

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

+ **CRL.REV.P. 386/2012**

% Reserved on: 17.07.2015
Date of Decision: 24.07.2015

STATE OF NCT OF DELHI Petitioner

Through: Mr.Rajesh Mahajan, ASC
SI Vivek Sharma, P.S.Gokulpuri.

versus

SALIM @ GUDDU Respondent

Through: Mr.Vishal Raj Sehijpal, Advocate.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J:

1. Raj Kumar, deceased was murdered by stabbing.
2. On 25.07.2009 at about 12:11 PM, an information was received at PS Gokalpuri that there had been a firing at house no. 6/19, 33 Foota road, Dayal Pur, Delhi. Police party, on such information reached the place of occurrence only to find that the injured was removed to GTB hospital. There was blood at the place of occurrence but nobody was available to account for the same. The members of the police team thereafter went to GTB hospital and obtained the MLC of injured Raj Kumar. The statement of Raj Kumar could not be recorded as the doctor declared him unfit for giving any statement.
3. The police party met one Shyam Lal at the hospital, who claimed to have seen the occurrence. On 25.07.2009, while Shyam Lal was crossing the house of Raj Kumar (deceased), he saw a motorcycle stop in front of the house of Raj Kumar. One person attempted to stab

Raj Kumar by means of knife. Raj Kumar ran out of his shop and raised alarm. While doing so, he fell down and hurt himself against the shutter of the shop. His wife, Poonam, came for his rescue but that did not deter the assailant from stabbing on the left side of Raj Kumar. Raj Kumar started bleeding profusely. The miscreants fled away.

4. Initially a case under section 307/34 IPC was registered but with the death of Raj Kumar, section 302 IPC was added.

5. Investigation revealed the complicity of the respondent along with others in getting the deceased eliminated. Apart from the respondent, Nazim Khan and Rehmat Ali were chargesheeted for the offences under section 302/120B/201/34 IPC and section 25/27 Arms Act.

6. The investigation reports revealed that about four and a half years ago one Nabhu @ Raja Khan, brother of the respondent, was killed near the house of the deceased (Raj Kumar), leading to the institution of FIR No. 84/2005 (PS Gokal Puri) under section 302 IPC and section 25 Arms Act. The aforesaid case ended in acquittal. The respondent therefore harboured a suspicion that the deceased along with his associates had committed the murder of his brother.

7. In order to take revenge, a conspiracy was therefore hatched to eliminate Raj Kumar (deceased). The respondent, as the story unfolds, conspired with his brother Nazim Khan and Rehmat Ali (both chargesheeted) to kill Raj Kumar. In order to put an adroit appearance of a blind murder, the respondent intentionally got himself involved in a theft case and went to Dasna Jail from 10.07.2009 to 04.08.2009. One of the co-accused Nazim Khan, brother of the respondent was

arrested on 30.08.2009 and a loaded country made pistol was recovered from his possession. During interrogation, he made a disclosure that the deceased was killed pursuant to a conspiracy, of which he, the respondent, and one Rehmat Ali were part. As part of the conspiracy a motorcycle was stolen and its number plate was changed. The aforesaid vehicle was used in committing the crime. According to the disclosure statement of Nazim Khan, the motorcycle was left at the place of occurrence whereas the country made pistol, which was recovered from his possession, was the same weapon which was used and fired for making good their escape.

8. The investigation report further reveals that the respondent met Nazim several times in the jail.

9. Another co-conspirator Rehmat Ali was apprehended and he also made a disclosure. His disclosure statement led to the recovery of a blood stained knife from the rickshaw garage of the respondent at Nasbandi Colony.

10. The postmortem conducted on the body of the deceased revealed the cause of death to be hemorrhagic shock due to ante mortem injury to auxiliary artery by a sharp weapon.

11. When the weapon of assault was shown to the doctor, it was opined that the injuries could have been caused by such weapon.

