial court and so also that passed by the High Court are clearly untenable and, as such, are set aside. That would not, however, prevent the trial court from re-examining the question of framing a charge u/s 302 IPC against the appellant and passing an appropriate order if upon a prima facie appraisal of the evidence, it comes to the conclusion that there is any room for doing so, keeping in view the decision of this Court in *Hasanbhai Valibhai Qureshi*. [para 14] [350-F-H]

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Hasanbhai Valibhai Qureshi v. State of Gujarat and Ors. 2004 (3) SCR 762 = (2004) 5 SCC 347; *Ishwarchand Amichand Govadia and Ors. v. State of Maharashtra and Anr.* 2006 (7) Suppl. SCR 229 = (2006) 10 SCC 322 - relied on. A

Rajendra Singh Sethia v. State and Ors. 1989 Cri.L.J.255; and *Shiv Nandan and Ors. v. State of U.P.* 2005 Cri. L.J 3047 - approved. B

Case Law Reference:

2010 (13) SCR 886	explained	para 5	C
2010 (12) SCR 1137	referred to	para 6	
2004 (3) SCR 762	relied on	para 14	
2006 (7) Suppl. SCR 229	relied on	para 14	
1989 Cri.L.J. 255	approved	para 14	D
2005 Cri. L.J 3047	approved	para 14	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 819 of 2013.

From the Judgment and Order dated 13.10.2011 of the High Court of Delhi at New Delhi in Writ Petition (Cri.) No. 413 of 2011. E

R.N. Sharma, Rameshwar Prasad Goyal for the Appellants. F

P.P. Malhotra, ASG, B. Sunita Rao, Shadman Ali, D.S. Mahra (for B.V. Balaram Das) for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted. G

2. The short question that falls for consideration in this appeal by special leave is whether the trial Court was justified in framing a charge under Section 302 of the IPC against the H

A appellants and whether the High Court was justified in affirming that order of the trial Court and dismissing the writ petition filed by the writ petitioners against the same. The question arises in the following background.

B 3. FIR No. 765/2007 was registered against the appellants alleging commission of offences punishable under Sections 498A, 304-B, 406 and 34 of IPC in connection with the demise in unnatural circumstances of Ms. Chandni wife of appellant No.1-Mr. Jasvinder Saini. The case was registered on a complaint filed Ajay Gautam, father of the deceased. The matter C was investigated and a charge sheet filed before the Jurisdictional Magistrate alleging commission of offences mentioned above against the appellants 1 to 4. A supplementary charge sheet followed in which appellants 5 to 8 were also implicated in the case to which Section 302 was also added D by the Investigating Officer.

E 4. The case was soon committed to the Sessions and assigned to the Additional Sessions Judge, Rohini, Delhi, who heard the matter for framing of charges and came to the conclusion that there was no evidence or material on record to justify framing of a charge under Section 302 IPC. Charges were accordingly framed against the appellants under Sections 498A, 304B read with Section 34 IPC.

F 5. At the trial the prosecution had examined as many as eighteen witnesses, when a two-Judges Bench of this Court passed an order on 22nd November 2010 in *Rajibir @ Raju & Anr. v. State of Haryana* AIR 2011 SC 568 by which this Court directed all trial Courts in India to add Section 302 in every case alleging commission of an offence punishable under G Section 304B of the IPC. This direction, it appears, came because the Court felt strongly about the commission of heinous and barbaric crimes against women in the country.

H 6. In *Rajibir's* case (supra) the appellant had been convicted under Section 304-B IPC and sentenced to

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imprisonment for life by the trial Court apart from offences under other sections. The High Court had, however, reduced the sentence to ten years rigorous imprisonment in so far as Rajbir was concerned and to two years rigorous imprisonment in the case of his mother Appellant No.2 in that case. This Court on a prima facie basis felt that the reduction in the sentence was not justified. Relying upon an earlier decision rendered in *Satya Narayan Tiwari @ Jolly & Anr. v. State of U.P.* (2010) 13 SCC 689, Criminal Appeal No.1168 of 2005 decided on 28th October, 2010 this Court issued notice to Rajbir to show cause why his sentence be not enhanced to life imprisonment as awarded by the trial Court.

