

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

% *Judgment Reserved on: 13.09.2017*
Judgment Pronounced on: 17. 10.2017

+ **Crl. Rev. Petition 464/2017**

STATE (GOVT OF NCT OF DELHI) APPELLANT
Through: Mr. Amit Chadha, APP for
State along with SHO Sanjay
Sharma, Inspector Ugesh
Kumar and SI R.K. Yadav, P.S.
Vasant Kunj (South) Delhi.

versus

RAMTEJ RESPONDENT
Through: Mr. Akhand Pratap Singh,
Advocate with Ms. Aditi Mittal,
Advocate.

CORAM:
HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J.

1. This Criminal Revision Petition impugns an order dated 29.08.2016 passed by the Court of Additional Sessions Judge, Fast Track Court, Patiala House Courts, New Delhi (in short 'ASJ') whereby an application of the prosecution under Section 216 of the Code of Criminal Procedure, 1973 (in short 'the Code') for framing additional/alternate charge under Section

302 of the Indian Penal Code, 1860 (in short 'IPC') besides the charges framed under Sections 376A/392/201 read with Section 411 of the IPC against the respondent/accused was dismissed.

2. The prosecution charge-sheeted the accused/respondent under Sections 302/201/376A/377/392 read with Section 411 of the IPC. The ASJ vide order dated 09.09.2015 framed charges under Sections 201/376A/392/411 of the IPC stating that there was no material for framing charges against the accused under Section 377 of the IPC and that the offence under Section 376A was a graver offence than the offence under Section 302 of the IPC as the cause of death of the deceased was due to the combined effect of strangulation and shock due to visceral injuries and blood loss due to insertion of wooden objects in both the private parts as per the post-mortem report and therefore there was no question of framing an alternate charge under Section 302 of the IPC.
3. This order dated 09.09.2015 of the ASJ was assailed by the State in Criminal Revision Petition 254/2016. It was argued by the State that the charge under Section 302 of the IPC has not been framed by the ASJ even though there was ample medical evidence on record. This petition was disposed of on 23.08.2016 with liberty to the State to approach the ASJ for framing a charge on the basis of the material before the Court.
4. The petitioner exercised the liberty so granted by this Court and moved an application before the ASJ for framing an

additional/alternative charge under Section 302 of the IPC. This application was dismissed of vide impugned order dated 29.08.2016 whereby the ASJ surprisingly concluded that this application was filed beyond the scope of liberty granted by this Court wherein the State had prayed for amendment of the charge and particularly for framing of charge under Section 302 of the IPC. The ASJ also observed that the application was devoid of any merit in view of his earlier order dated 09.09.2015. He reiterated that the court has the power to convict the accused for offences which are minor in relation to the offences with which the accused has been charged with after conclusion of trial if the evidence already led proves the commission of the minor offence.

5. Learned APP for the State argued that the ASJ had committed a grave error in law by holding that the offence under Section 302 is a minor offence in relation to the offence under Section 376A of the IPC. He argued that the two offences do not belong to the same genus and species and therefore cannot be treated as a minor and major offence. He argued that the offence of rape is distinct in comparison of the offence of murder and hence cannot be considered as being minor or major and at the time of framing of charge, offences cannot be compared particularly when both the offences are extremely grave and serious.
6. He further argued that the ASJ committed an error in not appreciating the spirit of the order passed by this Court on

23.08.2016 whereby liberty was granted to move the Trial Court with an application under Section 216 of the Code for framing a charge as per the material available on record.

7. He further argued that there was ample evidence on record to bring home the guilt of the accused under Section 302 of the IPC and therefore after going through the evidence *prima facie*, an additional or alternative charge under Section 302 should have been framed by the ASJ.
8. He further argued that in view of the fact that the victim was the only eye witness and since she was murdered, it might be difficult for the prosecution to prove the offence of commission of rape on the victim in terms of Section 376A of the IPC. He argued that the prosecution would be able to prove that the accused committed the offence under Section 302 of the IPC by way of circumstantial evidence on record i.e. last seen evidence coupled with medical evidence and therefore an additional or alternative charge under Section 302 of the IPC should have been framed.
9. He further argued that no prejudice would be caused to the accused if an additional/alternative charge under Section 302 would have been framed against him.
10. He relied upon the judgment of the **Hon'ble Supreme Court** in **Dalbir Singh v State of U.P (2004) 5 SCC 334 (para 17)** in support of his arguments.

