

Sr. No.268

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-62115-2018(O&M)

Date of decision:29.03.2019

Suresh Kumar

.....Petitioner

versus

State of Punjab and others

.....Respondents

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. M.S.Sachdev, Advocate
for the petitioner.

Mr. K.S.Aulakh, DAG, Punjab.

Mr. Gaurav Chadha, Advocate
for the accused/respondent.

Rajbir Sehrawat, J(Oral)

This is a petition, filed under Section 482 Cr.P.C seeking quashing of the impugned order dated 19.11.2018(Annexure P-1) passed by the Additional Sessions Judge, Jalandhar, vide which the application filed by the petitioner under Section 216 Cr.P.C for alteration of charge has been dismissed, in case of FIR No.182, dated 26.11.2013 registered under Sections 306/34 IPC at Police Station Division No.2, Jalandhar.

The facts which have led to the filing of the present petition are that the son of the petitioner, the deceased, namely Rahul Kapila was having a love affair with Surbhi, who is one of the accused in the trial. They intended to marry each other. However, since they were the first cousins, therefore, their marriage was not to the liking of the family of the girl Surbhi. As the facts unfold, during this log-jam, the deceased, namely, Rahul Kapila died because of poisoning. Accordingly, FIR was registered under Section 306 *IPC*. The trial went on. All the prosecution witnesses

had been duly examined. Thereafter, even the statement of the accused under Section 313 Cr.P.C had been recorded. It is at this stage that the petitioner/complainant moved an application for amendment of the charge from Section 306 IPC to Section 302 IPC.

The facts which further unfold are that on 25.11.2013, the deceased son of the complainant is stated to have gone to Jalandhar to meet the above said girl Surbhi. Later on the son of the sister of the petitioner, namely, Varun Takiar informed the petitioner on phone that the deceased was serious and he had brought him to Civil Hospital, Jalandhar but from there he was referred to Oxford Hospital. After some more time, it was intimated to him that the son of the petitioner had died. On these facts, the complainant alleged that his son had lost his life under conspiracy hatched by the girl Surbhi and her cousins Tarun and Varun Takiar, because these were the the persons who had taken the deceased to the hospital and, therefore, they were last seen with the deceased.

One more fact which deserves to be noted here is that since in the police version, the persons desired by the complainant to be added as accused and witnesses were not added as accused and witnesses, therefore, he had filed a private complaint as well, invoking, again, Section 306 IPC. That complaint filed by the present petitioner was dismissed. The petitioner filed revision petition against dismissal of the complaint. However, the same was also dismissed by the Revisional Court. It is also worth noticing that before filing above said criminal complaint, the petitioner had approached this Court as well, by way of Criminal Miscellaneous petition, for a direction to the police to add to the list of witnesses, certain persons who were not named as witnesses by the police. However, this Court had

not passed any order in favour of the petitioner at that stage. Accordingly, the petition was disposed of with liberty to the petitioner to file a private complaint. As a result, the above said complaint was filed by the petitioner, which was ultimately dismissed by the Trial Court.

While dismissing the application filed by the petitioner; for alteration of charge from Section 306 IPC to Section 302 IPC, the Trial Court has recorded that although the complainant, while appearing as PW-2 in the trial, has deposed in examination-in-chief that his son has died because of accused Tarun, Varun and Surbhi and that they had killed him, however, he has also stated in the statement that same persons had taken his son to the Civil Hospital, Jalandhar and that his son was with them at the time of death and immediately before that. It is further recorded that PW-5 Narsingh Rana, who was the salesman at a medical store, has deposed that the girl Surbhi had come to his medical store and had told him that the deceased has consumed some poisonous substance and that she had asked him to give some medicine to neutralise the effect of poisonous substance. Trial court has also noted that PW-6, Balwant Rai has also deposed to the same effect. In view of the depositions of the prosecution witnesses, the Trial Court has concluded that it has come on record that it was Surbhi; who had taken the deceased to the medical store for finding panacea for poison consumed by the deceased and thereafter she had taken him to the Civil Hospital, Jalandhar in an attempt to save his life. In view of these situations, by no means it can be concluded to any degree, that she had the intention of committing the murder of the deceased or that she has; infact; committed the murder. Accordingly, the application to add the charge under Section 302 IPC was declined.

While arguing the case, learned counsel for the petitioner has submitted that at the stage of framing of the charge, the Trial Court is not required to weigh evidence in terms of its evidentiary value qua the probability of conviction of an accused under a particular section. Only prima facie probability of involvement is to be seen by the Court. It is further submitted that since the allegation; that the son of the complainant has been murdered by the accused, is there, therefore, the charge under Section 302 IPC should have been framed. It is also submitted that since the accused were; admittedly, the last persons with the deceased, therefore, under Section 106 of the Indian Evidence Act, burden shifts upon the accused to explain their conduct qua being last seen with the deceased. In the present case, the accused have explained their conduct of being last present with the deceased; only during the investigation. They have not explained their presence with the deceased at his last time; during the trial; so far. Hence, the evidence of last seen being a substantive piece of evidence, the accused should be tried for Section 302 IPC. In the end, to counter the proposition that the trial has reached the stage of recording of statement under Section 313 Cr.P.C, therefore, the charge cannot be amended now, learned counsel for the petitioner has submitted that charge can be amended at any stage of the trial. In support of his contention, learned counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court rendered in ***Rohtash Kumar versus State of Haryana; 2013(3)R.C.R.(Criminal)355.***

On the other hand, learned State counsel has submitted that Police have properly investigated the case. Only thereafter, the challan was filed under the appropriate Sections of the IPC.

