

Court No. - 86

Case :- CRIMINAL REVISION No. - 4525 of 2023

Revisionist :- Sarvesh Kumar

Opposite Party :- State of U.P. and Another

Counsel for Revisionist :- Satyendra Narayan Singh, Sushil Kumar Pandey

Counsel for Opposite Party :- Anil Kumar Dubey, Chandra Bhan
Dubey, G.A.

Hon'ble Ram Manohar Narayan Mishra, J.

1. Instant Criminal Revision has been preferred against the judgment and order dated 26.07.2023 passed by learned District and Additional Session Judge/ FTC Court No.1, Muzaffar Nagar in S.T. No.09 of 2022, whereby the application 15-A moved by the accused/applicant Sarvesh with a prayer to hold that the charge under Section 307 IPC being not made out in the case on the basis of injury report and only a charge under Section 498A IPC is made out on the basis of allegations made in FIR and material on record. Therefore, the case be remanded to court of Magistrate to proceed with the trial of the case for charge under Section 498-A IPC.

2. Heard Sri Sushil Kumar Pandey, learned counsel for the revisionist, learned A.G.A. and Sri C.B. Dubey, learned counsel for the respondent No.2 and perused the material available on record.

3. Learned trial court has observed that only on the ground that injuries have been found on person of the injured Smt. Moni are simple in nature is not sufficient to discharge the accused/applicant. Learned counsel for the accused could not show any evidence which could prove that no prima-facie case is made out against them. Therefore, application 15A is dismissed and case is fixed for hearing for charge on 08.08.2023.

4. Learned counsel for the revisionist submits that this is a case of matrimonial dispute. The impugned order passed by learned trial court is completely misdirected, in application 15(A) there is no prayer to discharge the accused persons altogether from all charges and a specific

prayer has been made therein that no charge under Section 307 IPC is made out, in view of the fact that injuries found on the person of the injured are found by doctor simple in nature. Even the Doctor in CD-4 has opined in his statement that injuries are simple in nature and there were marks of friction in the neck of injured Smt. Moni. The independent witnesses have stated in their statement under Section 161 Cr.P.C. that on the day of incident altercation took place between Sarvesh and his wife.

5. He next submitted that the cognizance in the case was taken on a wrong chargesheet filed by investigating officer under Section 498A, 323, 307, 504 IPC and Section 3/4 of Dowry Prohibition Act after investigation into FIR lodged at the instance of the aggrieved Smt. Moni vide Case Crime No.193 of 2020, at P.S. Burhana, District Muzaffar Nagar. He further submits that learned trial court has wrongly observed in the impugned order that learned counsel for the accused/applicant submits that no offence is made out against accused persons. The specific prayer has been made in application 15-A that case be remanded to court of Magistrate for trial of charge under Section 498-A IPC. He also submits that the impugned order is misdirected and the purport and prayer made in the application 15-A has not been considered in proper perspective and a cryptic order has been passed while dismissing the application 15-A. In substance, this was not an application for discharge of the accused/applicant, but a specific prayer has been made therein to remand the case to Magistrate for trial of offence under Section 498-A IPC, which is triable by a Magistrate. The impugned order has been passed without application of judicial mind.

6. Learned counsel also submitted that learned court below has given an erroneous finding in impugned order that statement of charges in question is written by Magistrate, whereas no document was recorded by the Magistrate in the case under Section 164 Cr.P.C. whereas no such statement was recorded by Magistrate. The injuries detected on persons of injured are not in the nature of dangerous to life or grievous.

7. Per contra, learned counsel appearing for the respondent No.2 submitted that for attracting charge under Section 307 IPC it need not be prima-facie established that the injuries in question are likely to cause death, or dangerous in nature. An abrasion size 9 cm x 1.5 cm over interior aspect of neck 8 cm below chin has been found in the injury report of injured Smt. Moni who is wife of the revisionist which she has stated in her statement under Section 161 Cr.P.C. to be caused by her husband i.e. the revisionist by pressing her neck by a noose made of a saree.

8. He further submits that at the stage of framing of charge only prima-facie case has to be seen and meticulous examination of the evidence is neither desirable nor required. There is no illegality, irregularity or perversity in the impugned order passed by trial court and revision deserves to be dismissed.