7. It was in the above background, that this Court in para 11 of the interim order passed by it directed all the trial Courts in India to ordinarily add Section 302 to the charge under Section 304B "so that death sentences could be imposed in such heinous and barbaric crimes against women." Para 11 may be extracted at this stage:

"We further direct all trial Courts in India to ordinarily add Section 302 to the charge of Section 304B, so that death sentences can be imposed in such heinous and barbaric crimes against women."

8. In the case at hand the trial Court noticed the above direction and considering itself duty bound to abide by the same added a charge under Section 302 IPC to the one already framed against the appellant. While doing so, the trial Court simply placed reliance upon Section 216 of Cr.P.C. which empowers the Court to add or alter the charge at any stage and the direction of this Court in *Rajbir's* case (*supra*). This is evident from the following passage from the order passed by the trial Court:

"... I have considered the submissions made before me. It is settled law that charges can be modified/amended at any stage of the proceedings and even if at the initial

A stage the Court is of the view that there is no material for framing the charge under Section 302 IPC. The same can be added/altered at any later stage (Section 216 Cr.P.C.) which cannot be termed as a review of the earlier order. Even otherwise, the directions of the Hon'ble Apex Court in the case of *Rajbir @ Raju & Anr. Vs. State of Haryana* in Special Leave Petition bearing No. 9507/2010 decided on 22-11-2010 duly circulated vide No. 33760-69/DHC/Gaz/G-X/SCJ/2010 dated 3-12-2010, specific directions have been issued to all the subordinate Courts in India to ordinarily add Section 302 IPC to the charge under Section 304B IPC.

B Therefore, this being the background, charge under Section 302 IPC is being framed in alternative against the accused persons against whom charge under Section 304 B IPC had been framed. The accused pleaded not guilty and claimed trial."

D 9. Aggrieved by the above direction, the appellant preferred Writ Petition (Crl.) No.413 of 2011 before the High Court of Delhi which failed and was dismissed by the High Court in terms of the order impugned in the present appeal. Placing reliance upon Section 216 of Cr.P.C. the High Court observed that appearance of additional evidence at the trial was not essential for framing of an additional charge or altering a charge already framed though it may be one of the grounds to do so. The High Court apart from placing reliance upon the order passed by this Court in *Rajbir's* case (*supra*) held that a perusal of the Autopsy Surgeon's Report provided prima facie evidence to the effect that the death of the deceased "could be homicidal" in nature and that the earlier order passed by the trial Court holding that no case for offence under Section 302 IPC was made out did not constitute any impediment for the trial Court to take a different view at a later stage. The present appeal assails the correctness of the above orders.

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10. Section 216 of the Code of Criminal Procedure deals with alteration or addition of any charge and empowers the Court to do so at any time before the judgment is pronounced. The section runs as follows:

"216. Court may alter charge -

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defense or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."

11. A plain reading of the above would show that the Court's power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced. Sub-sections (2) to (5) of Section 216 deal with the procedure to be followed once the Court decides

A to alter or add any charge. Section 217 of the Code deals with
the recall of witnesses when the charge is altered or added by
the Court after commencement of the trial. There can in the light
of the above be no doubt about the competence of the Court
to add or alter a charge at any time before the judgment. The
B circumstances in which such addition or alteration may be
made are not, however, stipulated in Section 216. It is all the
same trite that the question of any such addition or alternation
would generally arise either because the Court finds the charge
C already framed to be defective for any reason or because such
addition is considered necessary after the commencement of
the trial having regard to the evidence that may come before
the Court. In the case at hand the evidence assembled in the
course of the investigation and presented to the trial Court was
not found sufficient to call for framing a charge under Section
D 302 IPC. The trial Court recorded a specific finding to that effect
in its order dated 18th March 2009 while framing charges
against the appellants before us. The trial Court said:

"The two witnesses Kiran Devi and Smt. Dharam
Kaur were at the spot when the deceased fell down from
E the second floor and did not notice anyone on the roof of
the house. Thus there is no material for framing of charge
Under Section 302 IPC against the accused persons.
However, there are specific allegations of dowry demand
and torture in the statement given by Sh. Ajay Gautam to
F the SDM and as also in the statements given by his wife
Manisha Gautam and his son Vishal Gautam. The
deceased had died under unnatural circumstances. Her
death took place at her matrimonial home within seven
years of her marriage. There is a presumption Under
G Section 113-B of the Indian Evidence Act of dowry death.
Hence on the basis of material on record, I am of the view
that prima facie offence Under Section 498A/304B/34 IPC
is made out against all the accused persons."