11. Per contra, the learned counsel for the accused had argued that there was no error in framing of charges by the ASJ.
12. He urged that a Court under Section 216 of the Code can only alter or add to a charge that has already been framed but cannot frame an alternative charge. He emphasised that such alteration must be based on some material on record and not based on conjectures. He relied on the judgment of the **Hon'ble Supreme Court in Anant Prakash Sinhs alias Anant Sinha vs State of Haryana & Others (2016) 6 SCC 105** and a judgment of this Court in **X v State of NCT of Delhi 2016 LawSuit(Del) 2839** to further substantiate his point.
13. I have heard the learned APP for the State and learned counsel for the respondent/accused.
14. The question that arises for consideration is whether the ASJ should have framed an additional charge/ alternative charge under Section 302 of the IPC in the facts and circumstances of the case? To answer this query, three questions arise for the Court's consideration –
 - i. Whether the Trial/Revisionist Court has the power to alter/add charge to the original charges?
 - ii. Whether the offence under Section 302 of the IPC is of the same genus and species as the offence given under Section 376A of the IPC?
 - iii. Whether there is sufficient material on record to frame a charge under Section 302 of the IPC in the present case?

15. It is appropriate to reproduce Section 216 of the Code:-

“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 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.”

16. The Hon’ble Supreme Court in *CBI v. Karimullah Osan Khan*, (2014) 11 SCC 538 laid down the scope of adding/altering charges under Section 216 of the Code as under:-

“17. Section 216 CrPC gives considerable power to the trial court, that is, even after the

completion of evidence, arguments heard and the judgment reserved, it can alter and add to any charge, subject to the conditions mentioned therein. The expressions “at any time” and before the “judgment is pronounced” would indicate that the power is very wide and can be exercised, in appropriate cases, in the interest of justice, but at the same time, the courts should also see that its orders would not cause any prejudice to the accused.

18. Section 216 CrPC confers jurisdiction on all courts, including the Designated Courts, to alter or add to any charge framed earlier, at any time before the judgment is pronounced and sub-sections (2) to (5) prescribe the procedure which has to be followed after that addition or alteration. Needless to say, the courts can exercise the power of addition or modification of charges under Section 216 CrPC, only when there exists some material before the court, which has some connection or link with the charges sought to be amended, added or modified. In other words, alteration or addition of a charge must be for an offence made out by the evidence recorded during the course of trial before the court. (See *Harihar Chakravarty v. State of W.B.* [AIR 1954 SC 266 : 1954 Cri LJ 724]) **Merely because the charges are altered after conclusion of the trial, that itself will not lead to the conclusion that it has resulted in prejudice to the accused because sufficient safeguards have been built in Section 216 CrPC and other related provisions.”**

17. There is no doubt that the trial court can alter/add to a charge already framed at any stage before the judgment is pronounced

provided that the safeguards under Section 216 and 217 of the Code are followed so that no prejudice is caused to the accused.

18. The ASJ dismissed the application of the State under Section 216 of the Code to frame additional/alternative charge under Section 302 of the IPC in addition to the charge under Section 376A of the IPC on the ground that the offence under Section 302 is a minor offence in relation to the offence under Section 376A of the IPC and therefore was no question of framing an alternative charge under Section 302 of the IPC.
19. It is important to reproduce Section 222 of the Code at this juncture:

“222. When offence proved included in offence charged

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of

proceedings in respect of that minor offence have not been satisfied. Illustrations

(a) A is charged, under section 407 of the Indian Penal Code (45 of 1860), with criminal breach of trust in respect of property entrusted to him as a carrier. It appears, that he did commit criminal breach of trust under section 406 of that Code in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under the said section 406.