9. He lastly submitted that in marginal head of application 15(A) it is stated that a “written objection is filed on behalf of accused present at the time of framing of charge”, which is in essence a discharge application.

10. Hon’ble Supreme Court has considered the application in purport of Section 307 IPC in Criminal Appeal No.3327 of 2024 **Shoyeb Raja Vs. State of Madhya Pradesh and others**, wherein Hon’ble Court observed on question of framing of charge in a case under sections 294, 332/34 and 307/34 IPC, which reads as under:-

.....11. Let us at this stage, consider the law as laid down by this Court in respect of this section, as also that of Section 34 IPC, given that there are a total of eight respondents (accused) before the court.

*11.1 In **State of Maharashtra v. Kashirao (2003) 10 SCC 434** the Court identified the essential ingredients for the applicability of the section. The relevant extract is as below:*

“The essential ingredients required to be proved in the case of an offence under Section 307 are:

(i) that the death of a human being was attempted;

(ii) that such death was attempted to be caused by, or in consequence of the act of the accused; and

(iii) that such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as : (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death, or that the accused attempted to cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse

for incurring the risk of causing such death or injury.”

*11.2 This Court in **Om Prakash v. State of Punjab** (1961) Law (Suit) SC 194 as far back as 1961, observed the constituents of the Section, having referred to various judgments of the Privy Council, as under:*

“a person commits an offence under Section 307 when he has an intention to commit murder and, in pursuance of that intention, does an act towards its commission irrespective of the fact whether that act is the penultimate act or not. It is to be clearly understood, however, that the intention to commit the offence of murder means that the person concerned has the intention to do certain act with the necessary intention or knowledge mentioned in Section 300. The intention to commit an offence is different from the intention or knowledge requisite for constituting the act as that offence. The expression “whoever attempts to commit an offence” in Section 511, can only mean “whoever : intends to do a certain act with the intent or knowledge necessary for the commission of that offence”. The same is meant by the expression “whoever does an act with such intention or knowledge and under such circumstances that if he, by that act, caused death, he would be guilty of murder” in Section 307. This simply means that the act must be done with the intent or knowledge requisite for the commission of the offence of murder. The expression “by that act” does not mean that the immediate effect of the act committed must be death. Such a result must be the result of that act whether immediately or after a lapse of time.”

(Emphasis supplied)

11.3 Hari Mohan Mandal v. State of Jharkhand (2004) 12 SCC 220 holds that the nature or extent of injury suffered, are irrelevant factors for the conviction under this section, so long as the injury is inflicted with animus. It has been held:

“10. ...To justify a conviction under this section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. ...What the court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

11. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. If the injury inflicted has been with the avowed object or intention to cause death, the ritual nature, extent or character of the injury or whether such injury is sufficient to actually causing death are really factors which are wholly irrelevant for adjudging the culpability under Section 307 IPC. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, it is not correct to acquit an accused of the charge under Section 307 IPC merely because the injuries inflicted on the victim were in the nature of a simple hurt.”

(Emphasis supplied)

*11.4 The principle governing the application of Section 34 has been captured thus in **Chhota Ahirwar v. State of M.P.:***

“24. Section 34 is only attracted when a specific criminal act is done by several persons in furtherance of the common intention of all, in which case all the offenders are liable for that criminal act in the same manner as the principal offender as if the act were

done by all the offenders. This section does not whittle down the liability of the principal offender committing the principal act but additionally makes all other offenders liable. The essence of liability under Section 34 is simultaneous consensus of the minds of persons participating in the criminal act to bring about a particular result, which consensus can even be developed at the spot as held in Lallan Rai v. State of Bihar [Lallan Rai v. State of Bihar, (2003) 1 SCC 268 : 2003 SCC (Cri) 301]. There must be a common intention to commit the particular offence. To constitute common intention, it is absolutely necessary that the intention of each one of the accused should be known to the rest of the accused.”

