

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL REVISION APPLICATION NO. 48 of 2018

State, Thr. Curchorem Police Station	...	Petitioner
Versus		
Shevanti Dessai & Anr.	...	Respondents

Shri S.R. Rivankar, Public Prosecutor for the Petitioner.

Shri Arun Bras De Sa with Shri Sidhesh Shet, Advocates for the Respondents.

Coram :- C. V. BHADANG, J.

Date :- 26th November 2018

ORAL ORDER:

By this revision application, the petitioner-State is challenging the order dated 19.06.2018, passed by the learned Sessions Judge at Margao in Sessions Case (302) No. 9/2018. By the impugned order, the learned Sessions Judge has found that there is no prima facie case made out, to frame charge under Section 302 of IPC and has directed framing of charge under Section 304 read with Section 34 of IPC against the respondents/accused.

2. The prosecution case is that on 23.02.2018, construction of a compound wall of one Shri Gokuldas Verekar at Gaowado, Xelvona, Curchorem was under way. One Shri Somnath Naik was the contractor, constructing the compound wall. There are houses of Suryakant Dessai (since deceased), Smt. Shevanti Dessai and her son Hemant Dessai (respondents), at the backside of the construction site, where the compound wall was being constructed. At around 15:20 hours on 23.02.2018, now deceased Suryakant Dessai came out of the house through the backside door and was having a talk with the labourers, who were constructing the compound wall. It is said that at around 15:30 hours, the respondent no. 1 (accused no. 1) came out of her house and got furious, seeing Suryakant Dessai speaking with the labourers. It is said that she asked the contractor Somnath Naik to remove the boundary stone existing at the place, to which, Somnath Naik replied that the boundary stone is besides the line of the compound wall and there is no need to remove the same. Saying this, Somnath Naik left.

It is said that thereafter, the respondent no. 2 (accused no. 2) came out of the house and had a quarrel with

the deceased Suryakant Dessai. It is said that both the respondents forcibly removed the boundary stone by means of a spade. Seeing this, the deceased intervened and accosted as to why they are removing the boundary stone. At this time, the respondent no. 2 caught hold of Suryakant Dessai and hit him on the backside of the head by the blunt end of the spade, which was lying there. On account of the said blow Suryakant Dessai sustained injuries, to which he succumbed. It appears that the wife of the deceased lodged a complaint, whereupon the investigation was carried out and both the respondents were chargesheeted for the offence punishable under Section 302 read with Section 34 of IPC. During the course of investigation, apart from the other witnesses, the investigating officer had recorded the statement of the labourers, who were purportedly the eye witnesses to the incident, namely, Shri Shankar Rikiyasan, Shri Mohan Ray, Shri Gour Chand, Shri Kartik Barman and Shri Arjun Ray etc.

3. The learned Sessions Judge heard the parties on the point of framing of charge and has found that the case falls under exception 1 and/or exception 4 to Section 300 of

IPC and in that view of the matter found that there is no prima facie case made out for framing of charge under Section 302 of IPC and instead, directed framing of charge for the offence punishable under Section 304 read with Section 34 of IPC.

4. I have heard Shri Rivankar, the learned Public Prosecutor for the petitioner and Shri De Sa, the learned Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have gone through the chargesheet and the statement of the witnesses.

5. Shri Rivankar, the learned Public Prosecutor for the petitioner submitted that the respondent no. 2 has dealt with a blow by a spade, on the vital part of the deceased, namely, the backside of the head. It is submitted that the case would not fall either under exception 1 or exception 4 to Section 300 of IPC. It is submitted that the learned Sessions Judge was in error in holding that it is immaterial as to which party offers provocation, particularly when it is yet to be decided whether, the case falls under exception 1 or exception 4 to Section 300 of IPC. It is submitted that the aspect

whether, which party offers provocation would be immaterial only in relation to a case, which falls under exception 4 and not exception 1 to Section 300 of IPC. It is submitted that there were long standing disputes between the parties and thus, the learned Sessions Judge, at the stage of prima facie consideration of the material for the limited purpose of framing charge, could not have held that there is no prima facie case for framing of charge under Section 302 of IPC. It is submitted that in the event, after the trial, the learned Sessions Judge comes to the conclusion that this is a case which falls under Section 302 of IPC, the learned Sessions Judge would be handicapped in convicting the respondents for the said offence, in the absence of charge under Section 302 of IPC. It is submitted that on the other hand, even where the learned Sessions Judge frames charge under Section 302 of IPC, the learned Sessions Judge can always find the respondents/accused guilty only of the offence under Section 304 of IPC. In short, in the submission of the learned Public Prosecutor, this matter requires oral evidence to be led, which can be done only at the stage of trial.