(b) A is charged, under section 325 of the Indian Penal Code (45 of 1860), with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under section 335 of that Code.”

20. A person can be convicted of an offence for which he was not charged with if that offence is a minor in relation to the offence for which he was charged with. No definition is provided in the Code or any other statute of a ‘minor offence’ but help can be taken from the illustrations itself given under Section 222 of the Code. A three judges bench of the **Hon’ble Supreme Court** in *Shamnsaheb M. Multtani v. State of Karnataka*, (2001) 2 SCC 577 interpreted the meaning of a ‘minor offence’ as under:

“16. What is meant by **“a minor offence”** for the purpose of Section 222 of the Code? Although the said expression is **not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence.** The two illustrations provided in the section would bring the above point home well. **Only if the two**

offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-à-vis the other offence.”

21. The Hon’ble Supreme Court in *Rafiq Ahmad v. State of U.P.*, (2011) 8 SCC 300 had explained which offences would fall within the same genus and species as under:

“31. With the passage of time more and more such cases came up for consideration of this Court as well as the High Courts. The development of law has not changed the basic principles which have been stated in the judgments aforereferred. **Usually an offence of grave nature includes in itself the essentials of a lesser but cognate offence. In other words, there are classes of offences like offences against the human body, offences against property and offences relating to cheating, misappropriation, forgery, etc. In the normal course of events, the question of grave and less grave offences would arise in relation to the offences falling in the same class and normally may not be inter se the classes. It is expected of the prosecution to collect all evidence in accordance with law to ensure that the prosecution is able to establish the charge with which the accused is charged, beyond reasonable doubt. It is only in those cases, keeping in view the facts and circumstances of a given case and if the court is of the view that the grave offence has not been established on merits or for a default of technical nature, it may still proceed to punish the accused for an offence of a less grave nature and content.”**

22. Therefore to decide whether an offence is a minor offence in relation to another offence under Section 222 of the Code, it needs to be ascertained whether both are cognate offences or that they belong to the same genus and species of offences. Punishment alone cannot be the deciding factor in determining the minor offence as held by the Hon'ble Supreme Court in **Shamnsaheb M.Multtani's case (supra)**.
23. The ASJ held that the offence under Section 302 of the IPC is a minor offence in relation to the offence under Section 376A of the IPC and therefore there was no need to frame an alternative charge under Section 302. Sections 376A is reproduced below:
- “376A. Punishment for causing death or resulting in persistent vegetative state of victim.—**
Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 **and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.”**
24. Relevant part of Section 300 which defines Murder and Section 302 are also reproduced below: -

“300. Murder ---

Except in the cases hereinafter excepted, **culpable homicide is murder**, if the act by which the **death is caused is done with the intention of causing death**, or

2ndly.—**If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused**, or

3rdly.—**If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death**, or

4thly.—**If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.**

.....
302. Punishment for murder.—

Whoever commits murder shall be punished with death or [imprisonment for life], and shall also be liable to fine.”

25. A comparison of Sections 376A and 300 brings out the difference in the ingredients of these Sections. To convict a person under Section 376A of the IPC, the prosecution first needs to establish that rape was committed on the victim and that in the course of commission of rape the accused inflicted such injury which was the cause of the victim’s death or was the cause of the victim being in a persistent vegetative state.

Therefore it is imperative to prove the commission of rape under this Section before proceeding to the second ingredient. To hold an accused guilty under Section 300, the intention of the accused to cause death has to be established or else the case would come under culpable homicide not amounting to murder. The difference between the two Sections is not of degree, even though the victim has to be dead for both the Sections to be attracted. Section 376A nowhere refers 'Murder', rather it uses the words 'causes the death' which does not attract the essential ingredient of Section 300 which requires intention of the accused to cause death. Under Section 376A, even if the accused had no intention of causing death but such injuries to cause death or cause the victim to be in a persistent vegetative state was inflicted during the commission of rape; the accused would be guilty under this Section. But under Section 300, intention has to be established to hold the person guilty of Murder.