H 12. A reading of the order which the trial Court

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subsequently passed on 23rd February 2011 directing addition A
of a charge under Section 302 IPC makes it abundantly clear
that the addition was not based on any error or omission
whether inadvertent or otherwise in the matter of framing
charges against the accused. Even the respondents did not
plead that the omission of a charge under Section 302 IPC was B
on account of any inadvertent or other error or omission on the
part of the trial Court. The order passed by the trial Court, on
the contrary directed addition of the charge under Section 302
IPC entirely in obedience to the direction issued by this Court
in *Rajbir's* case (supra). Such being the position when the order C
passed by the trial Court was challenged before the High Court
the only question that fell for determination was whether the
addition of a charge under Section 302 IPC was justified on
the basis of the direction issued by this Court in *Rajbir's* case
(supra). The High Court has no doubt adverted to that aspect D
and found itself to be duty bound to comply with the direction
in the same measure as the trial Court. Having said so, it has
gone a step further to suggest that the autopsy surgeon's report
was prima facie evidence to show that the offence was
homicidal in nature. The High Court has by doing so provided E
an additional reason to justify the framing of a charge under
Section 302 IPC.

13. Be that as it may the common thread running through
both the orders is that this Court had in *Rajbir's* case (supra)
directed the addition of a charge under Section 302 IPC to F
every case in which the accused are charged with Section 304-
B. That was not, in our opinion, the true purport of the order
passed by this Court. The direction was not meant to be
followed mechanically and without due regard to the nature of
the evidence available in the case. All that this Court meant to G
say was that in a case where a charge alleging dowry death is
framed, a charge under Section 302 can also be framed if the
evidence otherwise permits. No other meaning could be
deduced from the order of this Court. It is common ground that
a charge under Section 304B IPC is not a substitute for a H

A charge of murder punishable under Section 302. As in the case of murder in every case under Section 304B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial Court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the Court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial Court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in *Rajbir's* case (supra). The High Court no doubt made a half hearted attempt to justify the framing of the charge independent of the directions in *Rajbir's* case (supra), but it would have been more appropriate to remit the matter back to the trial Court for fresh orders rather than lending support to it in the manner done by the High Court.

14. In the light of what we have said above, the order passed by the trial Court and so also that passed by the High Court are clearly untenable and shall have to be set aside. That would not, however, prevent the trial Court from re-examining the question of framing a charge under Section 302 IPC against the appellant and passing an appropriate order if upon a prima facie appraisal of the evidence adduced before it, the trial Court comes to the conclusion that there is any room for doing so. The trial Court would in that regard keep in view the decision of this Court in *Hasanbhai Valibhai Qureshi v. State of Gujarat*

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and Ors. (2004) 5 SCC 347 where this Court has recognized the principle that in cases where the trial Court upon a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced, is satisfied that any addition or alteration of the charge is necessary, it is free to do so. Reference may also be made to the decisions of this Court in *Ishwarchand Amichand Govadia and Ors. v. State of Maharashtra and Anr.* (2006) 10 SCC 322 and the decision of the Calcutta High Court in *Rajendra Singh Sethia v. State and Ors.* 1989 Cri.L.J. 255 and that delivered by the Allahabad High Court in *Shiv Nandan and Ors. v. State of U.P.* 2005 Cri. L.J 3047 which too are to the same effect. In any such fresh exercise which the trial Court may undertake, it shall remain uninfluenced by the observations made by the High Court on merits of the case including those touching the probative value of the autopsy surgeon's opinion.

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15. In the result, we allow this appeal, set aside the order passed by the High Court and that passed by the trial Court framing the charge under Section 302 IPC and remit the matter back to the trial Court for a fresh order keeping in view the observations made above. No costs.

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R.P.

Appeal allowed.