11.5 Sanjiv Khanna J., writing for the Court in **Krishnamurthy v. State of Karnataka, SLP (Crl.) No.1633 of 2023** encapsulated, succinctly its field of operation as under:

“26. Section 34IPC makes a co-perpetrator, who had participated in the offence, equally liable on the principle of joint liability. For Section 34 to apply there should be common intention between the co-perpetrators, which means that there should be community of purpose and common design or prearranged plan. However, this does not mean that co-perpetrators should have engaged in any discussion, agreement or valuation. For Section 34 to apply, it is not necessary that the plan should be prearranged or hatched for a considerable time before the criminal act is performed. Common intention can be formed just a minute before the actual act happens. Common intention is necessarily a psychological fact as it requires prior meeting of minds. In such cases, direct evidence normally will not be available and in most cases, whether or not there exists a common intention has to be determined by drawing inference from the facts proved. This requires an inquiry into the antecedents, conduct of the co-participants or perpetrators at the time and after the occurrence. The manner in which the accused arrived, mounted the attack, nature and type of injuries inflicted, the weapon used, conduct or acts of the co-assailants/perpetrators, object and purpose behind the occurrence or the attack, etc. are all relevant facts from which inference has to be drawn to arrive at a conclusion whether or not the ingredients of Section 34IPC are satisfied. We must remember that Section 34IPC comes into operation against the co-perpetrators because they have not committed the principal or main act, which is undertaken/performed or is attributed to the main culprit or perpetrator...”

(Emphasis supplied)

11. Hon'ble Court after going through the aforesaid judgments as discussed in paragraph No.11 concluded as under:-

*13. It is well recognized that intention may not always be proved by hard evidence and instead may be required to be inferred from the facts and circumstances of the case. If the doctor who conducted the examination posits the possibility of throttling, then under what circumstances, without rigorous cross-examination, could it be concluded that the injuries sustained were simple? That apart, even if the injuries were taken as simple, the extent of the injuries, as observed supra in **Hari Mohan Mondal**, are not relevant, if the intent is present. We are not in agreement with the learned Courts below that intent was absent, as the Doctor's report itself records throttling to be reasonably suspected.*

12. In the present case approach of learned trial judge, in the impugned order appears to be erroneous and misconceived. At the stage of framing of charge the accused had moved an application 15-A, with marginal heading 'written objection on behalf of accused persons at the time of framing of charge'. In the application 15-A the accused have stated that chargesheet under Sections 498A, 323, 307 ad 504 IPC and Section 3/4 of Dowry Prohibition Act has been filed in the court by police of Police Station Budhana against accused Sarvesh, whereas chargesheet under Section 498A IPC filed against Smt. Sunita, Rajbahadur, Pravesh Kumar, and Smt. Sushma. However, on the basis of evidence available in chargesheet no case under Section 307 IPC is made out. The three injuries found on the person of injured Smt. Moni are of simple in nature and can be easily fabricated. The Investigating Officer has recorded statement of the doctor who authored this injury report in CD-4 on 12.06.2020, in which doctor has stated that he had examined Smt. Moni wife of Sarvesh on 19.05.2020 at 12:15 hours at C.S.C. Hospital Budhana and prepared her injury report, in which marks of violence were found on

her person. There were marks of friction on her neck and injuries were of simple in nature.

13. The Investigating Officer recorded the statement of two independent witnesses in CD-7, who stated that on the date of incident there was altercation between Sarvesh and his wife. In these circumstances no offence under Section 307 IPC is made out and all the sections are triable by the Magistrate. Therefore, it is prayed that the case may be remanded to learned Magistrate to frame charge under Section 498A IPC and Section 3/4 of D.P. Act. In injury report of the informant/injured Smt. Moni following injuries were found on her person:-

1. Reddish Scrab Abrasion size 9 x 1.5 cm over Anterior Aspect of neck 8 cm below chin, linear in shape. Anterior of neck C/O Difficulty in swelling. (2) Reddish contusion size 3 x 1 cm over right side of lower back. (3) Reddish abrasion size 1 x 0.2 cm Anterior side of upper abdomen. Injuries were simple in nature. Duration was 12-36 hours. Nature of weapon-rough.

14. While dismissing this application which is virtually an application for discharge of the applicant/revisionist for main charge under Section 307 IPC, the learned Magistrate has considered the injury report of victim Smt. Moni. This is a case of matrimonial discord between de-facto complainant and her husband and in-laws.