Still further, learned counsel for the accused/respondent has submitted that an application by the complainant or prosecution under Section 216 Cr.P.C is not maintainable. It is the discretion of the Court only, to take the decision regarding amendment of the charge, if any evidence sufficient in the opinion of the Trial Court, has come to substantiate the charge other than the one for which the accused is being prosecuted. Counsel for the accused/respondent has relied upon the judgment of the Hon'ble Supreme Court rendered in ***P.Kartikalakshmi versus SriGanesh and another;(2017)3 Supreme Court Cases 347.*** Counsel for the accused/respondent has submitted that the petitioner is against the factual gamut of the case, as found by Investigating Agency, from the day one. Even this Court, while disposing off his another petition, had ordered that the petitioner would be at liberty to take these pleas at the time of framing of the charge. Hence, the very fact that the petitioner had chosen to not to reek-up the issue at the relevant time; would preclude him from taking up the same issue after the statement of the accused under Section 313 Cr.P.C has been recorded. It is further submitted that the presence of the accused/respondent with the deceased at the time of his death is sufficiently explained even in the documents collected by the prosecution, as well as, in the evidence led by the prosecution. Accordingly, it is submitted that in view of the prosecution evidence, even the charge under Section 306 IPC is not maintainable, much less to speak off framing of a new charge under Section 302 IPC, at this belated stage.

Having heard the learned counsel for the parties, this Court is of the considered opinion that there cannot be any dispute regarding the proposition of law, as argued by learned counsel for the petitioner, that for

framing of the charge only a prima facie case is to be seen and that it is the responsibility of the persons last seen with the deceased; to explain their presence with the deceased. However, this Court finds that in the present case both the aspects have been duly satisfied before the Trial Court by the evidence on file of the case.

So far as the argument of learned counsel for the petitioner; that at the stage of framing of the charge, satisfaction of the Trial Court has to be only prima facie satisfaction, qua the involvement of the accused; is concerned, this Court finds that when the charge was framed by the Trial Court under Section 306 IPC, this satisfaction was already arrived at by the Trial Court. The entire evidence collected by the Investigating Agency was already with the Trial Court at the time when the Court had arrived at the satisfaction for framing of the charge under Section 306 IPC. Even during the trial, no fresh evidence had come on record. It is the same evidence, which was collected by the Investigating Agency and which was available at the time of framing of the charge, which is available even on the date when the application has been moved by the complainant for alteration of the charge. Hence, no fault can be found with the satisfaction arrived at by the Trial Court qua the framing of the charge. It deserves to be noted further that when the charge was framed under Section 306 IPC, the complainant or the State had not even challenged that charge, therefore, the satisfaction of the Trial Court, recorded qua charge against the accused, attained finality. That satisfaction of the Trial Court has not been under challenge at any stage even thereafter. Mere allegation of complainant that his son has been murdered is not sufficient to frame charge under Section 302 IPC, in absence of any other corroborating evidence, particularly when

entire evidence on file suggests otherwise. Hence, this Court does not find any force in this argument raised by learned counsel for the petitioner qua the degree of satisfaction of the Trial Court qua framing of charge.

Although learned counsel for the petitioner has submitted that since the accused were the persons last seen with the deceased, therefore, the burden of explaining their presence with the deceased at that time shifts upon them, however, this Court finds that as per the evidence which was collected by the Investigating Agency and also the evidence which has come on record of the case as prosecution evidence, nothing remains to be explained by the accused. It has already come even in the evidence of the prosecution that these were the accused only, who, when came to know that the deceased had consumed poisonous substance, had taken the deceased to a medical shop to try a panacea for neutralizing the effect of the poison. When they were told that there is no such medicine, then the accused themselves had taken the deceased to the government hospital. Not only this, the accused were even taking the dead body of the deceased to his parental house i.e the house of the complainant, when they were intercepted by the police to bring the body back to the Civil Hospital, Jalandhar. This entire story is not even disputed by; either the Investigating Agency or the prosecution or by the complainant. Hence, on the face of it, every aspect of presence of the accused with the deceased at his last moment is already sufficiently explained. Needless to say that while making statement under Section 313 Cr.P.C, the accused have taken the same stand as mentioned above, regarding their presence with the deceased at his last moment.

In view of the above facts, it is not necessary for the accused to lead any other independent evidence to discharge their onus of explaining

their presence with the deceased at the last moment. It is trite law that the accused have a right to remain silent; to the extent law permits them. Still further it is also settled law that the accused can probablize his defence even from the evidence led by the prosecution. In the present case, whatever liability of explaining their presence with the deceased at his last moment, was cast upon them under Section 106 of the Evidence Act, stands duly discharged from the facts on record of the case, which includes the statements made by prosecution witnesses themselves. Merely the evidence of last seen with the deceased is no ground to frame charge under Section 302 IPC against accused, unless it is accompanied by other facts which constitute a complete chain to incriminate the accused, which leads to only one conclusion that it is the accused only, who has committed the murder of the deceased, and none else.

Although there is another argument for and against; that the charge can be altered at any stage, however, this Court does not find any dispute regarding the proposition. This proposition has already been amply clarified by various judgments of the Hon'ble Supreme Court. But, in the facts of the present case, this proposition is otherwise irrelevant for the purpose of decision of this petition.

In view of the above, finding no merit in the present case, the same is dismissed.

Before parting with the judgment, it is clarified that anything said herein-above, would not be taken as an expression on the merits of the case, during the trial.

29th March, 2019

Shivani Kaushik

Whether speaking/reasoned Yes

Whether Reportable Yes

[RAJBIR SEHRAWAT]

JUDGE