12. A prayer for discharge was made by the respondent on the ground, that on the date and time of the occurrence he was in Dasna Jail, Ghaziabad from 10.07.2009 - 04.08.2009. The other ground raised by the respondent for seeking his discharge was that no evidence with respect to conspiracy could be collected against him and

merely on the basis of his having met Nazim Khan, he could not be put on trial for killing the deceased. It was submitted that the jail register evinces that meeting took place only on 19.07.2009 and never again. This, according to the respondent was a material, so frail that no charge under any one of the aforementioned sections could be framed against him.

13. The Trial court by order dated 06.2.2012 discharged the respondent for the offences under sections 302/201/120B/34 IPC and sections 25/54/59 Arms Act but framed charges against the respondent only under section 174A IPC as the respondent was declared a proclaimed offender by a competent court on 29.04.2010.

14. The aforesaid order is under challenge in the present petition.

15. The Trial court, on going through the materials available on record, found that the respondent had met Nazim Khan only once and therefore such solitary meeting would not entitle the prosecution to put up a case of conspiracy against the respondent. After listing the ingredients required for attracting the mischief of 120B IPC, the Trial court was of the opinion that the solitary instance of meeting the co-accused is not sufficient for inferring any element of conspiracy. On that score alone, the respondent was discharged for the offences under section 302/201/120B/34 IPC. As stated earlier charge under 174A IPC only was framed against the respondent as he was declared a proclaimed offender.

16. The prosecution sought to have such order revised on the ground that the respondent had a motive, which motive emerged from the disclosure of Nazim Khan and that of the respondent himself.

17. It was argued that an extra-judicial confession was made by the respondent before one Mohd. Rahis regarding the conspiracy.

18. The prosecution also relied upon the recovery of a bloodstained knife from the rickshaw garage of the respondent and the FSL report showed the presence of human blood on such knife. The autopsy surgeon, on being asked, opined that such a knife could have been used for inflicting the injury which was found on the person of the deceased.

19. The factual position with respect to the number of meeting of the respondent with Nazim Khan also belied the contention of the respondent that there was solitary meeting with Nazim Khan at the jail. The visitor register shows that Nazim Khan met the respondent in jail on 12.07.2009, 14.07.2009 and 19.07.2009, the last meeting being just a few days before the occurrence. There was another meeting post occurrence that is on 26.07.2009. Lastly, it was urged that the respondent after being released on bail on 04.08.2009 absconded and was finally arrested on 24.06.2011, which also pointed towards his involvement in the case.

20. Before considering the merits of the claims of the prosecution as well as the respondent, it would be necessary to refer to section 227 of the Code of Criminal Procedure, 1973:

“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.”

A bare reading of the section makes it very obvious that an accused could be discharged only if there was no sufficient ground for proceeding against him.

21. The scope of section 227 of the Code of Criminal Procedure (hereinafter referred to as ‘the CrPC’) was considered by the Supreme Court in *State of Bihar vs. Ramesh Singh*, (1977) 4 SCC 39. The Supreme Court observed as follows:

“4. ... Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.”

22. Thus a suspicion may not take the place of proof finally, but would be sufficient to frame charge against an accused.

23. Later, in Union of India vs. Prafulla Kumar Samal, (1979) 3 SCC 4, the Supreme Court elucidated as follows: (SCC p.9, Para 10)

“(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

24. The Supreme Court once again had the opportunity to examine the purview of section 227 of the Code of Criminal Procedure, in *Niranjan Singh Karam Singh Punjabi vs. Jitendra Bhimraj Bijjaya* (1990) 4 SCC 76. The Supreme Court observed as under:

*“6. ... Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is obvious that since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution. In *State of Bihar v. Ramesh Singh* [(1977) 4 SCC 39 : 1977 SCC (Cri) 533] this Court observed that at the initial stage of the framing of a charge if there is a strong suspicion evidence which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. In *Union of**

India v. Prafulla Kumar Samal [(1979) 3 SCC 4: 1979 SCC (Cri) 609] this Court after considering the scope of Section 227 observed that the words ‘not sufficient ground for proceeding against the accused’ clearly show that the Judge is not merely a post office to frame charge at the behest of the prosecution but he has to exercise his judicial mind to the facts of the case in order to determine that a case for trial has been made out by the prosecution. In assessing this fact it is not necessary for the court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but it may evaluate the material to find out if the facts emerging there from taken at their face value establish the ingredients constituting the said offence.”