26. Further the minimum punishment prescribed under Section 302 (punishment for murder) is imprisonment for life while the minimum punishment prescribed under Section 376A is imprisonment for 20 years. Therefore the offence under Section 300 of the IPC cannot be said to be a minor offence in relation to the offence under Section 376A of the IPC.
27. Moreover, under Section 222 of the Code, at the time of framing of charges, the Court cannot speculate if the accused

would be convicted for an offence. It can also not presume that some of the ingredients of an offence constitute the ingredients of another minor offence. It is important to note that it is only at the stage of final adjudication when the Court has the power to convict the accused for a minor offence even though the charge could not be framed. The state has been insisting since the stage of deciding point of charge before the ASJ who continued to be under a wrong belief that the accused can be convicted for the minor offence under Section 302 of the IPC in relation to the offence under Section 376A of the IPC without caring to peruse the ingredients of both the offences and without realising that it was not the stage of final adjudication. Chapter XVI of the IPC has the heading “Of offences affecting the human body”. This chapter, *inter alia*, contains the sub-headings “Of offences affecting life” for Sections 299 to 311 and “Sexual offences” for Sections 375 to 376E. As held by the **Hon’ble Supreme Court** in **Rafiq Ahmed’s case (supra)**, the quantum of grave and less grave offences would arise in relation to the offences falling in the same class and not *inter se* classes of offence.

28. There is force in the arguments of the learned APP that since the victim had died and due to the nature of injuries inflicted on her, it might be difficult for the prosecution to prove the offence of rape which would result in the accused being acquitted altogether resulting in the casualty of justice. It might be easier

for the prosecution to prove Murder as per Section 300 given the nature of injuries, medical evidence and last seen evidence.

29. PW-5 Dr. Abhishek Yadav who conducted the post-mortem of the deceased opined that the cause of death was due to a combined effect of ligature strangulation and shock due to visceral injuries and blood loss. He further opined that the injuries no.3, 9 and 10 were individually and collectively sufficient in the ordinary course nature to cause death. Injuries no. 9 and 10 of the victim's post-mortem report show that a wooden stick was inserted into the victim's vaginal canal and anal canal. The APP's argument that it might be difficult to prove rape finds force in view of these injuries as all biological as well as physical evidence which is essential to prove commission of rape might have been destroyed. Without going in to the details of evidence on record, a cursory look at the post-mortem report shows that a case for Murder under Section 300/302 of the IPC is *prima facie* made out. Impugned order is *per se* whimsical, illegal & perverse and speaks of non-application of judicial approach and grave error has been committed by the ASJ by which the failure of justice has in fact occasioned on account of non-framing of charge under Section 302 of the IPC.
30. The powers of the revisional court to frame a charge where there is an omission to frame a charge has been provided under Section 464 of the Code which is reproduced below:

“464. Effect of omission to frame, or absence of, or error in, charge.—(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision, is of opinion that a failure of justice has in fact been occasioned, it may,—

(a) in the case of an omission to frame a charge, order that a charge be framed, and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”

31. As per the trial court record, trial is at the final stage of arguments. It would not be out place to refer to Section 217 of the Code:

“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.”

32. In light of the above discussion and the facts and circumstances of the present case, impugned order dated 29.08.2016 passed by the ASJ declining the request of the prosecution to frame additional charge under Section 302 of the IPC is set aside. The ASJ is directed to frame an additional charge under Section 302 of the IPC and commence the trial in accordance with law keeping in view the provisions of Section 217 and Section 464(2) (a) (b) of the Code. It is directed that the trial shall be continued on a day to day basis and the ASJ shall conclude the trial within 3 months of receiving this order.
33. Trial court record be sent back forthwith.
34. Copy of this order be circulated to all the judicial officers for their knowledge and guidance.

(VINOD GOEL)
JUDGE

OCTOBER 17, 2017

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