

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL REVISION APPLICATION NO. 10 OF 2015

State
(Through Porvorim Police Station)
Porvorim Goa .. Petitioner/ applicant

Versus

1. Shailesh @ Shailu Naik, (Major)
Son of Dinanath Naik,
38 years of age,
Indian National,
r/o H.No.658, Kaskarwado,
Porvorim, Goa
2. Vijay Karbotkar, (Major)
Son of Tulshidas Karbotkar,
24 years, Indian national,
r/o H.No.187/2,
Coelhowado, Brittona,
Bardez, Goa. .. Respondents

Mr. S. R. Rivankar, Public Prosecutor for the Petitioner/applicant.

Mr. Arun De Sa, Advocate for the respondent no.1.

Mr. G. Teles, Advocate for the respondent no.2.

CORAM :- C. V. BHADANG, J.

Date : 23rd March, 2015.

ORAL JUDGMENT :

Admit.

2. The learned Counsel for the respondents waive notice.

3. Heard finally, with the consent of the learned Counsel for the parties.

4. By the present Criminal Revision Application, the State has challenged the order dated 14/08/2014 passed by the learned Additional Sessions Judge, Mapusa, Goa in Sessions Case No. 66/2013. The applicant-State is aggrieved by the impugned order, by which, in place of charge under Section 302 of Indian Penal Code (I.P.C., for short), the learned Sessions Judge has framed a charge for the offence punishable under Section 304-II of I.P.C.

5. The brief facts, necessary for the disposal of the Revision Application, may be stated thus -

The incident in question has occurred on 14/08/2013 at about 18.20 hours at Sun Shine Bar at Porvorim, Bardez, Goa. According to the prosecution, the respondents/ accused i.e. Shailesh Naik and Vijay Karbotkar were already sitting at the bar and having a drink. It is said that now deceased Lavu along with one Vijay Jadhav came there on a motorcycle. Further, according to the prosecution, Vijay asked the deceased Lavu to have a drink, to which Lavu declined. It is said that the deceased then allegedly

said to the accused Vijay whether he (Vijay) has any problem, if he (Lavu) leaves. This is said to have provoked the respondent accused Shailesh to rush on the person of the deceased. Subsequently, according to the prosecution, the accused no. 2 Vijay Karbotkar also joined him. Both of them assaulted the deceased. Further, according to the prosecution, the accused Vijay assaulted the deceased with knife on vital part, resulting into his death.

6. On the basis of complaint lodged, an offence came to be registered with Police Station, Porvorim and during the course of investigation, the statements of the witnesses, including five eye witnesses, were recorded. On completion of investigation, a chargesheet came to be filed before the learned Sessions Judge against the respondents for the offence punishable under Section 302 read with Section 34 of I.P.C.

7. It appears that the learned Sessions Judge heard the parties on the point of framing of charge and, by impugned order dated 14/08/2014, has been pleased to direct framing of charge for the offence punishable under Section 304-II of I.P.C. According to the learned Sessions Judge, *prima facie*, the material produced by the prosecution, including the statements of the eye witnesses,

would only make out an offence of Culpable Homicide not amounting to murder. Further, according to the learned Sessions Judge, from the material, only knowledge and no intention to commit murder can be gathered. It appears that although in the penultimate paragraph 28 of the order, the learned Sessions Judge found that there was common intention, which can be gathered, the learned Sessions Judge did not specifically add Section 34 of I.P.C.

8. I have heard Shri Rivankar, learned Public Prosecutor for the applicant, Shri De Sa, learned Counsel for the respondent no. 1 and Shri Teles, learned Counsel for the respondent no. 2. With the assistance of the learned Counsel for the parties, I have perused the statements of the witnesses and also the impugned order passed.

9. It is submitted by the learned Public Prosecutor that the learned Sessions Judge clearly exceeded the jurisdiction and powers available at the stage of framing of charge, in order to frame charge only under Section 304-II of I.P.C. in place of the one under Section 302 of I.P.C. It is submitted that the statements of the eye witnesses would clearly make out a case for framing of charge under Section 302 read with Section 34 of I.P.C. The

learned Public Prosecutor has taken me through the individual statements of Freddy Vaz, Suresh Parsekar, Parashar Sawant, Vijay Jadhav and Koendas Naidu, in order to demonstrate that a case for framing of charge under Section 302 read with Section 34 of I.P.C. is made out. It is submitted that at the stage of framing of charge, in depth consideration and appreciation of the material, is neither appropriate nor expected and that essentially has to be done at the trial. It is submitted that the learned Sessions Judge was clearly in error in finding that the case would be covered by exception (4) to Section 300 of I.P.C. It is, therefore, submitted that the impugned order demonstrates exercise of jurisdiction with material irregularity and requires interference by this Court, in exercise of revisional jurisdiction.