25. In *Soma Chakravarty vs. State*, (2007) 5 SCC 403, the Supreme Court has held that:

“The settled legal position is that if on the basis of material on record the court could form an opinion that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true ... Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial.

(Para 10)

Charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the court must come to a prima facie finding that there exist some materials therefor. Suspicion alone, without anything more, cannot form the basis therefor or held to be sufficient for framing charge.

(Para 19)”

(emphasis in original)

26. After having seen the position of law with respect of exercise of jurisdiction under section 227 of the Cr.P.C and the materials on record it appears that the learned Trial court has gone overboard and has actually held a mini trial at the stage of framing of charge.

27. The materials relied upon by the prosecution, namely, motive; extra-judicial confession; recovery of weapon of assault; meetings of the respondent with Nazim Khan in jail and the subsequent abscondence of the respondent are good materials for a prima facie opinion that the respondent should be put on trial for such offence.

28. Section 30 of the Evidence Act, deals with the situation when proved confession could be considered as a material against other accused person.

“30. Consideration of proved confession affecting person making it and others jointly under trial for same offence –

When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as

against such other person as well as against the person who makes such confession.”

29. The admissibility or acceptability of an extra-judicial confession is a matter which could be considered in proper perspective at the time of trial. Only in a full fledged trial could the probative value, admissibility, reliability etc. of an extra-judicial confession be evaluated. It was absolutely incorrect for the trial court to have completely shut out the prosecution by treating these materials lightly.

30. So far as the element of conspiracy is concerned, the mere agreement is sufficient to impose liability without the requirement of any overt act in furtherance of the conspiracy.

31. Since conspiracy is always hatched in secrecy, perhaps there could never be any direct evidence to prove the same. The trial court completely misdirected himself in rejecting the case of the prosecution on the score of lack of evidence with regard to conspiracy. It is impossible to adduce any direct evidence for the offence of conspiracy and it had, per force, to be proved largely from the acts or illegal omissions committed by the conspirators in pursuance of a common design.

32. In *Devinder Pal Singh vs. State (NCT of Delhi)*, (2002) 5 SCC 234, the Supreme Court, at paragraph 44, has reiterated the principle and observed:

“Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a

conspiracy is seldom available. Offence of conspiracy can be proved by either direct or circumstantial evidence. It's not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all this is necessarily in a matter of inference”

33. For bringing home the charges for conspiracy, per force, section 10 of the Evidence Act comes into play:

“10. Things said or done by conspirator in reference to common design –

Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.”

34. By the impugned order the learned Trial court has completely thrown to the winds the accepted cannons of appreciating materials at the stage of framing of the charge. The court has delved into the matter, as if it were deciding whether the materials collected during the investigation, would ultimately lead to conviction or acquittal of the respondent.

35. This court is satisfied that the materials which have been discussed above require scrutiny in detail in a full fledged trial. The Trial court has wrongly shut out the prosecution at the threshold, when there was every chance of it to put up a case against the respondent.

36. The order impugned therefore cannot be sustained in the eyes of law and has to be quashed.

37. The order dated 06.02.2012, discharging the respondent for the offence under sections 302/120B/34 IPC is set aside.

38. The matter is remitted to the learned Trial court for writing out a fresh order in accordance with law.

39. The petition is allowed.

July 24, 2015

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ASHUTOSH KUMAR, J