15. Learned Magistrate has wrongly observed that the learned counsel for the accused has stated that no offence is made out against accused persons, because the prayer in Application 15-A is not such that the accused persons be discharged from all offences, as no offence is made out against him. There is specific prayer that no offence under Section 307 IPC is made out against the accused Sarvesh, who has been discharged, interalia for charge under Section

307 IPC separately. Inasmuch as there is a specific prayer in application 15-A that no charge under Section 307 IPC is made out in respect of accused Sarvesh, the case be remanded to court of Magistrate for framing of charges and trying those charges which are triable by a Magistrate.

16. Similarly, the learned Magistrate has given an erroneous finding that as statements for offence under Sections 498A, 323, 307 and 504 IPC and Section 3 of Dowry Prohibition Act is written by learned Magistrate, therefore there is sufficient grounds for framing of charge against accused persons. Learned counsel for the revisionist submitted that no such statement of the victim has been recorded by the Magistrate under Section 164 Cr.P.C..

17. Learned trial Judge failed to realize this fact that in concluding para of report under Section 173 Cr.P.C., on which cognizance has been taken by learned Chief Judicial Magistrate. It is specifically stated that accused Sarvesh Kumar is chargesheeted for charge under Sections 498-A, 323, 307 and 504 IPC and remaining accused were chargesheeted under Section 498-A IPC and Section 3 of Dowry Prohibition Act. The independent witnesses Niyazu and Gayur who are localides of accused persons have stated in the statement under Section 161 Cr.P.C. that on 18.05.2020 an altercation took place between Sarvesh and his wife, when other family members have gone to sleep well. Injuries found on the person of the injured correspond to time of injury given in injury report dated 19.05.2020. The informant lodged FIR on the basis of written report on 21.05.2020 at 16:30 hours against husband Sarvesh Kumar, parents-in-law, brother-in-law (jeth) and sister-in-law (Jethaani) with averments that her marriage was solemnized on 13.07.2013 with accused Sarvesh Kumar. Her husband and in-laws' used to harass and subjected her to cruelty due to non-fulfillment of additional demand of dowry. She was blessed

with two daughters, but husband got enraged due to birth of girl child and went to Delhi and started living there. He did not discharge his obligations towards his wife and children and did not come back to home for last one year. On 18.05.2020 her husband came to home surreptitiously and tried to strangle her from behind and when her nephew raised an alarm he left her and escaped from the place after taking her two mobile phones and giving her threat to life. She has supported FIR version in the statement under Section 161 Cr.P.C., but this is specifically averred under para 9 of revision memo that no statement of victim has been recorded under Section 164 Cr.P.C. by the Magistrate. Therefore, it is surprising that how learned Magistrate made observations in this regard in the impugned order. If no such statement of victim was recorded by the Magistrate, then the observation of learned Magistrate with regard to said statement is based on non existence of fact.

18. Learned trial judge has also been misconceived by observing that the learned counsel for the accused could not produce any evidence which could prove that no prima facie case is made out against accused persons. The trial court has to find out as to whether a prima facie case is made out on the allegations in FIR and material collected during investigation against the accused to put him on trial for alleged charges, at the time of framing of charge. It is not the duty of the accused or his counsel to prove prima facie this fact that no offence is not made out against him, by producing evidence. In Section 227 Cr.P.C. it is provided as under:-

*227. **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 not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.*

19. In the light of foregoing discussion and keeping in view the totality of the facts and circumstances of the case, I am of the considered opinion that trial court has misdirected itself while assigning reasons for dismissing the application 15-A and even failed to understand the purport and contents of the application, The impugned order is vitiated by illegality and irregularity and cannot be sustained.

20. Accordingly, impugned order dated 28.07.2023 is set-aside and and quashed. The learned trial judge is directed to hear the application 15-A moved by the accused afresh in the light of judgments of Hon'ble Apex Court referred herein above, after affording opportunity of hearing to the accused, the defacto complainant and prosecution and decide the same in accordance with law.

Order Date :- 17.10.2024

Ashish/-