10. On the contrary, the learned Counsel for the respondents have supported the impugned order. It is submitted that the learned Sessions Judge has not considered any extraneous material other than the statements of the witnesses and in that view of the matter, the impugned order would not be susceptible to challenge. The learned Counsel for the respondent no. 2 was at pains to point out that both the accused were already at the alleged scene of occurrence and it is the deceased, who came there subsequently. It is submitted that thus, *prima facie*, this

would not be a case where the accused persons had any premeditation for commission of offence. The learned Counsel pointed out that the statements of the eye witnesses also *prima facie* indicate that it was the deceased, who had said something, which had started the entire incident. There is also a reference to a fight having ensued. The learned Counsel, therefore, submitted that this would be a case, which would clearly be covered by exception (4) to Section 300 of I.P.C.

11. I have considered the rival circumstances and the submissions made. I have given my anxious consideration to the statements of the eye witnesses as also the impugned order passed. At the outset, as has been rightly submitted on behalf of the applicant, it is not necessary at the stage of framing of charge for a Court to appreciate the evidence in detail, so as to record any final and binding opinion. The Court is essentially concerned with the *prima facie* case as borne out from the statements of the witnesses, in order to find out whether the necessary ingredients of the offence as charged, are made out or not.

12. Turning to the facts, admittedly, the chargesheet was filed alleging commission of an offence under Section 302 read with Section 34 of I.P.C. There are as many as five eye witnesses

in the matter and prima facie from the reading of the statements of these witnesses, it would appear that both the accused were present at the Sun Shine Bar and were having a drink, when the deceased Lavu along with one Vijay Jadhav came there. It would further appear that Vijay started teasing Lavu to have liquor to which Lavu declined. Further, Vijay asked Lavu to wait. To this Lavu said, he has no time to wait and further asked Vijay as to whether he is having any problem, if Lavu leaves the place. *Prima facie*, on reading of the statements of the witnesses, it appears that Vijay became angry on hearing this and rushed on the person of the deceased. The Postmortem report would show that there are as many as 13 injuries on the person of the deceased out of which injury nos. 1, 3, 6 are stab wounds, while injury no. 5 is said to be incise wound. Some of the injuries are on vital parts.

13. In my considered opinion, the material would be clearly sufficient to frame a charge under Section 302 of I.P.C. It would be significant to note that the learned Sessions Judge has not only stopped at holding that the offence charged is Culpable Homicide not amounting to murder, but has gone to the extent of saying that it only shows knowledge and no intention on the part of the respondents/ accused. In my considered opinion, such an in depth appreciation of the material and recording of a finding,

would clearly amount to prejudging the case. At the stage of framing of charge, such an exercise is not at all expected. I do not propose to go to the exception (4) to Section 300 of I.P.C., in order to make any further observations, lest the respondents accused would be prejudiced at the trial. Suffice it to mention that even assuming that there was any fight, on a provocation, the question, whether the provocation was serious enough or was self invited is always a question of fact, which can be decided at the trial. *Prima facie*, in the present case, only thing, which the deceased had said, was that whether the accused had any problem, if the deceased leaves. I am conscious of the fact that this Court is entertaining this Revision at the stage of framing of charge and hence, this Court would restrict itself in making any further observations, so that the prosecution or the defence is not prejudiced at the trial. Insofar as framing of charge based on common intention is concerned, the learned Sessions Judge has already found that there is material to gather common intention. The basic issue is about the substantive offence. In this view of the matter, I find that the impugned order cannot be sustained and deserves to be set aside.

14. In the result, the following order is passed :

ORDER

(i) The Criminal Revision Application is allowed.

(ii) The impugned order is hereby set aside.

(iii) The learned Sessions Judge shall frame charge under Section 302 read with Section 34 of I.P.C. against the respondents.

(iv) Needless to mention that at the trial, the learned Sessions Judge will not be influenced by any of the observations made herein.

C. V. BHADANG, J.

SMA