

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(CRL) No. 413/2011 & CrI.M.A. 3645/2011 (stay)**

% Reserved on: 22nd September, 2011

Decided on: 13th October, 2011

JASVINDEDR SAINI & ORS Petitioners

Through: Mr. R.N. Sharma, Mr. Manish Kr.
Singh, Advs.

versus

STATE Respondents

Through: Mr. Mukesh Gupta, APP for State with
SI Pardeep Dahiya, PS Nangloi.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Not Necessary |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MUKTA GUPTA, J.

1. FIR No. 765/2007 was registered against the Petitioners for offences punishable under Section 498A/304B/406/34 IPC on the death of one Ms. Chandni on a complaint lodged by her father Shri Ajay Gautam. After

completion of investigation charge-sheet was filed for offences punishable under Section 498A/304B/406/34 IPC against Petitioner Nos.1 to 4. Subsequently, on the formal arrest of Petitioner Nos. 5 to 8 supplementary charge-sheet was filed for offences under Section 498A/304B/406/302 IPC. The matter was heard for framing of charge, and vide order dated 18th March, 2009 Learned Additional Sessions Judge held that there was prima facie evidence of offences punishable under Section 498A/304B/34 IPC against the Petitioners and thus directed framing of the charges. Vide this order the Learned Additional Sessions Judge also held that there was no material evidence for framing of charge under Section 302 IPC against the accused persons. The trial continued and as many as 18 witnesses were examined. On 22nd November, 2010 the Hon'ble Supreme Court in *Rajbir @ Raju & Anr. Vs. State of Haryana SLP No. 9507/2010* directed as under:

“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.”

2. In view of these directions of the Hon'ble Supreme Court vide the impugned order dated 23rd February, 2011 after hearing the arguments on the issue of amendment of charge, learned Additional Sessions Judge framed the additional charge under Section 302 IPC against the Petitioners. This order is impugned in the present petition.

3. Learned counsel for the Petitioner contends that the directions dated 22nd November, 2010 of the Hon'ble Supreme Court were non est in law and the additional charge under Section 302 IPC could not have been framed without following due process of law. It is contended that the Learned Trial Court had no jurisdiction to review its earlier order and amend the charge by adding Section 302 IPC especially when it had returned a finding vide order dated 18th March, 2009 that there was no material for framing of charge under Section 302 IPC against the accused persons and the order passed is contrary to the principles of natural justice. The order dated 18th March, 2009 was not challenged by the State before the High Court. Further the charge was amended at the fag end of the trial, thus causing prejudice to the Petitioner. It is further contended that amendment of the charge could have taken place under Section 216 Cr.P.C. only if during trial additional material comes on record against the accused persons.

4. Learned APP on the other contends that Section 216 Cr.P.C. contemplates alteration and amendment of the charge at any stage of the trial and additional evidence being available during trial is no pre requisite, though the same may be one of the grounds to alter the charge. The Learned Trial Court has followed the due procedure, heard the Petitioners before alteration of charge and thereafter amended it. No prejudice has been caused to the

Petitioners. Further in view of the opinion of the Doctor who conducted the post-mortem a charge under Section 302 IPC was clearly warranted. There being no infirmity in the impugned order, the petition is liable to be dismissed.

5. I have heard learned counsels for the parties. In the present case the facts which are relevant to be noted are that the Autopsy Surgeon in the post-mortem report opined the cause of death as “Cranio Cerebral Damage” consequent upon blunt force impact. It was also opined that possibility of knock down by other party in this case cannot be ruled out at this stage. Thus, the Autopsy Surgeon did not rule out the possibility of homicidal death.

6. The Hon’ble Supreme Court in *Rajbir @ Raju* (supra) while dealing with a special leave to appeal under Section 304B IPC directed all trial Courts in India to ordinarily add Section 302 IPC to the charge of Section 304B IPC so that death sentences can be imposed in such heinous and barbarous crime against women. The contention of the learned counsel for the Petitioner that the said direction is non est in law is wholly fallacious. Directions issued by the Hon’ble Supreme Court are binding on all the subordinate Courts in the country and they are bound to follow it. However, at this stage it would be appropriate to note that the charge of Section 302 IPC can only be added in cases where unnatural death is homicidal in nature. The import of the directions of the Supreme Court cannot be read to mean that even in a case

where the unnatural death is suicidal in nature and there is no element of homicidal death, Section 302 IPC should be added. A perusal of the Autopsy Surgeon's report in the present case shows that there was prima facie evidence on record to show that the death of the deceased could be homicidal in nature. That being the position the order dated 18th March, 2009 noting that prima facie there was no material for framing of charge under Section 302 IPC against the accused persons is fallacious.

7. The contention of the learned counsel that the impugned order is violative of principles of natural justice is also not tenable. A perusal of the impugned order shows that before passing the same the Learned Additional Sessions Judge heard the Petitioners and the State. It is only after hearing their arguments that the order was passed. In the present case undoubtedly no charge was framed against the Petitioners for offences under Section 302 IPC and thus they were deemed to be discharged of the said offences. Though the Criminal Courts have no power to review but Section 216 Cr.P.C is in the nature of an exception to that general principle. Section 216 & 217 Cr.P.C. provides as under:

“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 defence 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 section is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction had been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

217. Recall of witnesses when charge altered.

Whenever a charge is altered or added to by the court after the commencement of the trial, the prosecutor and the accused shall be allowed-

(a) To recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) Also to call any further witness whom the court may think to be material.

8. A perusal of Section 216 Cr.P.C. shows that the Court may alter or add to any charge at any time before the judgment is pronounced. The appearance

of additional evidence at that stage for framing additional charge during the trial is not an essential pre requisite though it may be one of the grounds to do so. The only consideration is that the Court has to form an opinion whether any prejudice has been caused to the defence or the prosecution in which case the Court can either direct a new trial or adjourn the trial for such period as may be necessary. Section 217 Cr.P.C. permits the prosecutor and the accused to recall or re-summon and examine the witnesses with reference to such alteration or addition or to call any further evidence which the Court thinks is material.

9. By the impugned order the learned Trial Court considering all these aspects accepted the examination and cross-examination of certain witnesses and other witnesses were directed to be recalled for additional evidence/examination. Further no prejudice has been shown to have occurred to the Petitioners by the learned counsel.

10. In view of the facts and circumstances of the case, I find no infirmity in the impugned order. Petition and application are dismissed accordingly.

(MUKTA GUPTA)
JUDGE

OCTOBER 13, 2011
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