6. Shri De Sa, the learned Counsel for the respondents has supported the impugned order. The learned Counsel for the respondents has taken me through the NC Case No. 42/2018, registered on the same day, about an incident, which had occurred at 14:30 hours on 23.02.2018, under Sections 323 and 504 of IPC. That NC case is registered on the basis of a complaint made by the respondent no. 1 against Suryakant Dessai. It is submitted that it was the deceased, who had assaulted the respondent no. 1, sometime prior to the incident in question. It is also submitted that only injury no. 1 i.e. injury to the backside of the head has been found to be fatal, in the ordinary course of nature. The other seven injuries are only grazed abrasions. It is submitted that even according to the prosecution, the respondent no. 1 had used the blunt side of the spade and there was no intention to cause death and the incident occurred at the spur of the moment, without any premeditation. He therefore submitted that the learned Sessions Judge is right in finding that there is no prima facie case, of the offence punishable under Section 302 of IPC being made out.

7. I have carefully considered the circumstances and the submissions made. At the stage of framing of charge, the Court is only required to see as to whether, prima facie case for framing of charge of the offence is made out by the prosecution or not. At this stage, the Court is not expected to examine the evidence in details, so as to record any finding or binding conclusion. Normally, in a case of the present nature, the Court would be slow in framing a charge only under Section 304 of IPC, instead of Section 302 of IPC, for the reason that if, in a given case, after the trial, the learned Sessions Judge comes to the conclusion that the accused is guilty under Section 302 of IPC, he would be handicapped in recording such a conviction for want of appropriate charge and the entire trial would be at stake. Conversely, even where the Sessions Judge frames a charge under Section 302 of IPC, he can always find the accused guilty of some lesser offence, including Section 304 part I or part II or any other lesser offence under the IPC. Thus, although, it is neither necessary nor appropriate to lay down a rule of universal application that a Court in no case would frame a charge of lesser offence (where the accused is chargesheeted under

Section 302 of IPC), depending upon the facts and circumstances of each case, it would always be advisable that the charge is framed under Section 302 of IPC, in which case, after the trial, the Court can always come to the conclusion and find the accused guilty of some lesser offence.

8. At the cost of repetition, I would again hasten to add that this cannot be laid down as a rule. However, having gone through the statement of the witnesses and the labourers, who have purportedly witnessed the incident, in my considered view, the learned Sessions Judge would have done well in framing a charge under Section 302 of IPC, instead of the one under Section 304 of IPC. Prima facie, at this stage, it appears that there was an earlier dispute between the parties, on account of the compound wall and removal of the boundary stone. It also appears that at about 14:30 hours on the same day, the respondent no. 1 had lodged a complaint against the deceased on the basis of which, a NC case was registered. The incident in question had happened at about 15:45 hours on the same day. Thus, prima facie it is not possible to accept that the entire incident has happened at the spur of the

moment or out of grave provocation or any sudden fight as envisaged in exception 1 or exception 4 to Section 300 of IPC.

9. A perusal of the impugned order would show that even the learned Sessions Judge has observed that the act of the respondents would fall within the purview of the first exception and/or exception 4 to Section 300 of IPC. It is only where the case falls under exception 4 that the aspect as to which party offers the provocation or commits the first assault is immaterial. Thus, at the stage of framing of charge, it was not possible to come to the conclusion that the case would not fall under Section 302 of IPC. A perusal of the statement of the labourers, prima facie, indicates that the deceased was responding politely and at this stage, atleast from the statements of the labourers, who are allegedly the eye witnesses, it is not possible to make out any provocation being offered by the deceased. The learned Public Prosecutor, in my considered view, is right in contending that the matter would essentially rest on the conclusions, which can be drawn after the trial.

10. In that view of the matter, the criminal revision application is allowed. The impugned order is modified. The learned Sessions Judge shall frame a charge for the offence punishable under Section 302 read with Section 34 of IPC against the respondents. Needless to mention that the observations herein are of prima facie nature and the learned Sessions Judge shall not be influenced by the same at the trial.

C. V. BHADANG, J.

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